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THE
FEDERAL REPORTER.

VOLUME 101.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

GABLEMAN v. PEORIA, D. & E. RY. CO. et al.¹

(Circuit Court of Appeals, Seventh Circuit. March 22, 1900.)

No. 546.

REMOVAL OF CAUSES—FEDERAL QUESTION—ACTION AGAINST FEDERAL RECEIVER.

An action in a state court against the receiver of a railroad to recover damages for a personal injury resulting from alleged negligence in the operation of the road is not removable, as a case arising under the constitution or laws of the United States, solely on the ground that the receiver was appointed by a federal court. The liability which is the subject-matter of the action is one arising under general law or state statute, and not dependent on the constitution or any law of the United States; and the appointment of the receiver was, moreover, made under general equity powers common to all courts of chancery.²

In Error to the Circuit Court of the United States for the District of Indiana.

W. A. Cullop, for plaintiff in error.

W. S. Horton, for defendants in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge. This action was brought originally in the superior court for Vanderburg County, in the State of Indiana, by the plaintiff in error, a citizen of Indiana, against the defendants in error, to recover damages for personal injuries said to have been sustained by the plaintiff in error through the negligence of the defendants in error in the operation of a railway train, and the failure to properly operate the gates at a railway crossing. The defendant railway company is a corporation organized under the laws of the State of Indiana, and the defendant George Colvin is a citizen of Indiana. The defendant Edward O. Hopkins was, at the time the injuries were received, and the suit was commenced, receiver of the defendant rail-

¹ Rehearing granted and questions certified to the supreme court of the United States.

² As to jurisdiction of cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore-Purchasing Co. v. Boston & M. C. G. & S. Min. Co.*, 35 C. C. A. 7.

way company, by appointment of the United States Circuit Court for the Southern district of Illinois, and was, at the time of the injuries, in sole control and management of the railway company; having an office in Vanderburg County, in the State of Indiana. The record does not disclose his place of residence as an individual. In due time after the commencement of the suit the defendant, Edward O. Hopkins, receiver, on his sole petition, removed the cause into the Circuit Court for the District of Indiana, upon the ground that it was a case arising under the Constitution and laws of the United States. A motion to remand was entered by the plaintiff in error, and overruled by the Circuit Court for the District of Indiana (82 Fed. 790); and at the trial, subsequently, a verdict was, by direction of the court, returned for the defendants in error.

The plaintiff in error challenges the jurisdiction of the Circuit Court for the District of Indiana, and the inquiry thus raised lies at the threshold of this case.

The receiver is not appointed under any law or provision of the Constitution of the United States peculiarly relating to a receiver. His appointment arises from the general equity powers of the United States Courts, in common with other courts exercising chancery jurisdiction, to appoint receivers in given cases. If an action against him, such as the one under consideration, can be said to arise under the Constitution and laws of the United States, it is simply because the court making the order of appointment is itself organized under the laws and the Constitution of the United States. In the earliest case (*Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204), construing the language of the constitution relating to cases arising under the Constitution and laws of the United States, Chief Justice Marshall says:

"We think, then, that, when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it. * * * The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being thus constituted have a case which does not arise literally, as well as substantially, under the law? Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of congress was exercised antecedently to the first decision on that right, and, if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular con-

tract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not."

In *Railway Co. v. Cox*, (145 U. S. 594, 12 Sup. Ct. 905, 26 L. Ed. 829,) the action was by defendant in error, a citizen of Texas, in the United States Circuit Court for the Eastern District of Texas, against John C. Brown and Lionel L. Sheldon, as receivers of the Texas & Pacific Railway Company, to recover damages for the death of the defendant in error. It did not appear that the defendants were citizens of a state other than the plaintiff, and for that failure the jurisdiction of the court was questioned. Fuller, C. J., said:

"The Texas & Pacific Railway Company is a corporation deriving its corporate powers from acts of congress, and was held in *Pacific R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, to be entitled, under the act of March 3, 1875, to have suits brought against it in the state courts removed to the circuit courts of the United States, on the ground that they were suits arising under the laws of the United States. The reasoning was that this must be so, since the company derived its powers, functions, and duties from those acts, and suits against it necessarily involved the exercise of those powers, functions, and duties, as an original ingredient. * * * In respect of liability, such as is set up here, the receiver stands in the place of the corporation. As observed by Mr. Justice Brown, delivering the opinion of the court, in *McNulta v. Lochridge*, 141 U. S. 327, 331, 12 Sup. Ct. 11, 13, 35 L. Ed. 796, 800: 'Actions against the receiver are, in law, actions against the receivership, or the funds in the hands of the receiver; and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from funds in his hands.'"

Railway Co. v. Cody, (166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132,) was a case originally commenced by the defendant in error in the district court of Tarrant County, Tex., against the Texas & Pacific Railway Company, to recover for personal injuries, and was removed by the Texas & Pacific Railway Company to the Circuit Court of the United States for the Northern District of Texas. In the petition filed by the defendant in error in the state court at the commencement of the suit, the Texas & Pacific Railway Company was designated as a private corporation created and existing under the laws of the State of Texas, the same state of which the defendant in error was a citizen, but in the petition for removal it was stated that at the commencement of the suit the railway company was a corporation organized under and by virtue of certain Acts of Congress. The gist of the decision is that, notwithstanding the defendant in error's misstatement in the original petition respecting the governmental origin of the railway corporation, the railway company may, by petition for removal, bring to the court the fact that it is a corporation under the laws of the United States. It necessarily follows, upon the principle stated in *Railway Co. v. Cox*, supra, that the Circuit Court of the United States had jurisdiction. It will be observed that in these cases the parties invoking jurisdiction were either corporations organized under laws of the United States, and deriving their rights to

sue and be sued, and their general rights to carry on business, therefrom, or were successors in trust to such corporations. The cases therefore fall within the principles announced by Chief Justice Marshall in *Osborn v. Bank*, supra.

Cases of another class, however, have been called to our attention, in support of the court's jurisdiction. *Buck v. Colbath*, (3 Wall. 334, 18 L. Ed. 257,) and *Feibelman v. Packard*, (109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984,) were actions against the United States marshal. The first was prosecuted through the state courts, coming to the Supreme Court on error to the state court. The second, begun originally in the state court, was removed by the marshal into the Federal Court.

In the case first named, the suit was against the marshal, to recover in trespass for the taking of goods, and the defense was that the goods were taken by virtue of a writ of attachment taken out of a United States Court. The principle on which that case was decided was stated by Mr. Justice Miller as follows:

"Whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."

In the second case the action was against the marshal, and his sureties on his official bond, to recover for an alleged illegal seizure of goods. The bond was required and governed by sections 783 and 784 of the United States Revised Statutes, the latter of which expressly gave the right of action, and governed the amount of damages. In deciding the case, Mr. Justice Matthews said:

"The counsel for plaintiff in error assumes in argument that the suit was to recover damages for alleged trespass. It was plainly upon the bond itself, and therefore arose directly under the provisions of an act of congress."

White v. Ewing, (159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67,) was a case arising out of, and ancillary to, a creditors' bill previously brought by George P. Bosworth, a citizen of Massachusetts, against the Cardiff Coal & Iron Company, a corporation of Tennessee, in the Eastern District of Tennessee, setting forth the insolvency of the company, the wasting of its assets, etc., and praying for a sale of the property, the collection of its choses in action, and the appointment of a receiver. Ewing was appointed receiver, and, upon authority of the court obtained in the original action, instituted suit in the United States Circuit Court for the Eastern District of Tennessee against White and others, to recover upon promissory notes previously executed by White and others to the Cardiff Coal & Iron Company, and constituting a part of its assets. The decision in this case went upon the principle that suits ancillary to the receivership fall to the jurisdiction of the court appointing the receiver; in other words, that the diversity of citizenship that gave to the United States Circuit Court jurisdiction in the original case was carried over to all strictly ancillary suits. This has been frequently decided since in other cases. (*Krippendorf v. Hyde*, 110

U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145, and *Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498.)

In none of these cases was the order of the Circuit Court of the United States appointing a receiver, standing alone, found to be the basis of federal jurisdiction; nor is such a case to be found in the decisions of the supreme court.

The case now under consideration is not, properly speaking, ancillary to the case brought in the Circuit Court of the Southern District of Illinois, in which the receiver was appointed. It does not aid or supplement the purposes of that suit. It is not brought by the receiver, but against him. It is not intended directly to increase or diminish, or in any way affect, the assets intrusted to him, whatever may be its incidental effect; and it involves the inquiry simply whether the receiver's conductor, or the receiver himself, was guilty of negligence in the operation of the train, or in the failure to maintain the gates. It is no more ancillary to the transactions involved in the original suit than would be an action brought upon a receiver's purchase of coal to operate the locomotives.

Nor is the case one of those in which a court, having rightly obtained possession of property, will refuse, except upon inquiry in its own forum, to surrender the property to the direction of another court. The suit is not to transfer property from the receiver to another upon inquiry of the state court, but merely to fix his liability for noncompliance, in his operation of the road, with the ordinance of the city, the statutes of the state, and the common law governing his duties as a railway manager.

The case is not one that involves, as a necessary ingredient, inquiry into the statutes of the United States, or any provision of the Federal Constitution, such as was involved in *Osborn v. Bank, Railway Co. v. Cox*, and *Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co.*, supra. Indeed, the case can be decided, and decided rightly, without looking into either the Federal Constitution or the statutes. No Federal law lies at the basis of the receiver's right, in this class of cases, to either sue or defend,—certainly not to defend. No Federal law governs his liability in the matter complained of. The subject-matter of the suit, from beginning to end,—from the question of the receiver's liability to suit, to and including the principles that shall give direction to the suit, and govern the amount of damages,—is determinable solely according to general laws, or the law of the state where the injuries were committed. Nor are the appointment of the receiver itself, and the power of the court to make such appointment, traceable directly to Federal law. They grow out of the law of general chancery jurisdiction, which, of course, was conferred originally upon the courts by the Constitution and laws of the United States; but they are as remote from this origin as is an action of ejectment, growing out of a land patent in which the validity of the patent is not involved, or an action upon a judgment obtained in one of the United States Courts. *Assurance Soc. v. Ford*, (114 U. S. 635, 5 Sup. Ct. 1104, 29 L. Ed. 261.) The case under consideration, in no just sense, therefore, involves the

validity, the scope, or the effect of any right, derived from the Constitution and laws of the United States, of federal courts to appoint this receiver, and put him in possession of the property.

The conclusion thus reached is, we think, sustained by the case of *Pope v. Railway Co.*, (173 U. S. 573, 19 Sup. Ct. 500, 43 L. Ed. 814.) The action reviewed by the Supreme Court in that case was brought originally in the Circuit Court for the District of Indiana by Pope, a citizen of Illinois, suing as receiver of the Chicago & South Atlantic Railroad Company, against the Louisville, New Albany & Chicago Railway Company of Indiana. The action was properly ancillary to other suits,—the one brought by a citizen of Wisconsin in the Circuit Court for the Northern District of Illinois, against the Chicago & South Atlantic Railroad Company, a consolidated corporation of Illinois; and the other in the Circuit Court for the District of Indiana, brought by the same citizen of Wisconsin against the same defendant, but designated in that suit as a corporation organized under the laws of Indiana. In the suit in the Illinois circuit court, Pope had been appointed as receiver, in succession to one Fish; and in the suit in Indiana, Pope was appointed as the original receiver. Both suits were for the same purpose, namely, for the administration of the affairs of the Chicago & South Atlantic Railroad Company; and in both the receiver was authorized to prosecute all necessary suits for the collection of claims, choses in action, or otherwise, touching the rights or interests of such property. The action brought by Pope against the Louisville, New Albany & Chicago Railway Company, under review by the Supreme Court, was in pursuance of this order.

Defeated in the Circuit Court of Appeals in the prosecution of his suit against the Louisville, New Albany & Chicago Railway Company (26 C. C. A. 131, 80 Fed. 745), Pope sought to appeal to the Supreme Court as of right, upon the ground that suing as a receiver of a Federal Court, the case arose under the Constitution and laws of the United States. The Supreme Court ruled that the suits were ancillary to the original cases out of which the receivership grew, and were on that account dependent for their jurisdiction upon the facts constituting jurisdiction in the original cases. (18 Sup. Ct. 945, 42 L. Ed. 1216.) But after so ruling, the court, through Fuller, C. J., believing that "some further observation might be usefully added," although what had been said disposed of the motion, took up, as we understand the text, the general question whether suits thus brought by receivers, not ancillary to other suits, but depending wholly for jurisdiction upon the fact that the receiver was appointed by a Federal Court, were, within the meaning of the law, suits arising under the Constitution and laws of the United States. The court, through the Chief Justice, said:

"The bill nowhere asserted a right under the constitution and laws of the United States, but proceeded on common-law rights of action. We cannot accept the suggestion that the mere order of a federal court, sitting in chancery, appointing a receiver on a creditors' bill, not only enables the receiver to invoke federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the circuit court of appeals in proceedings taken by him.

The validity of the order of appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and the jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made. The order, as such, created no liability against defendants; nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the constitution or laws of the United States. In *Bausman v. Dixon*, 173 U. S. 113, 19 Sup. Ct. 316, 43 L. Ed. 633, we have ruled that a judgment against a receiver appointed by a circuit court of the United States, rendered in due course in a state court, does not per se involve the denial of the validity of an authority exercised under the United States, or of a right or immunity specially set up and claimed under a statute of the United States. That was an action to recover damages for injuries sustained by reason of the receiver's negligence in operating a railroad company of the state of Washington, though the receiver was the officer of the circuit court, and we said: 'It is true that the receiver was an officer of the circuit court, but the validity of his authority as such was not drawn in question; and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state supreme court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the circuit court appointing a receiver did not create a federal question, under section 709 of the Revised Statutes; and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to facts, and not in any way on the terms of the order.' That was, indeed, a writ of error to a state court, but the reasoning is applicable here. Pope was appointed receiver by an interlocutory order of the circuit court in the exercise of its general equity powers. He did not occupy the position of a receiver of a corporation created under federal law, as in *Railway Co. v. Cox*, 145 U. S. 594, 12 Sup. Ct. 905, 26 L. Ed. 829, or of a marshal of the United States, as in *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 280, 27 L. Ed. 984, or of a receiver of a national bank, as in *Kennedy v. Gibson*, 8 Wall. 498, 19 Sup. Ct. 476. Nor did his cause of action originate or depend on the order of appointment, or assignments made to him by the Atlantic Company pursuant to that order. Nor was any right claimed by him by virtue of his order of appointment, or of his deeds of assignment denied, or alleged to have been denied. * * * It is impossible to hold that these orders of appointment were equivalent to laws of the United States, within the meaning of the constitution."

We regard this portion of the opinion as an *ex cathedra* announcement against the doctrine that suits begun in state courts against receivers of Federal Courts are removable into the Federal Court upon the ground alone that the receivers are appointed under an order of the Federal Court. Indeed, it would be anomalous—and this consideration probably moved the Supreme Court to speak—if such incidental actions against the receiver as the one now under consideration by us could be appealable of right to the Supreme Court, as it could if removable at all, while the original action, to which he owed his appointment, rested finally with the Circuit Court of Appeals. Maintenance of such a view of the rights of receivers would carry to the court of last resort all the driftwood of a receivership, while leaving with the Circuit Court of Appeals, except in rare instances of certiorari, direction and control of the stream.

The case is reversed, with directions to the Circuit Court for the District of Indiana to sustain the motion to remand. †

MANORITA v. FIDELITY TRUST & LOAN CO.

(Circuit Court, S. D. Alabama. April 4, 1900.)

No. 213.

1. BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF BORROWING STOCKHOLDER—CONSTRUCTION OF CONTRACT

Petitioner became a stockholder in defendant building and loan company, and by her contract of subscription agreed to pay a fixed sum monthly on each share of stock until the same became matured by reaching its par value, no time for such maturity being fixed by the by-laws. The by-laws authorized the company to loan its funds to members on such terms and conditions as should be therein prescribed, and provided that such loans should be paid according to the terms agreed on. Petitioner borrowed \$1,800, the par value of her shares, securing the same by a pledge of her stock, and also by a mortgage conditioned for the payment of \$2,356.20, "the same being principal, interest, and premium of a loan from said company, * * * which said loan is evidenced by 77 promissory notes of even date with this mortgage, each for the sum of \$30.60." One of said notes matured each month, and included, besides interest and premium on the loan, the monthly installment due on petitioner's stock, and on the payment of each note she was credited with such installment on the books of the company. *Held*, that such installments constituted the "principal" of the mortgage debt, and on payment of all the notes such debt was extinguished, and there was nothing in the contract which entitled the company to hold the mortgage as security for the payment of further installments, although the stock had not matured by reaching its par value.

2. SAME—INSOLVENCY—ADJUSTMENT OF ACCOUNTS WITH BORROWING STOCKHOLDERS.

In adjusting the accounts of a borrowing stockholder with an insolvent building and loan association, the stockholder will be credited with all payments made to the association, whether of principal, premiums, or interest, but will be required to contribute his pro rata share to the losses of the association.

In Equity. In the matter of the petition of Laura J. Martinez.

Robert T. Ervin, for petitioner.

Bestor & Gray, for defendant.

TOULMIN, District Judge. The petitioner avers that nothing is due on the mortgage mentioned in the petition, and that there is nothing owing on or secured by said mortgage, except the last note mentioned therein, payment of which is offered, and tender thereof made. Petitioner prays that the receiver be restrained from selling the property described in the mortgage, and that he be directed to accept the amount of money tendered, and to surrender said note, and to cancel and surrender said mortgage. The receiver, answering, admits that all the notes mentioned in the mortgage, except the last one, have been paid, and admits the tender alleged, but denies that the mortgage was executed to secure only the notes described therein, and insists that a large sum of money in addition to the last-mentioned note is due on said mortgage, to wit, the sum of \$1,200. There is nothing in the answer that shows how said sum is due, and nothing in the mortgage which specifically shows that the money loaned to petitioner was an advance on her stock in the company. There is nothing in the mortgage as to the probable time

of the maturity of the stock, or when the shares would reach their par value. There is nothing in the mortgage to indicate that the maturity of the loan depended on the maturity of the stock. The mortgage recites that it "is intended as security for the payment of the sum of \$2,356.20, the same being principal, interest, and premium of a loan from said company, * * * which said loan is evidenced by 77 promissory notes of even date with the mortgage, each for the sum of \$30.60." Among other covenants contained in the mortgage, the mortgagor agrees to keep and perform promises and engagements made and entered into with said company according to the true intent and meaning of its by-laws and articles of association, the effect of which, I presume, is that she will pay all fines, fees, penalties, etc., in accordance with the by-laws of the company. The agreed statement of facts shows that the petitioner was a shareholder in said company. Her certificate of stock and the by-laws of the company are in evidence. They provide that each shareholder shall pay a monthly installment of 35 cents on each share for every month until maturity. The articles of association of the company provide that when funds are on hand the company shall lend the same to any shareholder, on such security and on such terms and conditions as may be prescribed by the by-laws, and that the loans made are to be paid according to the terms agreed on. The mortgage provides, as I have said, that petitioner would keep and perform the promises and engagements made according to these by-laws and articles of association; also that the property will be kept insured, and the taxes paid, etc. It further provides that if default shall be made in the payment of any of said notes, or any part thereof, or in case of failure to duly observe and keep the by-laws of the company, or in case of a breach of any of the covenants and agreements contained therein, the whole of the principal, interest, premium, fines, dues, and costs shall at once become due and payable, at the option of the company; and the right is given the company to sell the real estate conveyed by the mortgage, and out of the proceeds of sale, after paying certain expenses, to reserve enough to pay all principal, interest, premium, dues, fines, taxes, insurance, or other evidences thereby secured to be paid. It is further provided that if the mortgagor fails to effect insurance on the property, or to pay the taxes on it, as she covenants and agrees to do, and the company effects such insurance, and pays the taxes, as it is therein authorized to do, then the amounts so paid shall be a lien on the premises, added to the amount to be secured by the mortgage; but there is no provision in the mortgage that, on failure to pay fees, fines, or dues, there shall be a lien on the property to secure their payment. The mortgage provides that it is to be void if the full payment of the principal and interest be made as therein specified, and if each of the covenants be well and truly kept and performed, as specified and provided for.

It matters not whether the money received by the petitioner and secured by the mortgage be called a loan, or simply an advance to her on her shares. The mortgage was given to secure the repayment of the money in the manner and upon the terms therein men-

tioned. *Association v. Read*, 93 N. Y. 474. Payments upon stock are not payments on the mortgage debt, and do not ipso facto work an extinguishment of so much of the mortgage. The payment on one is not necessarily a payment on the other. *Southern Building & Loan Ass'n v. Anniston Loan & Trust Co.*, 101 Ala. 582, 15 South. 123, 29 L. R. A. 120. While the mere fact that a payment on stock is not itself—that is, has not the effect of—a payment on the mortgage, yet there is nothing in the articles of association or in the by-laws to prevent the parties to the transaction from so contracting. The mortgage is the contract, and it prescribes the manner and the terms in and upon which the money is to be repaid, and they are not in contravention to the by-laws or the articles of association.

The agreed statement of facts shows that the sum of money evidenced by the notes, the payment of which is secured by the mortgage, was made up of monthly installments on stock, and interest and premiums on loan, and the pass book in evidence shows that the money, when paid on the notes, was so applied; thus showing the construction put on the contract by the parties themselves. So, then, the monthly payments on stock were designated in the mortgage as principal. There is no other provision in the mortgage that can be considered as securing such monthly payments. The mortgage, by its terms, was executed to secure a specific sum of money, being principal, interest, and premium, and in addition thereto such sums as the company would have had to pay out for insurance and taxes. If "principal" therein mentioned was not meant to be the monthly payments provided for by the by-laws, then such monthly payments have not been made. But it is evident that "principal," as that term is used in the mortgage, and monthly payments on stock are the same thing, while it is not clear what is meant by "dues" spoken of.

Let us suppose that the affairs of the company had not by this time gotten into the court and the hands of a receiver; can it be questioned that, on payment of all the notes provided for (there being no default shown in any of the other covenants contained in the mortgage), the petitioner would be entitled, not only to the surrender of the notes, but also to the cancellation and surrender of the mortgage? If her shares of stock had not been matured at that time, she would still be obligated to continue the monthly payments on them, for her promise and engagement as a shareholder bound her to make such payments until the maturity of her stock. But she has given no security that she would make such payments after the maturity and payment of the notes. The only effect of her failure to keep this promise and undertaking would be a forfeiture of her stock. She would then be, as to forfeiture and penalties, on the same footing with nonborrowing shareholders, who give no security for monthly payments on their stock. To hold that the mortgage was given to secure the payment of the principal of the loan, to wit, \$1,800, interest and premium, and also to secure the payments on stock, as contradistinguished from such principal, would, it seems to me, place the borrowing shareholder in a worse condition than the

nonborrowing shareholder. There would be no equality in this. Surely, such a condition was not contemplated in the organization of the company, in the contract for subscription of stock, or in the contract for the loan.

The position of the petitioner seems to be this: She had advanced or loaned to her the estimated par value of her stock at its maturity. She was required to repay in monthly installments the amount advanced, with certain charges, as interest and premium, added thereto, in a given or definite period of time, and she was required to give security (both real estate and a transfer of her stock) that she would make the payments as specified. It was an advancement or a loan to her of a sum of money, with an agreement to repay it in monthly installments, with interest, and a "bonus" for the loan, for the repayment of which she gave the security required. There is no default shown in the payment of the notes or in the keeping and performing of any of the provisions of the contract. Without such default, there is no forfeiture of the mortgage, and no power in the company to sell the property conveyed by it.

If I am correct in my construction of the contract, there was nothing owing on the mortgage debt at the time the affairs of the company went into the hands of the receiver, except the last note of \$30.60, which became payable a short time thereafter, payment of which was tendered to the receiver and by him refused. It appears that the receiver then sold the property, and at the sale himself became the purchaser. But the so-called "insolvency" of the company, and the proceedings to wind it up, put an end to its operations, and to the contract between it and its members, at least so far as future performance is concerned. *Curtis v. Association* (Conn.) 61 Am. St. Rep. 17 (s. c. 36 Atl. 1023); *Knutson v. Association* (Minn.) 64 Am. St. Rep. 410 (s. c. 69 N. W. 889), and authorities therein cited; *Sullivan v. Stucky* (C. C.) 86 Fed. 491.

All authorities agree that, on the premature abandonment of the enterprise by its so-called insolvency and by the winding it up by judicial proceedings, the original contract between the company and the borrowing shareholder cannot be carried out, and that neither party is bound to its literal fulfillment, but they differ as to the relative rights and obligations of the company and its borrowing shareholders, and as to the rule by which such rights and obligations should be settled. See authorities *supra*; *Mellwaine v. Iseley* (C. C.) 96 Fed. 62; *Douglass v. Kavanaugh*, 33 C. C. A. 107, 90 Fed. 373.

Now, nothing remains but to wind up the affairs of the company in such a manner as to do equity to creditors and between the members of the company themselves. The question is, how shall it be done? Many of the courts, so far as possible, treat the changed condition of affairs as equivalent to a rescission of the contract, and hold that, in adjusting matters between the company and its members, the principle of rescission should be applied as far as it is just and equitable; that each borrowing member indebted to the company should be charged with the amount received by him, with legal interest from the date of the loan, and should be credited, on

the principle of partial payments, with all sums paid,—as for interest, premiums, monthly installments on stock, or otherwise. While this appears to be a reasonable and just rule, it must be remembered that the borrowing member is no less a stockholder in the company, and his relations to the company as such are not changed by the fact that he is also a borrower. He is not relieved, in case of the company's insolvency, from liability to contribute his share with other stockholders to its losses, and is not entitled to a cancellation of his mortgage on payment of the mortgage debt, or to receive a surplus remaining in case the property is sold under the mortgage, until the final adjustment of the accounts between the company and its stockholders. *Lauer v. Association* (C. C.) 96 Fed. 775; *Curtis v. Association*, *supra*; *Robertson v. Association*, 69 Am. Dec. 154-165; *Strauss v. Association* (N. C.) 23 S. E. 450, 30 L. R. A. 693; *Buist v. Bryan* (S. C.) 61 Am. St. Rep. 787 (s. c. 21 S. E. 537).

The statute of Alabama provides that, upon foreclosure of any mortgage of land by a member of a building and loan association, to such association it shall credit, as of the date made, upon the entire debt claimed by the association, all payments made upon such debt, whether of principal, premiums, or interest, and the stock pledged for such loan shall be credited on the said loan at its actual value. Code Ala. § 1135. It seems to me that this is a just rule, upon which the account between the borrowing member and the association should be settled in the case of the insolvency of the association and the winding up of its affairs by the court, with the qualification, however, that the borrowing member should contribute his pro rata share to the losses of the association. This rule, as far as practicable, I adopt in this cause.

HIERONYMUS et al. v. NEW YORK NAT. BUILDING & LOAN ASS'N.

(Circuit Court, S. D. Alabama. February 6, 1899.)

No. 206.

1. USURY—WHAT LAW GOVERNS—PLACE OF PAYMENT.

Parties to a loan by a corporation of one state to a resident of another, to be paid to the borrower in his own state, and secured by mortgage on real estate there situated, will be presumed to have contracted with reference to the laws of the state of the lender, where repayment of the principal of the debt is to be there made; and the question whether the contract is usurious is to be determined by the law of that state, especially if, under such law, it is valid, while under the law of the state of the borrower it is invalid.

2. PLEADING—ALLEGATION OF CONCLUSION.

An allegation in a pleading that a provision in a contract making a loan payable in the state of the lender instead of that of the borrower was a mere device to evade the usury laws of the latter state must state the facts from which such conclusion may be deduced.

3. BUILDING AND LOAN ASSOCIATIONS—USURY—NEW YORK STATUTES.

Under the statute of New York governing building and loan associations, the taking of premiums for loans made by such associations does not render the loans usurious.

In Equity. On demurrers to bill and amended bill.

Gregory L. & H. T. Smith, for complainant.

Pillans, Hanaw & Pillans and R. W. Stoutz, for defendant.

TOULMIN, District Judge. This is a bill in equity, praying, among other things, that the court will cause an account to be taken of the transaction between the complainants and the defendant set out in the bill; that the contract described therein may be declared to be usurious; and that the mortgage mentioned in the bill may be declared to be fully satisfied and paid, and canceled upon the record. The contract set out in the bill is a bond and mortgage executed by the complainants to the defendant to secure the payment of a sum of money loaned by the latter to the former on certain terms and conditions therein recited. The contract expressly provides that the payment of the principal sum shall be made at the home office of the defendant in New York City. No express provision is made for the place for the payment of the interest. It is admitted in the bill that the contract provides for the payment of the debt in New York, but it is alleged that this provision in the bond was a mere guise, which was intended to enable the defendant to avoid the usury laws of the state of Alabama, and that it was understood and agreed that all the payments to be made by the complainants should be made in Mobile, Ala., to the defendant, through one Willis G. Clark, who was the local collector of the defendant at that place. It is also alleged in the bill that certain monthly payments of premiums, dues, etc., provided for in the contract, should be made either to said Clark, local collector, or at the home office. In view of the express provisions of the contract, and of all the circumstances and conditions of the transaction as shown by the bill, I think there is no doubt that the agreement for payments to be made to Clark, the local collector, was for convenience sake only, and did not make the contract an Alabama contract. The real issue presented for our consideration is whether the contract is usurious. If the contract is usurious, the complainants' bill should be sustained. If the contract is not usurious, the demurrers to the bill—many of them, at least—should be sustained, and the bill dismissed.

In deciding whether the contract is usurious or not we must determine by the law of which state—Alabama or New York—the performance of the contract is to be governed. All the terms of a contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed. "In every forum a contract is governed by the law with a view to which it was made." It is well-established law that the performance of contracts is to be governed by the law of the place of performance; and, if the interest allowed by the law of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. *Miller v. Tiffany*, 1 Wall. 310, 17 L. Ed. 540; *Coghlan v. Railroad Co.*, 142 U. S. 109,

12 Sup. Ct. 150, 35 L. Ed. 951; *Brower v. Insurance Co. (C. C.)* 86 Fed. 748; *Andrews v. Pond*, 13 Pet. 65, 10 L. Ed. 61. "The law of the state where a contract is made generally controls in respect to its validity; but, if it appears that it was made to be performed in some other state, the law of that state governs." *Sturdevant v. Bank*, 9 C. C. A. 256, 60 Fed. 730; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Wick v. Dawson (W. Va.)* 24 S. E. 587. Parties to a loan by a foreign corporation to a resident of another state, to be paid to the borrower in his own state, and to be secured by a trust deed upon property in his state, will be presumed to have contracted with reference to the laws of the state of the lender, where repayment of the loan is to be made there. *Nickels v. Association (Va.)* 25 S. E. 8; *Association v. Logan*, 14 C. C. A. 133, 66 Fed. 827; *Coghlan v. Railroad Co.*, *supra*. Under the well-established rule, as hereinbefore stated, when a party in Alabama borrows money from a New York corporation, promising to pay the principal sum at the home office in New York City, the question whether the contract is usurious must be determined by the New York law, though the loan is secured by a mortgage on Alabama lands. The rule referred to is not affected by the fact that the loan is secured by a mortgage of realty in a state other than that in which the debt, to which the mortgage is only an incident, is payable. The laws of the state of New York permit the contract complained of in this case. The contract, construed in reference to these laws, is regular and lawful. The debt is, by the contract, expressly made payable in New York City. The allegation in the bill that this provision of the contract was a mere guise, which was intended to enable the defendant to avoid the usury laws of the state of Alabama, if intended as an allegation that the place of payment named was a false one, is a mere conclusion of the pleader, and must be disregarded except so far as the facts alleged sustain it. The facts from which the conclusion is deducible must be averred. 9 Enc. Pl. & Prac. 686, and numerous authorities cited in the notes. The facts alleged in the bill do not show, or, in my judgment, tend to show, that the place fixed for the payment of the debt was for the purpose of avoiding the penalty of a usurious contract in Alabama. The parties to a loan by a foreign corporation will be presumed to have contracted with reference to the laws of the state of the lender, where repayment of the loan is to be made there. And it is well settled by the decisions of the United States supreme court that a contract is governed by the law with a view to which it is made; and it is to be presumed, in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated. *Nickels v. Association*, *supra*; *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; *Coghlan v. Railroad Co.*, *supra*; *Caesar v. Capell (C. C.)* 83 Fed. 403. It seems clear to me that the parties to the contract in question had in contemplation the law of the state of New York, which upholds the contract. "If there is one thing which, more than another, public

policy requires, it is that men of full age and competent understanding shall have the utmost power of contracting; and their contracts, when entered into freely and voluntarily, shall be held sacred, and be enforced by courts of justice." Registering Co. v. Sampson, L. R. 19 Eq. 462. In a case much like this one in principle, the learned judge who rendered the opinion, in referring to the defendants, aptly said:

"They made the contract. It is too late to complain that it was a bad one. Reckless borrowing and contraction of debts is the bane of this country; and too often, after parties have made bad contracts, they come to the courts asking their help, even though they must violate the law in granting it. It has been said that the speediest way to procure the repeal of a bad law is by its strict enforcement. Perhaps the way to discourage the borrowing mania of the people is to strictly apply the law to all contracts. At any rate, the courts cannot violate the law to lighten the burden of improvident contracts." Trust Co. v. Dygert (C. C.) 89 Fed. 123.

These remarks may be appropriately applied to the case at bar and others of like character. My conclusion, therefore, is that the demurrers to the bill are well made, and should be sustained, and it is so ordered.

(March 17, 1900.)

In this case there are 80 grounds of demurrer assigned to the bill as amended. I think, as a whole, they are unnecessarily voluminous and prolix. Some of them, it seems to me, present points not raised by the bill, and many of them are repetitions of the same point. As I understand the amendments to the bill, there are practically but two material questions raised by them: First, the question whether there was a binding contract growing out of the alleged representations as to the time of the maturity of the stock of the defendant company,—whether the time of maturity, alleged to have been fixed at seven years, could be arbitrarily fixed at that period by the company, so as to relieve the complainants, after that period, from the further payment of the charges provided for in the contract; and, second, whether the premium charged was unauthorized by the laws of New York, and the contract, therefore, usurious under those laws. This court held on the hearing of the demurrers to the bill as originally filed that the contract was governed by the laws of New York, and that under those laws it was not usurious. I see now no reason to change that ruling. The New York statute governing building and loan associations does not provide for the manner or mode of making loans to members of such associations, or of fixing the premiums to be paid by them, but it does provide that any premiums for loans made to such members shall not be deemed a violation of the provisions of any statute against usury. *Andruss v. Association*, 36 C. C. A. 336, 94 Fed. 575; *Association v. Read*, 93 N. Y. 474. If the statute had provided for the manner or mode of fixing the premiums to be paid, and such mode had not been followed, then the premium would have been unlawful. *Douglass v. Kavanaugh*, 33 C. C. A. 107, 90 Fed. 375. By the terms of the contract providing for the payment of dues, premium, and interest, as the same is shown in the bill, the complainants are not entitled to cancellation of the mortgage after paying such charges for a period of seven

years, it not appearing that complainants' shares of stock are fully paid. *King v. Union* (Ill. Sup.) 48 N. E. 677; 4 Am. & Eng. Dec. Eq. 9; *O'Malley v. Association*, 92 Hun, 572, 36 N. Y. Supp. 1016; *People v. Preston*, 140 N. Y. 549, 35 N. E. 979; *Weirman v. Union*, 67 Ill. App. 550. My opinion is that the demurrers on the proposition, contended for by the complainants, that the contract is a definite and binding contract to satisfy the debt in seven years, are well taken, and they are sustained; and also that the demurrers on the proposition that the premium is unlawful and usurious, are well taken, and they are sustained. The demurrers presenting the point that the contract is governed by the laws of the state of New York, and that under those laws it is not usurious, are sustained. All other demurrers are overruled.

NEW YORK COMMERCIAL CO. v. FRANCIS.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 133.

1. PARTNERSHIP—RIGHTS OF CREDITORS—WHAT IS FIRM PROPERTY.

Where a partnership, after taking in a new member, treated property of the old firm as that of the new, pledging the same for its debts, the presumption is that such property constitutes assets of the new firm as to its creditors, although the new partner contributed no capital, and there was no agreement between the partners as to the ownership of such property.

2. SAME—ATTACHMENT OF FIRM PROPERTY BY CREDITOR OF PARTNER.

An individual creditor of a partner, who attaches partnership property for his debt, acquires a lien upon the interest of his debtor in the attached property subordinate to that of partnership creditors who attach subsequently.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Theo. M. Maltbie, for appellant.

Wm. L. Bennett, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The general questions of fact which arise under the bill in equity in this case and the object of the bill are stated in the opinion of this court upon the appeal from a decision of a motion for a preliminary injunction, and reported in 28 C. C. A. 199, 83 Fed. 769. The questions now arise upon the defendant's appeal from the decision of the circuit court upon final hearing. 96 Fed. 266. Joseph P. Earle and William P. Earle went into partnership in 1877, as brokers in India rubber, under the firm name of Earle Bros., without articles of partnership, and each member drew from the firm "whatever suited" him. The state of the partnership accounts of the firm as between themselves, or of its successor, has never been ascertained. The firm had a capital, but how much it was does not appear. It was probably substantially contributed by Joseph. In June, 1882, Earle Bros. agreed to buy 153 shares of the

stock of the Seamless Rubber Company, a corporation established in New Haven, Conn., and in that month gave for 115 shares the firm's note for \$14,858.06, which were subsequently paid by checks of the firm. In September, 1882, they gave for 38 shares the firm's note for \$5,890 and interest, and subsequently paid the note with the firm's check for \$6,069.64. A certificate for 115 shares in the name of Earle Bros., and a certificate for 38 shares in the name of Joseph P. Earle, were received by the firm, and still continue in the possession of Earle Bros. The reason given by William for the certificates being made in the name of Joseph is inadequate, but the fact is that all the bookkeeping entries are in accordance with a purchase by the firm, and no part of the price of the 38 shares was charged to Joseph on the books. In 1892 the Seamless Rubber Company made a stock dividend of 100 per cent., and issued certificates for 115 shares to Earle Bros., and a certificate for 38 shares to Joseph. These certificates were taken into the possession of the firm, the dividends on the entire 306 shares were received and used by it, and the 76 shares were hypothecated for debts of the firm due to the Seventh National Bank of New York from September, 1892, to March, 1895, and from July, 1896, to January, 1897. Between 1885 and 1890, Henry Earle came into the firm of Earle Bros. The date is uncertain, because he was insolvent in 1885, and he came in, according to William's testimony, "when it suited him to decide to be a member." He contributed nothing to the firm, there were no written articles of partnership, there was no understanding as to the amount that any one should receive from the business, the accounts of the former partners were not balanced, the condition of the firm was not ascertained, and no change was made in the books. An account called the "Henry Earle, Trustee, Account" was opened in 1888, and continued till 1895, in which the entries of dividends of the Seamless Rubber Company were made. Apparently the name of the account indicated nothing in regard to the title to the stock. If the question of the ownership of this stock rested upon the oral testimony of William and Henry Earle, the complainant's case would not have been proved; but the books of the firm show not only that the stock was bought, paid for, and used by the firm, but that no part of the payments was ever charged to Joseph, while all his other private investments, and whatever payments were made for him personally, were charged to him individually, and no accounts were kept with the corporations in which Joseph individually owned stock. Joseph did not receive any dividends from the Seamless Company, except as they swelled the firm assets, from which he drew as he pleased. The books were kept by a bookkeeper, who is apparently indifferent between the parties, and the facts as they appear on them compel an agreement with the circuit court in its finding that the original firm of Earle Bros. paid for the 76 shares, and continued to be the equitable owners thereof. Joseph Earle was not called as a witness by either party. He is suffering from locomotor ataxia, and mental deterioration has gradually developed.

In December, 1893, the New York Commercial Company entered into an agreement with William P. Earle and Henry Earle, to which

Joseph assented, that all business in crude rubber should be transacted by William and Henry, in the name of Earle Bros., and for account of the Commercial Company, which was to have the gains and bear the losses, and that the two Earles were to receive as full compensation for their services \$16,000 per annum, one-half to be paid to each. In other words, by virtue of this singular contract, William and Henry were to divide the compensation, but the partnership of Earle Bros. was to bear the hazards of their indebtedness, if any, to the Commercial Company. For a debt of Joseph P. Earle to Henry H. Francis he has attached the 76 shares of the Seamless Rubber stock in the name of Joseph. Subsequently, for two alleged debts of Earle Bros. which accrued after December, 1893, the Commercial Company attached the stock of the Seamless Rubber Company standing in the name of Earle Bros. and of Joseph P. Earle. If the 76 shares belonged to the present partnership of Earle Bros., Francis secured by his attachment only the separate interest of Joseph P. Earle in the partnership property, subject to the partnership debts, and, if partnership creditors had not attached the same property, he could have levied upon the interest of Joseph, if any, in the property after payment of the partnership debts. He could not levy upon the whole property. "The purchaser takes the same interest in the property which the judgment debtor would have upon a final adjustment of all the accounts of the partnership. It is not only an undivided, but an unascertained, interest, and the purchaser is substituted to the rights and interests of the judgment debtor in the property sold. Neither does the sale transfer any part of the joint property to the purchaser, so as to entitle him to take it from the other partners; for that would be to place him in a better situation than the partner (judgment debtor) himself. The remedy of the purchaser is to go into equity and call for an account, and thus entitle himself to the interest of the judgment debtor, if any, after the settlement of the partnership liabilities." *Claggett v. Kilbourne*, 1 Black, 346, 17 L. Ed. 213; *Hannon v. O'Dell*, 71 Conn. 698, 43 Atl. 147. In Connecticut, such a bill in equity can be brought pending the attachment before a levy of execution, under the provisions of section 1316 of the Revised Statutes. *Hannon v. O'Dell*, *supra*.

In this case, the partnership attaching creditors are those of the present firm of Earle Bros., and the question in regard to their right to priority is whether the property is partnership property of the present firm. It was among the assets of the original firm, but it is said that when Henry Earle became a new member he brought no capital, bought no interest in the old assets, but simply brought his services, and was entitled to nothing save a share in the profits. When he became a partner, the former members could have made whatever contract they chose, in the absence of fraud towards existing creditors respecting the partnership assets, and could have made them separate property, and placed the stock in their individual names. Nothing of the sort was done, no agreement as to ownership was made, and Henry entered the firm with no contract, except that he was to be a partner. The other members per-

mitted him to manage the finances, pledge the new and old certificates for new debts of the firm, and to receive the dividends as firm property, and, although they contributed the whole capital, in the absence of an agreement that it should remain their property, and in the existence of this conduct on their part, the capital must be presumed to have become partnership property, in which Henry Earle had a technical interest. *Story*, Partn. § 27; *Malley v. Insurance Co.*, 51 Conn. 222, 247; *Livingston v. Blanchard*, 130 Mass. 341. In any event, the stock of the rubber company was partnership property with respect to partnership creditors of the new firm. As between the firm and its creditors, the conduct of the members of the partnership with relation to the apparent personal property or stock in trade of the firm made it a fund for the payment of partnership debts. This stock had always been partnership assets, and after Henry Earle became a member the certificates remained as before, and the stock and its dividends were treated upon the books of the firm as before, and the stock was pledged for the new debts of the firm. It is impossible to say that, as against partnership creditors, it was not partnership assets. *Elliot v. Stevens*, 38 N. H. 311. The status of the case is that Francis, a creditor of Joseph Earle individually, has attached his interest in partnership property, and that subsequently partnership creditors have attached the same property to secure the payment of partnership debts. Their lien is superior; for it is well settled that the right of the creditor of one partner, who had attached partnership property for his debt, is subordinate to the right of the partnership creditors, who have attached subsequently, to have the property applied in payment of firm debts. *Bank v. Fitch*, 49 N. Y. 539; *Filley v. Phelps*, 18 Conn. 294; *Trowbridge v. Cushman*, 24 Pick. 310; *Peck v. Schultze*, 1 Holmes, 28, Fed. Cas. No. 10,895; *Coover's Appeal*, 29 Pa. St. 14. The suits of the complainant against Earle Bros. have not yet become, and may never become, judgments. The injunction against Francis should not, therefore, be absolute, but the attachments of the complainant should be adjudged to be liens upon the 76 shares of stock superior to the lien of Francis, and he should be enjoined against a levy of his execution, and his levy should be stayed until the judgments, if any, of the complainant have been paid or satisfied from the partnership property of Earle Bros.; recourse to such property by levy of execution being had first upon the shares standing in the name of Earle Bros.

As thus modified, the decree of the circuit court is affirmed, with costs.

REAVIS et al. v. REAVIS et al.

(Circuit Court, D. California. March 26, 1900.)

No. 12,158.

EQUITY PLEADING—OBJECTION TO JURISDICTION—EFFECT OF MOTION TO DISMISS.

Under the rule established by the decisions of the supreme court, that, under the federal judiciary act, objection to the jurisdiction of the court may be taken in the answer upon a denial of jurisdictional averments, where objection is so taken, a motion to dismiss, based thereon, and upon

evidence subsequently taken on the merits, whether considered as a motion or a plea in the abatement, will not be deemed a waiver by defendant of the other defenses set up in the answer.

In Equity. On motion of complainants for a decree pro confesso on the ground that a motion to dismiss (treated as a plea in abatement), filed after answer, waived answer.

Goodwin & Goodwin, for complainants.

McKune & George, for respondent Clarke.

MORROW, Circuit Judge. This is an action in equity, brought in this court on January 20, 1896, by the complainants, who are residents and citizens of Missouri, as heirs at law of one Andrew Reavis, deceased, against the respondents, who are citizens and residents of California. The bill charges that by virtue of certain fraudulent conveyances respondents have fraudulently acquired, held, and used certain real and personal property in the state of California, formerly belonging to Andrew Reavis, deceased, which property is at present held and used by the respondent Clarke. The bill prays for a decree declaring that the respondent Clarke holds this property and its rents and profits in trust for the complainants to the extent of four-fifths thereof, and that four-fifths of the said property belongs to the complainants, as heirs of the said Andrew Reavis, deceased. The bill further asks that an accounting be had, and that the respondent Clarke execute such conveyances to complainants as may vest in them, and each of them, their right and title to their interests in the property. To this bill a plea in abatement was filed on March 4, 1896, by the respondent Clarke, alleging that the interest of David M. Reavis, a citizen of the state of California, and a co-respondent in the matter in controversy, was united with, and not separate from, or adverse to, or against the interests of the complainants in the suit, and that the court had no jurisdiction to hear and determine the cause by reason of a lack of diverse citizenship of the parties to the action. To this plea the complainants interposed a demurrer on March 19, 1896. By the consent of counsel, and for reasons not disclosed in the record, the demurrer was withdrawn on April 6, 1896, and the plea was thereupon overruled by the court. On May 18, 1896, the complainants filed an amended complaint. The answer and amended answer of the respondent Clarke and the several answers of the other respondents were thereupon filed, and upon the issues joined by the filing of a replication by complainants to the answer of the respondent Clarke testimony has been taken upon the merits.

The respondent Clarke, in his answer, sets up a defense on the merits, and as a special defense the lack of diversity of citizenship of the parties necessary to give this court jurisdiction of the cause. This defense is based upon the claim, originally set up in the plea, that the interest of David M. Reavis is with the complainants; and the same charge is also made in the answer against the respondent J. J. Reavis. Upon this issue of jurisdiction, and the testimony taken upon that issue, a motion was made by the respondent Clarke on May 20, 1899, to dismiss the amended bill. On November 13, 1899,

complainants were allowed to file a replication to respondent Clarke's motion to dismiss, and on November 27, 1899, this motion was denied. 98 Fed. 145. In denying the motion to dismiss, the court decided that the evidence did not show that the real interests of D. M. Reavis were with the complainants; and, further, that there was no such proof of collusion between the complainants and D. M. Reavis as to render a rearrangement of parties necessary, according to the equities of the case. Thereupon, on December 11, 1899, complainants' counsel moved the court for a default, and for a judgment, and for a decree pro confesso against the respondent Clarke. The grounds of this motion, as stated in the notice filed by complainants' counsel, were as follows:

"That, the defendant having pleaded in abatement to the jurisdiction of the court in this cause, and having taken and published the testimony on that plea, and having insisted upon the trial of the issue thus presented, he thereby waived and withdrew his former plea in bar; that the court tried and determined the issue tendered by said plea in abatement adverse to said defendant; that said defendant has failed at or before the next rule day after the rendition of said judgment to file an answer to the merits, or obtain an extension of time or right from the court so to answer."

The motion of respondent Clarke to dismiss the bill is thus regarded as a plea in abatement by complainants' counsel. But it will be observed that this motion was based upon the special defense of a lack of jurisdiction raised by the answer. To turn this issue of the answer into a plea in abatement, and dispose of the case upon the rules governing a judgment upon that plea, would seem to be, under the circumstances of this case, an extremely technical proceeding, and, in the possible result, unjust to the respondents. Complainants, however, contend that they find authority for such a proceeding in the established rules of equity practice. Section 5 of the act of March 3, 1875 (18 Stat. 472), provides:

"That if in any suit commenced in a circuit court * * * it shall appear to the satisfaction of said circuit court at any time after such suit has been brought or removed thereto, that the parties to said suit have been improperly or collusively made or joined for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein."

In the case of *Hartog v. Memory*, 116 U. S. 588, 590, 6 Sup. Ct. 521, 522, 29 L. Ed. 725, 726, the court, referring to this act, stated that prior to its passage the rule was that, when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the face of the record, evidence to contradict the record was not admissible except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such plea to the jurisdiction. The court further said that in its general scope this rule had not been altered by the act of 1875, except in so far as it provided that the court might at any time, without plea and without motion, stop all further proceedings, and dismiss the suit the moment a fraud on its jurisdiction was discovered. But the court went further, and observed that:

"Neither party has a right, however, without pleading at the proper time, and in the proper way, to introduce evidence the only purpose of which is to

make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction, or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed."

The complainants claim the right, under this statement of the rule of pleading governing the procedure in raising the question of jurisdiction, to treat the respondent's motion to dismiss as, in substance and effect, a plea in abatement; and, as the motion or plea has been overruled, they contend that they are entitled to a decree upon a default to answer after the court denied the motion. But in the case of *Morris v. Gilmer*, 129 U. S. 315, 327, 9 Sup. Ct. 289, 293, 32 L. Ed. 690, 694, the supreme court qualified its statements made in *Hartog v. Memory* upon the manner of raising the question of jurisdiction by the explanation that the sufficiency or regularity of the pleadings was not under consideration in that case, and any comments thereupon could only be regarded as irrelevant to the determination of the question decided in the case. It said:

"In that case, the citizenship of the parties was properly set out in the pleadings, and the case was submitted to the jury without any question being raised as to want of jurisdiction, and without the attention of the court being drawn to certain statements incidentally made in the deposition of the defendant against whom the verdict was rendered. After verdict, the latter moved for a new trial, raising upon that motion, for the first time, the question of jurisdiction. The court summarily dismissed the action upon the ground, solely, of want of jurisdiction, without affording the plaintiff any opportunity whatever to rebut or control the evidence upon the question of jurisdiction. The failure, under the peculiar circumstances disclosed in that case, to give such opportunity, was itself sufficient to justify a reversal of the order dismissing the action, and what was said that was irrelevant to the determination of that question was unnecessary to the decision, and cannot be regarded as authoritative."

And in *Anderson v. Watts*, 138 U. S. 695, 701, 11 Sup. Ct. 449, 450, 34 L. Ed. 1078, 1080, an express modification of the views of the supreme court upon this subject is clearly shown. Speaking through the chief justice, the court says:

"Under the act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. 470, 472), the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted"

The same opinion is indicated in the case of *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 373, 15 Sup. Ct. 1004, 34 L. Ed. 363. Under the authority of those last cases, respondent Clarke was entitled to raise the question of jurisdiction in his answer, and it would seem that this was so understood by counsel, when, by consent, the demurrer to the original plea in abatement was withdrawn, and the plea overruled by the court. No other explanation satisfactorily accounts for the disposition that was made of that plea. Evidence was required to support it, and evidence that in some degree went to the merits of the whole case. It was, therefore, convenient and practicable to embody this issue with the other issues of fact in the answer, and reserve the determination of this question for the hearing. In the case of *State of Rhode Island v. State of Massachusetts*, 14 Pet.

251, 257, 10 L. Ed. 423, 445, Chief Justice Taney, speaking for the court, declared that courts of chancery have always exercised an equitable discretion in relation to rules of pleading whenever they have found it necessary to do so for the purposes of justice. And, as illustrating the necessity for the exercise of this discretion, and the adoption of the most liberal principles of practice and pleading, the learned judge refers to the possible results arising from a too strict adherence to such rules. He says:

"According to the rules of pleading in the chancery court, if the plea is unexceptionable in its form and character, the complainant must either set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea. If he elects to proceed in the manner first mentioned, and sets down the plea for argument, he then admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea, and denies the truth of the facts therein stated, he then admits that, if the particular facts stated in the plea are true, they are then sufficient in law to bar his recovery; and, if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. *Hughes v. Blake*, 6 Wheat. 472, 5 L. Ed. 303. Undoubtedly, if a plea upon argument is ruled to be sufficient in law to bar the recovery of the complainant, the court of chancery would, according to its uniform practice, allow him to amend, and to put in issue, by a proper replication, the truth of the facts stated in the plea. But in either case the controversy would turn altogether upon the facts stated in the plea, if the plea is permitted to stand. It is the strict and technical character of these rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the court of chancery in relation to pleas. In many cases, where they are not overruled, the court will not permit them to have the full effect of a plea; and will, in some cases, save to the defendant the benefit of it at the hearing, and in others will order it to stand for an answer, as, in the judgment of the court, may best subserve the purposes of justice."

The plea in that case involved no question of jurisdiction over the parties, but the views expressed are applicable to equity pleading generally, and particularly where the enforcement of technical rules will result in manifest injustice to either party. It follows that under the present practice the motion of the respondent Clarke to dismiss the bill, whether considered as a motion or a plea in abatement, cannot, under the circumstances of this case, be deemed to have been a waiver of the other defenses set up in his answer. The motion for a decree *pro confesso* will therefore be denied.

SOUTHWEST MISSOURI LIGHT CO. v. CITY OF JOPLIN, MO.

(Circuit Court, W. D. Missouri, W. D. March 31, 1900.)

1. CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS — CITY ORDINANCE.

An ordinance adopted by a city under assumed authority from the state which impairs the obligation of a previous contract made by the city is the same in effect as a subsequent enactment by the state legislature, and is within the prohibition of the contract clause of the federal constitution.

2. MUNICIPAL CORPORATIONS—CONTRACTS—ORDINANCE GRANTING FRANCHISE TO LIGHT COMPANY.

A statute of Missouri (Laws 1891, p. 60) authorizes cities of the third class to erect, maintain, and operate gas or electric light works or water

works, to supply light or water for public purposes, and for the use of the inhabitants of such city: "provided, that the council may, in their discretion, grant the right to any person or persons or corporation to erect such works * * * upon such terms as may be prescribed by ordinance: provided, further, that such right to such persons or corporation shall not extend for a longer period than 20 years, and shall not be renewed unless by the consent of a majority of the qualified voters." Acting under such statute a city passed an ordinance by which, "in consideration of benefits to be derived therefrom," it granted to the assignors of a corporation the right to erect, maintain, and operate electric light works for a term of 20 years, with such incidental rights as were necessary for the efficient operation of such works. The ordinance required the grantees to complete the works within a specified time; to erect poles to properly suspend street lights, if contracted for at any time by the city; to maintain a light at a railroad crossing, free of expense to the city; and fixed the limit of rates to be charged for lights. *Held* that, having adopted the alternative method of procuring light for the city and its inhabitants contemplated by the statute, it was an implied term of the contract, made by the acceptance of the ordinance, that the city would not itself enter into competition with the grantee in supplying lights to private consumers during the term of the grant by means of a light plant erected under the powers conferred by the statute.

3. SAME—IMPAIRMENT OF CONTRACT—INJUNCTION.

Where a city, having erected an electric light plant under an ordinance adopted pursuant to a vote, is proceeding to furnish lights to private consumers, in competition with a private corporation, and in violation of the implied terms of the franchise granted to such corporation, under which it had expended money in building works, the latter is entitled to an injunction against such competition as the only adequate remedy; and it is not precluded from such relief by the fact that it did not object to the erection of the works by the city, when the ordinance under which they were built did not disclose any intention on the part of the city to compete for private business, and no injunction is asked against the furnishing by the city of lights for public purposes.

In Equity. On motion for temporary injunction.

Edwin Silver, for complainant.

C. H. Montgomery, for defendant.

PHILIPS, District Judge. This is a bill in equity to enjoin the defendant, a municipal corporation under the laws of the state of Missouri, from proceeding further in the operation of works constructed by it for the purpose of furnishing electric lights in so far as it is furnishing and proposes to continue to furnish private consumers for commercial purposes. In 1891 the legislature of the state passed an act (Laws Mo. 1891, p. 60) the fourth section of which is as follows:

"Sec. 1519. The council shall have the right to erect, maintain and operate gas-works, electric light works or light works of any other kind or name, and to erect lamp posts, electric light poles or any other machinery or appliances necessary to light the streets, avenues, alleys and other public places, and to supply private lights for the use of the inhabitants of the city and its suburbs, and regulate the same and to prescribe and regulate the rates to be paid by the consumers thereof, and to acquire by purchase, donation, or condemnation, suitable ground within or without the city upon which to erect such works, and the right of way to and from said works, and also the right of way for laying gas pipes, electric wires under or above ground, and erecting posts and poles and such other machinery and appliances as may be necessary for the efficient operation of such works; all of which shall be done in the manner prescribed by ordinance: provided, that the council may, in their discretion, grant the right to any person or persons or corporation to erect

such works and lay the pipes, wires, and erect the posts, poles and other necessary appliances and machinery therefor, upon such terms as may be prescribed by ordinance: provided, further, that such right to such persons or corporation shall not extend for a longer period than twenty years, and shall not be renewed unless by the consent of a majority of the qualified voters of said city voting at an election held for such purpose."

The succeeding section makes a like provision for erecting water-works, either by the city or by contract with some person or corporation. Afterwards, on the 7th day of October, 1891, the defendant city adopted an ordinance by which, "in consideration of benefits to be derived therefrom," it granted to certain designated persons the right, power, privilege, and authority within said city, and any additions thereto, to build, erect, operate, and maintain all necessary and convenient electric light and electric motor plants, appliances, machinery, and appurtenances for the generation of electricity, with proper means for maintaining conduits for the distribution of such electricity, for the purpose of furnishing light, heat, motor power, and other purposes, for a period of 20 years from the granting of the franchise; giving authority to use the streets, avenues, alleys, and public grounds in the city for laying pipes and erecting poles and other proper supports, and to suspend wires thereon, for the purpose aforesaid. After imposing certain conditions under which the privilege should be exercised, the ordinance fixed the limitation for charges to be allowed for furnishing such lights. This grant inured to the benefit of the assignees of the grantees, which right passed by assignment to the complainant corporation. The ordinance was accepted, and the grantees thereunder proceeded, at an outlay of \$15,000, to erect said works and appliances for furnishing to the city and the people thereof electric lights. The complainant thereafter continued to operate said plant, furnishing lights to the city and residents thereof and its vicinity, up to the date of the filing of the bill herein, in full compliance with the requirements of the ordinance. On the 7th day of February, 1899, the defendant city passed an ordinance authorizing and calling a special election for the purpose of voting on the proposition to increase the indebtedness of the city of Joplin for the purpose of building an electric light plant to be owned, controlled, and operated by the city, authorizing the council to issue bonds therefor, and providing for a sinking fund. An election thereunder was held, and the proposition submitted was carried. On the 1st day of March, 1899, the city, by its council, adopted an ordinance declaring the result of the election, and authorizing the issue of \$30,000 in bonds for the purpose of erecting its own electric light works, which have been constructed and put into operation. The bill does not seek to enjoin the city from furnishing such lights for public uses, but alleges that by the erection of such works and doing a commercial business in furnishing lights to private consumers it is entering into competition with the franchise granted to the complainant, the practical effect of which is to threaten to destroy the value of its plant by driving it out of business. The bill alleges that the complainant is the owner of a large amount of property in said city (presumably its electric plant), which will be subjected to the payment of taxes thereon to aid in supporting the works constructed and operated by the city, and that it will there-

by be compelled to contribute to the destruction of its own business. The claim is that such act of the city impairs the obligation of its contract with the complainant, and is, therefore, prohibited by section 10 of article 1 of the federal constitution, which declares that no state shall pass any law impairing the obligation of contracts.

It is to be conceded to the contention of complainant that the subsequent adoption of the ordinance by the city under an assumed authority from the state has the same effect upon the pre-existing contract as a subsequent enactment by the legislature of the state. *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. The principal contention of defendant is that the ordinance of October 7, 1891, merely granted the right or privilege to the use of its streets, avenues, alleys, etc., for laying conduits, erecting poles, and stringing wires thereon necessary for the operation of complainant's works in the distribution of electricity; that it left the city perfectly free either to concede a like right to any other private person or corporation, or immediately to erect its own plant, and furnish lights, either for public or private use, within the city limits. If the grant under the ordinance was merely a unilateral contract, imposing no mutual obligations and undertakings between the parties, to be kept and observed by them during the life of the franchise, it might well be maintained that it was the mere grant of the privilege to erect and maintain, as best it might, within the city, such works, with no express or implied undertaking on the part of the city not to become such competitor. There is no better rule for the construction of grants and contracts than "to place ourselves as nearly as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by the four corners, read it." *Walsh v. Hill*, 38 Cal. 481. Accordingly, it was said by the court of appeals for this circuit in *Speed v. Railroad Co.*, 30 C. C. A. 3, 86 Fed. 237:

"It may be regarded as the recognized rule that in the exposition of grants and contracts the construction should be upon the view of the attitude of the persons making them, and upon a comparison of every part of the entire instrument; so that, while endeavoring to give every substantive part operative effect, also to give it a practical rather than a theoretical application. And when the intention is apparent, without repugnance to the settled rules of law, it will control the technical terms; for the intention, and not the words, is the sense of any agreement. And this will prevail regardless of inapt expressions or careless recitations."

It is a well-known public fact that in this state in 1890-91 there existed in cities of the third class the ambition and desire to enjoy the advantages and conveniences of modern civilization in having waterworks, gas, and electric lights, both for public and private use. Many of these municipalities were already burdened with public debt to the full extent of the constitutional limit of taxation. In others there was timidity, to immovability, about issuing bonds to enable such cities to embark in the experiment of building and operating such works. To meet these conditions, the act of 1891, *supra*, was passed by the state legislature, the fourth section of which provided for gas and electric light works, and the fifth section provided for waterworks for the city. The first part of said fourth section author-

ized the city to erect, maintain, and operate electric light works "necessary to light the streets, avenues, alleys and other public places, and to supply private lights for the use of the inhabitants of the city and suburbs, and regulate the same," and it prescribed and regulated the rates to be paid by consumers thereof, etc.; and to provide for the condition above adverted to, where the city might not be able to erect and maintain its own works, follows the proviso authorizing the council, in the exercise of their discretion, to "grant the right to any person or persons or corporation to erect such works." The right to erect such works was for the purpose of giving the city and its inhabitants the facilities for obtaining such lights. When it, by such contract, obtained these advantages for the given period of 20 years, the city had accomplished through this legislation the desired object. The opening words of section 1 of the ordinance indicate this: "In consideration of the benefits to be derived therefrom," the persons named, and their assigns and successors, were authorized to erect such works; that is, the consideration of the benefits to be derived from such contract to the city and its inhabitants justified the grant. The last clause of the same section, which imposed upon the company the duty of erecting poles for lights, so as "to properly suspend street lights, if contracted for at any time by the city," shows that by the ordinance, if the city elected to contract for such street lights, the duty was imposed upon the grantees to erect poles, and properly to suspend therefrom such lights. And as long as the complainant exercises such grant, it must furnish this equipment for the suspension of street lights for the city's use. So, also, under the third section of the ordinance, which fixes the maximum rate that the company may charge for such lights, occurs this provision:

"For one light erected on the front porch of Freeman's Foundry, so as to light the Frisco Railroad crossing on Main street, and to be maintained and kept in order without charge or expense to the city."

By this provision the contract compels the company to maintain and keep in order, without charge or expense to the city, an electric light at a given place for a given purpose, during the period of 20 years, whether or not the city erects and operates its own works. The purpose of the city in making this contract to secure such lights for the public and the people of the city is further indicated by the provision in section 5 of the ordinance that, "unless said parties, their successors, or assigns, shall begin work in good faith within sixty days from the approval of this ordinance, and have the works in operation within four months, this ordinance shall be void and of no effect." It would have been quite a matter of indifference to the city when the work should be begun and the works put in operation, if it did not understand that the same was for the benefit of the city and its inhabitants; and, if these grantees did not thus get to work, and complete the works, so the city could get the use thereof, it intended by this provision to be at liberty to contract with some other person or corporation therefor. And certainly it must follow that when the company thus began work and completed it, the obligation was imposed upon the city not to interfere with the right and privilege granted to furnish such lights to the people of the city.

It is among the recognized canons of construction of statutes, contracts, and grants that what is implied is as much a part of it as if expressed in so many words. *U. S. v. Babbitt*, 1 Black, 61, 17 L. Ed. 94. The rule is thus expressed in 2 Kent, Comm. (12th Ed.) § 555:

"The mutual intention of the parties to the instrument is the great, and sometimes the difficult, object of the inquiry, when the terms of it are not free from ambiguity. To reach and carry that intention into effect, the law, when it becomes necessary, will control even the literal terms of the contract, if they manifestly contravene the purpose; and many cases are given in the books in which the plain intent has prevailed over the strict letter of the contract.
* * * The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual."

So Bishop (Cont. § 256) says:

"It is the interpreted stipulation, not its naked words, which, in trial of a cause, the judge submits to the jury as the foundation for their verdict.
* * * The contract as shaped, or as to be shaped, by judicial hands is the real undertaking between the parties, and the written or spoken words fill simply the office of helps to the tribunal in determining the contract."

This principle is graphically expressed in Plowd. 467:

"Hence it appears that there is great diversity between these two equities. The one abridges the letter, the other enlarges it; the one diminishes it, the other amplifies it; the one takes from the letter, the other adds to it. So that a man ought not to rest upon the letter only, but he ought to rely upon the sense, which is tempered and guided by equity, and therein he reaps the fruit of the law; for, as a nut consists of a shell and kernel, so every statute consists of the letter and the sense; and as the kernel is the fruit of the nut, so the sense is the fruit of the statute."

There is another rule of law applicable to this case:

"If the act to be done by the party binding can only be done upon a corresponding act being done or allowed by the other party, an obligation of the latter to do or allow to be done the act or thing necessary for the completion of the contract will be necessarily implied." *Black v. Woodrow*, 39 Md. 194; *U. S. v. Speed*, 8 Wall. 77, 19 L. Ed. 449.

This rule is very aptly put by Judge Wagner in *Lewis v. Insurance Co.*, 61 Mo. 538:

"It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied,—as, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will be necessarily implied."

When the city granted this right and privilege to erect such works, and to furnish lights for a period of 20 years, can it be possible that the city contemplated, and that the parties understood, that, after the grantees should go to the large expense of erecting such works, the city would, at its pleasure, construct like works, to occupy the same field as a competitor with the grantees? In *Cort v. Lassard*, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, the court, speaking of a contract binding an actor to act at a particular theater for a specified time, declared that:

"In the nature of things, it implies a regulation against acting at any other theater during that time. * * * According to the true spirit of such agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for plaintiff follows as inevitably and logically as if it was expressed."

The question presented here has nowhere been more fully discussed than by the supreme court of Pennsylvania in the case of *White v. City of Meadville*, 35 Atl. 694, 177 Pa. St. 643, 34 L. R. A. 567. The city, after making a contract with the water company for the erection of a water plant, attempted subsequently to build its own plant under a later statute; and the court, in this connection, made an observation most pertinent to the facts of this case:

"A municipality, in its beginning, is perhaps not financially strong, or its debt may approach the constitutional limit so closely that it cannot borrow. Nevertheless, the low state of its financial condition does not render less urgent the necessity of a water supply. It can obtain it in but one way: by contract with those who have the money, and are willing to invest their private capital in the construction of waterworks. The legislature knew that capital would not be invested in such enterprises if, in the future, it were liable to confiscation by competition with a public enterprise operated from a municipal treasury capable of replenishment from the pocket of the taxpayer. The municipality will not be forever poor. The time will come when it will be of financial ability to own and operate its own works. That fact suggested clause 7 of the corporation act [which conferred the power to buy]. The very fact of having a supply of water on an investment of private capital has tended to stimulate its growth, and largely appreciate the value of taxable property. Both the contracting parties must be conclusively presumed to have had in view the law which empowered them to contract, and which became a part of the contract. At the end of 20 years the defendants have a right to take the works at a price fixed by the law, and that is one of computation. True, as to the city, the taking of the works is only permissive."

This case was followed in *Metzger v. Borough of Beaver Falls*, 35 Atl. 1134, 178 Pa. St. 1, in which the court said:

"The legislature never intended to commit the duty of supplying water to a municipality to two different agencies, both in operation at the same time. The borough had authority 'to provide a supply of water for the use of the inhabitants.' This supply was provided by the Union Water Company, subject to such regulations in regard to streets, roads, and grades as the borough imposed. The borough did not attempt to construct works until years after the water company had laid its mains and the public had been served. The rights of the water company vested by consent of the municipality, and its contract to supply water for public purposes. * * * After twenty years the borough has power to purchase the works at a price not exorbitant."

The court held that the city could not, by constructing its own works within 20 years, without buying out the company, become a competitor with the company, and drive it out of business. After the decision in the *Meadville Case*, the city attempted to evade the decision of the supreme court by the subterfuge stated in *Welsh v. Borough of Beaver Falls*, 40 Atl. 784, 186 Pa. St. 578. The court held that what could not be done directly could not be done indirectly, and said:

"When a contract is made with a private water company, authorized usually only to build its works and maintain its plant at one place, it would be grossly inequitable to hold that the municipality, after inviting the construction of such works, and contracting with the company for the water supply, could at any time thereafter destroy them by constructing its own works. To author-

ize such municipal action, the statutory right must be explicit. It will not be implied from doubtful language."

This question was very carefully considered by Judge Carpenter in *Westerly Waterworks Co. v. Town of Westerly* (C. C.) 75 Fed. 181. It is true that in that case it may be said there was something of an express obligation on the part of the water company to supply water, and there was something of an exclusive grant, with the right of the city to purchase within 25 years. But what difference, in contemplation of law, can it make whether, under a statute like that of Missouri, where the option is given to the city either to build its own works or to contract with some other person or corporation to build such works for the purpose of supplying the city and its inhabitants, under which the implication necessarily arises that the city should not become a competitor by erecting its own works, and an express provision in the ordinance to that effect? The court in the case last cited said:

"The question is whether the contract here in dispute contains an implicit reservation, founded on the then existing state of the law, of a right of a town at pleasure to construct waterworks. The law gives power to construct waterworks, and also to contract for a water supply, and, as incidental to such contracts, to confer certain rights and exemptions on the contractors. Does this leave it competent for the town to make a contract with this corporation, and afterwards, without any default alleged on the part of the corporation, and in derogation of the terms of the contract, to construct other works? The question is not whether the town may grant a franchise to be exclusively exercised by the company for a term of years, without regard to its ability or willingness to furnish an adequate supply of suitable water; but the question is, rather, whether the town has not, by its own act, under one branch of the law, limited its power to act under the other branch of the act."

Without undertaking to review or reconcile some apparent conflict of authority on this subject, I am unable to differentiate this case from the governing principle ruled by the supreme court in *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. The charter of the city of Walla Walla empowered it to erect and maintain waterworks, or to authorize the erection of the same, "for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water." And by another section the city was empowered to provide a sufficient supply of water, and "to grant the right to use the streets of the city for the purpose of laying gas and other pipes, intended to furnish the inhabitants of the city with light or water, to any person or association of persons, for a term not exceeding 25 years; provided, always, that none of the rights or privileges shall be exclusive, nor prevent the council from granting the same right to others." Under this statute the city, by ordinance, granted to the water company the right to lay and maintain water mains, etc., for 25 years, reserving to itself the right to maintain fire hydrants and to flush sewers during this term, each without charge. The contract further provided that it was voidable by the city so far as it required the payment of money upon the judgment of a court of competent jurisdiction, when there should be a substantial failure of the supply of water, or failure of the company to perform its undertaking. The provisions of the ordinance were accepted by the water company, and the works were erected, and the company for a number of years supplied the requisite water, and performed its contract.

Then the city passed an ordinance to construct its own system of waterworks, and to issue bonds therefor. Thereupon the water company filed its bill to enjoin the city. It is true that in that case the ordinance creating the contract between the city and the water company undertook to give the company the exclusive right to furnish water. And while it might seem, on a casual reading of the opinion of the court, that this fact had some influence on its judgment, enjoining the city from becoming a competitor with the water company, yet a closer analysis of the opinion satisfies my mind that this fact could not have been of controlling effect. Such a provision in the contract, being in express violation of the grant under the state statute to the city, the statute read the provision out of the contract, and therefore the case necessarily was determined without regard to such provision. This case decides expressly that the subsequent ordinance of the city brought the case within the purview of that clause of section 10 of article 1 of the federal constitution which prohibits a state from passing any law impairing the obligation of contracts. The municipality being an integral part of the state, its legislative act in the form of an ordinance under an assumed authority from the state operated upon the previous contract the same as if it had been a subsequent act of the state legislature. The court said:

"Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly, without an express sanction of the legislature to that effect."

It then further proceeded to hold:

"That an ordinance granting the right to the water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of the city with water does not, in our opinion, create a monopoly or prevent the granting of a similar franchise to another company."

And as conclusive proof that the court did not base its conclusion upon the provision in the contract giving the company the exclusive right for the designated period, on page 17, 172 U. S., page 84, 19 Sup. Ct., and page 348, 43 L. Ed., the court says:

"There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That, if the city should desire to establish waterworks of its own, it would do so by condemning the property of the company, and making such changes in its plant, or such additions thereto, as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith. An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons for a term not exceeding twenty-five years. In establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not

itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that in one of the sudden changes of public opinion, to which all municipalities are more or less subject, the city might resolve to enter the field itself,—a field in which it undoubtedly would have become the master,—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

In other words, such an express provision in the contract, in good conscience and equity, could amount to nothing more than what the law would write into a contract made by a city of the third class in Missouri under this statute of 1891. The city of Joplin, "in consideration of the benefits to be derived" from the construction and erection of the plant by its grantees, gave them the right and privilege to its streets, etc. It compelled them to go to work within a given number of days, and to complete its works within a given time; to so erect its poles and string its wires as to furnish the streets of the city with electric lights if the city should demand a contract therefor; it required of the company to keep and maintain a light at a given place for lighting a railroad crossing; it invited the company to put its money into this plant, and to become the owner of property in the city. Will the law permit that, as soon as it becomes strong enough to stand alone, because, perhaps, the very presence of electric lights on the streets and in its houses, furnished by this complainant, has invited population and growth and increase of its wealth, the city itself should embark in the electric light business, lay its pipes alongside of those of the complainant, and enter the field of competition in the mercantile business of selling lights, and to tax the property of the complainant to help to support this competition, and ultimately drive it from the field, and destroy its investment? When it exercised its option, under the statute of 1891, to enter into a contract with some other person or corporation for a period of 20 years, it thereby as effectually declared to its grantee that it did not propose to exercise contemporaneously the power given in the first part of the statute to erect its own works, and enter upon competition with its grantees, as if it had written it in italics in the ordinance itself. What is necessarily implied need not be expressed. My conclusion in this case is based largely upon the peculiar provisions of this statute, the object of the legislature in its grant to cities of the third class, as well as the obvious equities and justice of the case. As the complainant does not ask that the defendant shall not supply for its public use electric lights, it certainly ought not to complain that it shall be restrained from entering the field of speculation in a business venture to compete for private patronage.

The remaining question of importance is, will the remedy of injunction apply to the facts of this case? Doubtless, where the grantee from the city should stand by silently, and see the city proceed to erect its own plant, with the knowledge of the fact that it was entering into competition in its operation with the grantee in every respect, at an outlay of a large amount of money in the issue and sale of bonds, good conscience would demand that the objector should speak out,

and take affirmative action at the earliest time possible. But each case must depend largely upon its own peculiar facts. The ordinance under which the city built its works simply provided "to increase the indebtedness of the city of Joplin for the purpose of building an electric light plant, to be owned, controlled, and operated by the city." There was nothing in this ordinance declaring to the public the purpose of the city to do more than build an electric light plant, to be owned and operated for the public uses of the city. There was nothing on the face of the ordinance to communicate that it was the further purpose of the city to operate its plant for mercantile purposes. The complainant is not objecting to the construction and operation of the defendant's works in supplying electricity for its public use, but for extending that use to competition in the open market. The purpose of the city to enter into this competition was not made manifest to the complainant until the defendant began to furnish lights to private consumers, which is now in its incipency. Has the complainant, for such invasion of its rights, a complete remedy at law within the meaning of the statute? "The remedy at law, in order to exclude the concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity." *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 12, 19 Sup. Ct. 82, 43 L. Ed. 346. The court in this same case, speaking of the remedy at law for the breach of the covenant, says:

"In the meantime great—perhaps irreparable—damage would have been done to the plaintiff. What the measure of such damages would be exceedingly difficult of ascertainment, and would depend largely upon the question of whether the value of plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere with, the business of the complainant."

Could the complainant's damages in a suit at law be ascertained in a single suit? How would it be possible for a court and jury to fix a reliable and just standard for the ascertainment of all damages the complainant would sustain, dependent upon future events and results impossible of anticipation? Must it sue every day, or every month, or must it wait until the fact is actually demonstrated by experiment that its property and business have been wholly destroyed, or could the court and jury take the results of a preceding period of competition, and by that measure the results for the future? It seems to me that this is the proper office of the remedial justice sought by the process of injunction. Temporary injunction granted.

PHILLIPS v. UNION CENT. LIFE INS. CO.

(Circuit Court, W. D. Georgia, S. D. February 21, 1900.)

1. LIFE INSURANCE—CONTRACT—UNDELIVERED POLICY.

An applicant for life insurance was duly examined and recommended for insurance, and the application forwarded for acceptance by the company. Subsequently a part of the first premium was paid, and a note given for the remainder, upon an agreement with the agent that, if ac-

cepted, the insurance should be from that date. The application was accepted, and a policy issued bearing date in accordance with such agreement, which was forwarded to the agent of the company, who notified the applicant of such acceptance by mail, and that he would call and deliver the policy, but before he had done so the applicant died. *Held*, that there was a completed contract of insurance.

2. SAME.

The fact that an applicant for life insurance desired the policy to be made payable to a particular person, while, as issued, in conformity to the written application, it was made payable to the legal representatives of the insured, does not constitute a variance of which the company can take advantage to defeat the contract.

3. SAME—EXAMINATION OF INSURED.

A contract of life insurance is not vitiated by the failure of an agent of the company to make a personal examination of the applicant as required by its rules, where a policy was issued upon a proper examination by the medical examiner, and where it does not appear that the insured had knowledge of the requirement.

4. SAME—ACTION ON POLICY—LIMITATION.

By a verbal understanding between an applicant for life insurance and the agent of the company, the policy was to be made payable to a particular person; but the written application required it to be made payable to the legal representatives of the applicant, and it was so issued. Before it had been actually delivered, but after it had become effective, the insured died; and the company then refused to deliver it to her representatives, and removed it from the state. In the belief that the policy had been written in accordance with the verbal agreement, an action was brought thereon in behalf of the supposed beneficiary, and the time fixed by the policy within which an action was required to be commenced thereon expired before the mistake was learned by those in interest, by the production of the policy in court. *Held*, that the company was estopped to plead the limitation in defense to a suit in equity instituted within a reasonable time thereafter by the legal representative of the deceased to compel delivery of the policy and to recover thereon.

This was a suit in equity to compel the delivery of a life insurance policy, and to recover thereon, brought by the administrator of the insured.

Dessau, Harris & Birch, Pope S. Hill, Hardeman, Davis & Turner, and Hardeman & Moore, for complainant.

Guerry & Hall and Robert Ramsey, for respondent.

SPEER, District Judge. In this case there was plainly a contract of insurance. The deceased, whose life was insured, had made application for insurance, was duly examined, and was recommended for insurance. The policy was dated the 1st day of May. Thereafter, on the 8th day of May, her grandfather paid a part of the first premium, taking a receipt therefor, and gave a note for the balance due. In the receipt thus taken it was stipulated that, if the application was accepted, she was to be insured from that date. The defendant company thereafter issued a policy, which was dated May 1st, in accordance with this understanding, and sent it to its general agent at Macon. The agent notified the applicant through the mail that it had been accepted, and apprised her of his intention to call and deliver it in a few days. This, in my opinion, completed the contract to that extent that the company was bound. While the policy was in the hands of the agent at Macon, and before it was

actually delivered to her, or any one for her, she died. Now, it appears in the testimony that the grandfather of Willie A. Pugh, who had represented her in the negotiations with the defendant company, wished that the policy should be made payable, not to the heirs and administrators of the applicant, but to her younger sister; and he was of the opinion that it was issued in that form until it was produced in court. It now turns out that it was made payable to her legal representatives. This was a variance between the terms of insurance as proposed by Mr. Phillips and as they were expressed in the policy, and it is insisted, therefore, that the minds of the insured and insurer never met upon this contract of insurance, and it is, therefore, no contract. While it may be true that Willie A. Pugh might have had the terms of the policy corrected in accordance with her wishes if she had lived, yet, having died, it is, in my opinion, not competent for the insurance company to take advantage of its own mistake. The contract was to insure her life, and that contract was of force, and a court of equity, under the circumstances, will enforce it. It is, moreover, true that the written application which Willie A. Pugh signed requested the policy to be made out as it was drawn, and the verbal understanding with her grandfather and the agent of the insurance company anterior to this written application, and the policy drawn pursuant thereto, cannot alter or vary it so as to void the liability of the defendant company.

Now, does the failure of the agent, Lowery, to make a personal examination of the applicant, vitiate the policy? I do not think so. This was a rule of the company, but it seems to refer to married women alone, and Miss Pugh was a single woman. Besides, it appears that she was subjected by the medical examiner of the company to the special examination required for females. This was a substantial compliance with the regulations of the defendant company. If it were otherwise, it may well be doubted if the private instructions given to the general agent, Lowery, by the defendant, were binding upon the insured, if they had not been communicated to her. It does not appear that any such communication was made. He notified her through the mails that the policy was effected, and this became, in the absence of fraud on her part, obligatory upon the company as soon as the communication was made. The delivery of the policy under the circumstances was not essential to its validity. It must be construed as completed and delivered when the general agent notified her by mail of its acceptance.

Nor will the defense of the statute of limitations avail the defendant company. Under a misapprehension as to the beneficiary of the policy, suit was brought thereon within the 12-months period by the guardian of the younger sister. This suit was erroneously brought, for the terms of the application and the policy place the title to its proceeds in the legal representative of the deceased. A few days after the expiration of the 12 months this bill was filed by the proper party plaintiff to compel the defendant company to deliver the policy, which it had refused to do, and also sought a decree for the amount due thereon. This being true, I think it would now be unconscionable to allow the company to take advan-

tage of its own mistake. It was, as we have seen, a completed contract, and, although death had intervened before the actual delivery of the policy, it was the plain duty of the company to deliver the policy to the legal representative of Miss Pugh. Instead of doing this, it took the policy out of the state. Thus deprived of the opportunity to correct their mistake by an inspection of the policy, the legal representative of Miss Pugh technically fell under the bar of the statute; but a court of equity, under the circumstances, will not hold him barred. The company is estopped from pleading the statute. This suit was brought within a reasonable time after the discovery of the true terms of the policy. The right of the plaintiff to his day in court was so evident that in the original suit we attempted to protect the plaintiff against a bar of the statute by an order passed at the hearing, and, if this be regarded as a proceeding ancillary to the original suit, the bar of the statute could not be operative. If, however, it be treated as an original bill, the plaintiff will be equally protected under the circumstances. One and the same person was plaintiff both in the original common-law action and in this equity suit. The policy sued on was the same. The only difference was that Phillips, in the outset, because of his mistake as to the terms of the policy then withheld by the defendant, sued as guardian, and now he sues as administrator.

For these reasons a decree will be rendered for the plaintiff for the full value of the policy, with interest. I do not regard this a case where the action of the company was so marked by bad faith that damages and attorney's fees should be assessed against it, pursuant to section 2140 of the Code of Georgia. The demand of the plaintiff in this respect is disallowed.

BARNARD v. LANCASHIRE INS. CO. OF MANCHESTER, ENGLAND,
et al.

LANCASHIRE INS. CO. OF MANCHESTER, ENGLAND, et al. v.
BARNARD.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1900.)

Nos. 1,262, 1,263.

1. INSURANCE—AGREEMENT FOR ARBITRATION—SETTING ASIDE AWARD.

The award of arbitrators appointed, in accordance with an agreement in a policy of insurance, to appraise a loss thereunder, is supported by every reasonable intendment and presumption, and will not be vacated unless clearly shown that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance, of the appraisers.

2. SAME.

Where there are two methods by which the result may have been reached by arbitrators in making an award fixing the amount of a loss under an insurance policy, one of which was legal and authorized, and the other not, the presumption is that the legal method was followed.

3. SAME.

The fact that an award made by arbitrators appointed under a provision of an insurance policy to appraise the amount of a loss thereunder was not made under oath, as provided in the policy, affords no ground for a suit in equity to set aside the award.

Appeals from the Circuit Court of the United States for the District of Nebraska.

Frank H. Gaines (Edward R. Duffie and James E. Kelby, on the brief), for Lura D. Barnard.

Charles J. Greene and Ralph W. Breckenridge, for Lancashire Ins. Co. and others.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. These cases are appeals from a decree which set aside the award of appraisers made under the usual provision in policies of fire insurance for the appraisal of the damages from fire. The insured, Lura D. Barnard, appeals from the decree avoiding the award, and the insurance companies appeal from the decree because it does not perpetually enjoin the prosecution of actions at law which had been brought upon the award.

An agreement of appraisal is a contract. Appraisers who make an award under such an agreement are presumed to have acted in accordance with the law and the terms of the contract, and the burden of proof is on those who attack their award to establish the contrary by convincing evidence. Every reasonable intendment and presumption is in favor of the award, and it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers. *Karthus v. Ferrer*, 1 Pet. 222, 228, 7 L. Ed. 121; *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 15 U. S. App. 134, 140, 5 C. C. A. 524, 528, 56 Fed. 378, 382; *Blood v. Shine*, 2 Fla. 127, 132; *Insurance Co. v. Goehring*, 99 Pa. St. 16, 17; *Tank v. Rohweder* (Iowa) 67 N. W. 106, 107; *McDonald v. Arnout*, 14 Ill. 58, 62; *Golder v. Mueller*, 22 Ill. App. 527, 528. The award in the case in hand is valid on its face, and the first question for consideration is whether or not the insurance companies have fairly shown by a preponderance of evidence that it was made without authority, or that it was the result of misfeasance or malfeasance on the part of the appraisers. The eight insurance companies and the insured were parties to the agreement of appraisal, and the insurance companies brought this action in equity to avoid the award and to enjoin actions at law which the insured had brought upon it. The legal effect of the various clauses for appraisal in the eight policies, so far as they relate to the main question at issue in these cases, is the same. One of them is:

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss."

Two appraisers were chosen under these clauses, one by the insurance companies and the other by the insured. These appraisers chose an umpire, and, after consideration, an award was made, which was signed by the umpire and one of the appraisers, to the effect

that the sound value of the insured property was \$21,031.33 and the loss and damage was \$19,681. This award was avoided at the suit of the insurance companies on the ground that the umpire failed to confine his decision to a determination of the differences between the appraisers, but extended it, without authority, to the determination of matters on which the appraisers had agreed. Conceding, but not deciding, that the authority of the umpire was limited to a determination of the differences between the two appraisers, this record has been searched in vain for evidence that he has exceeded his authority. No witness has testified that he did so, and the only facts bearing upon this issue which the record discloses are these: The property insured was a four-story brick hotel building known as the "New Peoria House." After the two appraisers were selected, they chose the umpire, and then proceeded to examine the insured property, and estimate its sound value and its damage. They agreed upon the sound value of the property when first constructed, but did not agree upon the depreciation on account of its age. They submitted this question of difference to the umpire. He decided it, and the appraisers thereupon agreed that the sound value of the property was \$21,031.33. They disagreed upon the question whether or not the building was susceptible to repair. They submitted this question of difference to the umpire, and he decided that it was. They then agreed upon the damage to about 25 items, which they specified, and found it to be \$5,604.53, but differed as to the damage to the remainder of the property, which consisted of the brick walls, floors, and interior of the building insured. One appraiser thought this damage was \$2,300 and the other believed it to be \$12,127.60. Thereupon they certified to the umpire the fact of this disagreement, and at the same time gave him a list of the items upon which they had agreed, and the agreed damage upon those items. At this time the appraisers had finished the examination of the property; and the damage to the items upon which they had agreed, together with the damage upon the items concerning which they had disagreed and had made their certificate to the umpire, constituted all the damages to the property. The umpire's answer was that he did not agree with either of the appraisers in their figures, but held that the loss and damage suffered by the insured was \$19,681. Thereupon the award was made and signed by the umpire and one of the appraisers. It will be noticed that the amount agreed upon by the appraisers as the sound value of the property is adopted in the award, and that there were two methods by which the umpire may have arrived at his conclusion that the entire loss and damage was \$19,681. He may have taken the amount agreed upon as the damage to the items specified by the appraisers, \$5,604.53, and have found the damage to the items upon which they disagreed to be \$14,076.47 and have added that to the \$5,604.53, thus obtaining \$19,681. On the other hand, he may have considered and determined for himself the damage to all the items, including those upon which the appraisers agreed, and in this way he may have found the \$19,681. If he adopted the former course, he acted strictly within the limits of his authority, even upon the theory of counsel for the insurance companies.

If he adopted the latter course, he exceeded that authority on their theory. There is no evidence in the record to show by which method he arrived at his conclusion. Where there are two ways by means of which a result may have been attained, one lawful and authorized, the other illegal and without authority, the presumption always is that the legal method was followed. The result is that the legal presumption in support of the award has not been overcome by the testimony produced by the insurance companies, and it must stand.

The argument and authorities of counsel for the companies to the effect that an award that is in part good and in part bad cannot be sustained where it is impossible to separate the lawful from the illegal part of it, have not been overlooked, but they have no application to the case at bar, because the legal presumption is that the umpire proceeded within the limits of his authority, and that all his acts were legal and valid; and this presumption has not been overcome by the evidence, so that there is nothing to show that any part of this award or of the proceedings which led to it was either unauthorized, insufficient, or illegal.

It is contended that the decree should be sustained so far as it relates to the interest of the Traders' Insurance Company, because its policy provided that the award should be made in writing, and under oath, and this award was made without oath. This, however, is no ground for relief in equity. If the award is illegal or void because not made under oath, that is a perfect defense to the action at law upon it, and can be presented by answer in that action. The decree below must be reversed, with costs against the insurance companies in each case, and the cases must be remanded to the court below, with directions to dismiss the bill.

UNITED STATES v. KENNARD et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 122.

POSTMASTER—ACTION ON BOND—PLEADING.

The United States cannot recover, in an action on the bond of a postmaster, for losses suffered by the post-office department by reason of the payment of fraudulent money orders by other offices, which fraud was made possible by the defendant's disregard of a regulation of the department requiring him to safely keep his book of money-order forms, where the cause of action stated in the complaint is for the recovery of moneys received and collected by the defendant, as postmaster, from postage, the sale of stamps, envelopes, money orders, and cards, and not turned over.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon a writ of error by the United States, who were plaintiffs below, to review a judgment of the circuit court, Southern district of New York, in their favor, for \$12, with interest and costs. The judgment was entered upon the verdict of a jury, which was instructed by the court to render a verdict in favor of plaintiffs for \$12, and which, as to the residue of the claim, brought

in a verdict for defendants. The plaintiffs claimed to be entitled to a recovery in the amount of some \$2,320.

Arthur M. King, for the United States.

W. J. Townsend, for defendants in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The action was brought upon a postmaster's bond, in the sum of \$3,000, executed October 13, 1892, by defendant Coleridge Kennard, the postmaster at Chauncy, N. Y., as principal, and by the two other defendants as sureties. The bond is conditioned that said postmaster, Kennard—

"Shall faithfully discharge all the duties and trusts imposed on him, either by law, or the rules and regulations of the post-office department of the United States, and shall also perform all of the duties and obligations imposed upon or required of him by law, or the rules and regulations of the said department, in connection with the money-order business."

A regulation of the department, with which the defendant postmaster was familiar, provides as follows:

"Postmasters Responsible for Loss of Money-Order Forms. Postmasters must keep their stock of blank money-order and advice forms in their own custody, under lock and key, in some place of security, to which unauthorized persons cannot have access; and they will be held responsible for any loss which the department may suffer, arising from fraud made possible through a disregard of this regulation."

In the latter part of June, 1893, a person presented himself to the defendant postmaster, at his office, in Chauncy, and stated that he was a post-office inspector; at the same time exhibiting a card to that effect, countersigned by the postmaster general. The fair inference from the testimony seems to be that he was a man who had once been inspector, and who, upon leaving the government service, had retained his credentials. He told a plausible story about there being some change in the form of money orders prescribed by the department, stating that he had been sent to take up the old book of forms. Believing his visitor to be his superior officer, the postmaster delivered to him the book of money-order forms. Subsequently many of the forms thus fraudulently obtained were filled up, all in the same name, were stamped with a bogus stamp purporting to be the stamp of the Chauncy post office, and were cashed at other offices; causing a loss to the government of the amount of such bogus orders. Such loss undoubtedly was caused by a fraud which was made possible through the delivery of the book of forms to the wrongdoer. There seems to have been much discussion below as to the powers of a post-office inspector, and as to the degree of care exercised by the defendant postmaster. The latter question is the one which was sent to the jury, and exceptions were taken to the charge of the court in that particular. It seems to us unnecessary to review any of these exceptions, for the reason that, in our opinion, the court should have directed a verdict for precisely the same amount that the jury found. Upon the proof as it stood at the close of the case, plaintiffs were entitled to recover \$12, with interest and costs, and no more. The cause of action set forth in the complaint is for moneys received and

not turned over. After reciting the bond, the complaint avers that the defendant Coleridge Kennard, being in fact such postmaster, did not faithfully comply with or perform the duties thereunder, but neglected and refused to discharge the duties and trusts imposed upon him, and neglected and refused to "turn over or pay to the plaintiffs the moneys collected by said Kennard, as postmaster, due the plaintiffs, from postage, and from the sale of postage stamps and stamped envelopes, and for money orders and postal cards, and from other sources connected with the postal service of the said United States, while he was such postmaster." It further avers that on or about June 20, 1894, there was a balance in the hands of said defendant, due to the plaintiffs from said defendant, for money collected as aforesaid by said defendant as postmaster, amounting to \$2,320, which, although demanded, he had neglected and refused to pay over. Manifestly, the breach of the bond here counted on is not a failure to conform to the regulation touching the safe custody of the book of forms, whereby the post-office department suffered loss, arising from a fraud made possible through the defendant's disregard of such regulation. The defendants are called upon by the complaint to answer no such claim. The issues arising upon the denial of the averments of the complaint are merely whether the postmaster collected moneys due to the United States, which he has neglected and refused to turn over. If he did, all three defendants are liable, for such conduct would constitute a breach of the condition of the bond. The evidence showed that for a certain money order, described as No. 26, he received \$12, which he had never turned over; but the record presented to this court wholly fails to show the collection by him of any other moneys due the United States from postage, postage stamps, stamped envelopes, money orders, postal cards, or other sources, which he had not turned over. The testimony shows affirmatively, and without contradiction, that he never collected a penny for the money orders which he delivered to the fraudulent inspector. Upon this state of the pleadings and the proof, plaintiffs were entitled to judgment for no larger amount than that included in the judgment now under review. The judgment of the circuit court is affirmed.

HERRMANN v. CENTRAL CAR TRUST CO. et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 106.

PLEDGE—CONSTRUCTION OF CONTRACT—SETTLEMENT OF DEBT BY PLEDGEE.

Where bonds were transferred by the owner as security for payment by a railroad company of the purchase price of rolling stock, the instrument by which the transfer was made providing that, in case of default, the rolling stock should be first sold, and the proceeds applied on the debt, and the bonds should be held as secondary security to make good any deficiency remaining, the contract shows that the intent of the parties was to constitute a pledge, and not a mortgage, of the bonds, and the pledgee lost all right to sell the same by making a settlement by which it took back the rolling stock, and released the railroad company from further liability.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Howard A. Taylor, for appellants.

F. K. Pendleton, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In the year 1890, the Birmingham, Sheffield & Tennessee Railway Company, hereinafter called the "Railway Company," was in existence in Alabama, having been built by the Sheffield & Birmingham Construction Company, hereinafter called the "Construction Company," which owned substantially all the stock and bonds of the Railway Company. On January 10, 1890, the Railway Company entered into a contract with the Central Car Trust Company, another corporation, for the purchase of a quantity of cars and equipment, by which contract the Car Trust Company agreed to sell this rolling stock to the Railway Company for a sum payable in specified installments, the title to remain in the Car Trust Company until the whole amount should be paid; the contract being in the form of a lease, and the promises in regard to installments being in the form of lease warrants. Upon default in the payment of any installment, the Car Trust Company could take possession of the equipment, sell it, and apply the avails in payment of all the installments due or not due. On the same day the Construction Company entered into a written contract with the Car Trust Company, by which the former delivered to the latter 75 mortgage bonds of the Railway Company, of the par value of \$1,000 each, as a security for the fulfillment of the Railway Company's contract. The terms of the Construction Company's contract which are now important are as follows:

"First. The Construction Company, in consideration of the premises and the sum of one dollar (\$1) to it in hand paid by the Car Trust Company, the receipt of which is hereby acknowledged, has sold, assigned, and transferred, and herewith delivers to the Car Trust Company seventy thousand dollars (\$70,000) of the first mortgage five per cent. bonds of the Birmingham, Sheffield & Tennessee River Railway Company, to be held as collateral security for the payment of the said seventy-two (72) lease warrants in addition to the security provided by the terms of said contract of lease or conditional sale. If there is a default in the payment of any or all of the said lease warrants, the aforesaid rolling stock and equipment will be first sold to make good the said default, and the bonds hereby assigned and transferred shall be held as secondary security to make good any deficiency that may result after the said equipment has been realized upon. Second. The Car Trust Company hereby acknowledges the receipt of said seventy thousand dollars (\$70,000) of the first mortgage bonds to be held under the terms of this contract."

It was further provided that, upon payment of a specified number of warrants or of payment of warrants before maturity, the Car Trust Company would surrender and deliver to the Construction Company a specified amount of bonds. The Railway Company defaulted in the payment of interest upon its mortgage bonds, a suit for foreclosure was brought in the United States circuit court for the Northern division of the Northern district of Alabama by the trustee of the mortgage, and E. A. Hopkins, who was president of the Con-

struction and Railway Companies, was appointed receiver of the latter company. The Car Trust Company subsequently filed a petition in the foreclosure suit, alleging default in the payment of the installments provided by the car trust contract already mentioned, and three other contracts of similar character; whereupon a decree was entered on December 10, 1894, as follows:

"And the Central Car Trust Company, petitioner, offering to take back the cars and railway equipments sold and delivered under the terms of the aforesaid four contracts, in full payment and satisfaction, for the amounts due thereon, as set forth above, excepting and reserving only a claim against the Birmingham, Sheffield & Tennessee River Railway Company, defendant, and E. A. Hopkins, receiver, for a fair rental for the said cars and railway equipment, during the period of six months prior to the appointment of the receiver, and during the receivership, which claim is asserted by the Central Car Trust Company to be a valid prior claim, and entitled to a lien upon the property of the defendant company in the hands of the receiver prior to the mortgage of the Knickerbocker Trust Company, trustee, and the other parties interested herein, represented as aforesaid, accepting and agreeing to said offer, upon the understanding and agreement that all matters regarding the rights of the Central Car Trust Company to a rental of the said cars and equipments during the period named, to wit, six months prior to the receivership, and the status of said claim shall be reserved for future consideration, it is ordered, adjudged, and decreed, that the receiver be, and he hereby is, instructed and directed, upon the execution and filing by the Central Car Trust Company, with the papers of this cause, of a formal release of the amounts due it as rental or purchase money for the cars or railway equipments, covered by the aforesaid four contracts as set forth above, to deliver to the Central Car Trust Company, upon its request, the aforesaid cars and railway equipment."

The Car Trust Company, in pursuance of said decree, on November 26, 1895, executed and filed its release to the railway company "from any and all claims for rental and purchase money covered by the aforesaid four contracts," excepting as in the decree already mentioned excepted, and all the equipment in the hands of the receiver was delivered to the Car Trust Company, and was never sold under the agreements of January 10, 1890. Subsequently, this reserved claim was ascertained and paid in money by order of court out of the proceeds of sale in the foreclosure suit. The Construction Company was not a party to any of these proceedings. In 1895 a reorganization committee was appointed, which took steps to organize a new railroad company. The Manhattan Trust Company was appointed depository of the bonds, with which company the \$70,000 bonds already mentioned were deposited by the Car Trust Company in May, 1895, through E. W. Clark & Co., of Philadelphia, its agents. The decree of foreclosure and sale was entered on July 5, 1895, and amended in September, 1895; the property, not including the rolling stock of the Car Trust Company, was sold to J. Kennedy Tod and James G. Leiper, two of the members of the reorganization committee; the sale was confirmed in October, 1895; and a deed was made to their assignee, the Northern Alabama Railway Company, on November 29, 1895. The Car Trust Company, on November 19, 1895, without notice to the Construction Company, sold at auction at Philadelphia the receipts for the \$70,000 of bonds to E. W. Clark & Co. for \$3,500. E. W. Clark was the president of the Car Trust Company. The Northern Alabama Railway is the assignee of E. W.

Clark & Co. and of the Car Trust Company, and each of them knew all the foregoing facts. Upon the ascertainment of the amount due on the reserved claims, which was a prior lien on the property in the hands of the receivers, this \$3,500 was credited to the Car Trust Company by the Northern Alabama Railway Company. The complainant, Herrmann, as assignee of a claim against the Construction Company, recovered a judgment against it in the supreme court of the state of New York on February 26, 1896, by default, for \$42,566.08. The Construction Company is a New Jersey corporation, and was not doing business in New York, and service of process was made upon its president in New York. The plaintiff brought, on December 3, 1897, a suit upon this judgment, the complainant also alleging the cause of action upon which the first judgment was founded, in the supreme court of the state of New York, in which the defendant also appeared, by authority of its president, and, by consent, judgment was entered, on January 11, 1898, against it for \$47,372.01. Upon these judgments executions were issued, and were severally returned unsatisfied. The present suits are two judgment creditors' bills in equity, originally brought in the supreme court of New York against the Construction Company and other defendants upon these two judgments, to reach the certificates given in lieu of the bonds for \$70,000, and were removed to the circuit court for the Southern district of New York, in which suits the Alabama Railway Company became a party defendant. The two causes were heard together, were ordered to be consolidated, and one decree was entered that the certificates should be applied to the payment and satisfaction of the complainants' judgments. 95 Fed. 55. From this decree divers defendants appealed, but the Northern Alabama Railway Company and Tod and Leiper are the parties defendant really interested in the appeal.

The contention of the appellants is that the contract of 1890 between the Construction Company and the Car Trust Company was a mortgage, by which the legal title to the 70 bonds at once vested in the Car Trust Company, not to revert to the Construction Company except upon payment of the lease warrants as they, respectively, matured; and that, upon default of payment of any warrant, the title of the Car Trust Company became absolute at law, subject only to an intentional waiver on its part, or to a decree in equity providing for redemption by the mortgagor. The complainant asserts the contract was a pledge by which the Car Trust Company had only the right of possession, and not the title; that the lien of the Car Trust Company was released by its subsequent agreement, its acceptance of the equipment, and discharge of the Railway Company from its liability under the contract. If the contract was a mortgage, the legal title became vested in the mortgagee, and being a mortgage of personal property, accompanied with possession, the theory of the appellants is that the mortgagee, after default, has an absolute title to the chattel, and has "a right to keep it and account for its market value, or to sell it at auction, and credit the net proceeds upon his debt." *Craig v. Tappen*, 2 Sandf. Ch. 78.

In view of the facts in the case in regard to the discharge of the

debt against the Railway Company by the Car Trust Company, it may not be absolutely necessary to ascertain whether the contract of January 10, 1890, was a mortgage or a pledge, yet it is important to do so, because it is only upon the theory that the contract was a mortgage that the appellants claim title to the certificates which are a substitute for the bonds. It was not in the form of a mortgage, for it contained no clause of defeasance; but the appellants say that the title was conveyed because the words, "sell, assign, and transfer," were used. That is true, and the words ordinarily contained in contracts of pledge, viz. "to be held as security," and the promise that upon payment at maturity the Car Trust Company will "deliver and surrender," instead of "reconvey," the security were also used. The question of mortgage or pledge cannot be determined by selecting two or three words which indicate a conveyance of title, and disregarding other language which is also important; for the question is to be determined by the intent of the parties, as gathered from the whole instrument. *Thompson v. Dolliver*, 132 Mass. 103. This intent is disclosed with clearness by the entire contract, which provides that the rolling stock must first be resorted to for payment, and that the bonds shall be held as security for any deficiency after the sale of the equipment. An immediate disposition of the bonds upon default is virtually forbidden, and their retention as security for an ultimate deficiency is compelled. The plan upon which the contract was made was the postponement of power in the Car Trust Company to resort to the bonds until it had retaken and sold the equipment. Meanwhile, they were to be a security for the deficiency after the avails of the sale had been applied upon the debt, and whether they would be needed could not be ascertained until after a sale or an agreement of all the parties. While, under this plan, the parties could have made the contract in the form of a mortgage, with a defeasance, yet, in the absence of the customary peculiarities of a mortgage, their obvious intent was to give the Car Trust Company the possession of the bonds by way of pledge, as a security for an ultimate deficiency, which was to be determined, not upon default in payment of the lease warrants, but after a sale of the rolling stock, and with the obligation upon the part of the Car Trust Company, in case of fulfillment by the Railway Company of its contract of purchase, to surrender and deliver the bonds to the Construction Company.

In this condition of the agreements between the three companies, the Car Trust Company voluntarily and of its own motion took possession of the equipment, put an end to the conditional sale or lease, released the Railway Company from any claim except its claim against the receiver for the use of the property, and the bonds which were a security for the ultimate amount due by the Railway Company upon its agreement to purchase were freed from the lien. The Car Trust Company could not enforce a lien for the fulfillment of the Railway Company's contract, for it had discharged the debt under that contract. *Crompton v. Beach*, 62 Conn. 25, 25 Atl. 446, 18 L. R. A. 187. The fact that nothing was said in the decree of December 10, 1894, in regard to the bonds, is not significant of an intent upon the part of the Car Trust Company to retain a lien upon them, because the

Construction Company was not a party to the decree. The auction sale to E. W. Clark and the sale by him to the Alabama Railway Company were made to persons who took the bonds with full knowledge of the weakness of the Car Trust Company's title, and the credit of \$3,500 which the Alabama Railway Company undertook to give to the Car Trust Company was a credit which had no effect upon the rights of the Construction Company. If the original contract was a pledge, the lien cannot be regarded as a continuous one, in view of the voluntary action of the Car Trust Company with respect to its conditional sale of the rolling stock, and, if it was a mortgage, the agreement to take back the equipment, the acceptance of the equipment, and the discharge which was given thereupon, it is by no means clear that the mortgagee's claim upon the bonds was not also extinguished. *Charter v. Stevens*, 3 Denio, 33. We perceive no adequate foundation for the position that the second judgment against the Construction Company is defective. The decree of the circuit court is affirmed, with costs.

TRAVELERS' PROTECTIVE ASS'N v. GILBERT. -

(Circuit Court of Appeals, Eighth Circuit. April 2, 1900.)

No. 1,284.

1. APPEAL—RECORD—NECESSITY OF BILL OF EXCEPTIONS.

Evidence introduced on a trial or affidavits used on the hearing of a motion to vacate a judgment form no part of the record, and cannot be considered by an appellate court unless brought into the record by a bill of exceptions.

2. JUDGMENTS—PRESUMPTIONS OF VALIDITY—JURISDICTION OF PARTIES.

To overcome the presumption of jurisdiction over the parties arising in favor of the judgment of a court of superior jurisdiction, when reinforced by an express finding that service was duly made on the defendant, it is not enough that the record is silent as to facts material to the validity of such service, but it must be shown affirmatively that the service was invalid.

3. LIFE INSURANCE—ACTION ON POLICY—SERVICE UNDER ARKANSAS STATUTE.

An action to recover the full amount of indemnity contracted to be paid by an accident policy on the death of the insured by accidental means is one founded on a contract of life insurance, within the meaning of the statute of Arkansas (Acts 1895, p. 188) providing that in any action on a policy or certificate on the life of a person against any fraternal society service of process may be made on the chief officer, or, in his absence, on the secretary, of any subordinate lodge or society of such fraternal society in the state; and a subsequent statute (Acts 1897, p. 31), authorizing a different mode of service in actions on insurance policies generally, did not operate to repeal the former act, or to render service thereunder invalid in case of a policy issued by a society having local subordinate lodges or societies in the state.

4. APPEAL—REVIEW—RECORD.

In determining the sufficiency of a complaint on an insurance policy to sustain a judgment rendered thereon, the policy itself cannot be considered as a part of the complaint, where it was not filed therewith, but was only used as evidence on the trial, and such evidence was not brought into the record by bill of exceptions.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

The writ of error in this case is brought to review a judgment by default, which Mary J. Gilbert, the plaintiff below, the defendant in error here, recovered against the Travelers' Protective Association, the plaintiff in error. At the term succeeding that at which the judgment by default was rendered the Travelers' Protective Association filed a motion to vacate the judgment on the ground that it had been obtained against it without proper service, and also upon the ground that it had been procured by fraud. This motion was heard and overruled by the trial court, but no bill of exceptions was filed for the purpose of making the motion and the affidavits that were read on the hearing of the same a part of the record. The plaintiff below sued on a membership certificate issued by the defendant company to her deceased husband, claiming that under its provisions she, as the beneficiary therein, was entitled to \$5,000 by reason of her husband's death having been occasioned by accidentally taking an overdose of chloral hydrate. Upon the summons that was issued in said action a return was indorsed by the United States marshal, which return was subsequently amended before the judgment by default was rendered so as to read as follows:

"In obedience to the within writ, I have served the within summons on the defendant by delivering to W. H. Bass, the secretary of the local subordinate lodge of said defendant at the city of Little Rock, in the state of Arkansas, the chief officer of said subordinate lodge being absent, and his whereabouts unknown to the plaintiff or the marshal, a true copy of said summons, at Little Rock, Arkansas, on the 3d day of November, A. D. 1898.

"Henry M. Cooper, U. S. Marshal.

"By J. G. Botsford, Deputy Marshal.

"Returned and filed November 3, 1898. W. P. Feild, Clerk."

When the action was instituted a statute of the state of Arkansas (Acts Ark. 1895, p. 188) was in force, which is as follows: "Whenever any action, either at law or in equity, is instituted on a policy or certificate of insurance on the life of a person against any fraternal society, such as the Knights of Honor, Knights of Pythias, or like societies, in the courts of this state, service of process on the chief officer, or in case of his absence, the secretary of the subordinate lodge or society through which the policy was issued or obtained, or on the chief officer, or in case of his absence on the secretary of any subordinate lodge in this state of such fraternal society, shall be a good and valid service on such lodge, society or institution issuing the policy, the same as if service had been on the supreme officer of said lodge, society or institution." Another statute of the state (Acts Ark. 1897, p. 31) was in force at the same time, which reads as follows: "When any loss shall occur by fire, lightning or tornado, in the burning, damage or destruction of property upon which there is a policy of insurance, or when any death has occurred of a person whose life shall have been insured, or in case of death or injury of any one having a policy of accident insurance, the assured or his assigns in case of fire insurance, may maintain an action against the insurance company taking the risk, in the county where the loss occurs. And the beneficiary, or his assigns, in case of life insurance, may maintain an action against the insurance company that has taken the risk, in the county of the residence of the party whose life was insured, or in the county where the death of such party occurred. And the beneficiary in the case of a policy of accident insurance, may maintain an action against such accident insurance company that has taken the risk, in the county of the residence of the party insured, or in the county where the accident occurred, and service on an agent of any such company or companies, in any county in this state, or service upon the auditor of state, as now prescribed by law, returnable to the court having jurisdiction under this section shall be good service."

The judgment by default which was rendered by the trial court is as follows: "Comes the plaintiff, by P. C. Dooley, Esq., her attorney, and the defendant, having been duly served with process herein, and being now three times solemnly called, comes not, but makes default, whereby said plaintiff's claim against it remains wholly undefended: and the plaintiff having introduced proof as to the death of David B. Gilbert, and exhibited to the court his certificate of membership in said Travelers' Protective Association of America, upon which this action is founded; and the court having heard said

proof, and having examined said certificate of membership, and being now well and sufficiently advised in the premises: It is therefore considered, ordered, and adjudged that said Mary J. Gilbert, wife of David B. Gilbert, deceased, do have and recover of and from said defendant, Travelers' Protective Association of America, the sum of five thousand and seventy-five dollars (\$5,075.00) for her damages, together with all her costs herein expended, and have execution herefor."

W. E. Hemingway (Henry T. Kent, U. M. Rose, and George B. Rose, on the brief), for plaintiff in error.

P. C. Dooley, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Since no bill of exceptions was filed in the trial court embracing either the testimony that was introduced when the judgment was rendered or the affidavits that were read on the hearing of the motion to vacate the judgment, such testimony and affidavits form no part of the record, and cannot, as a matter of course, be noticed by this court. *Hildreth v. Grandin*, 38 C. C. A. 516, 97 Fed. 870, 872. The only questions that are open for consideration in this court are: First, whether the judgment was rendered upon defective service; and, second, whether the complaint is sufficient to support the judgment. With respect to the first of these questions two facts are to be noted, the first being that the judgment below was rendered by a court of superior jurisdiction, from which a presumption arises that jurisdiction over the defendant company was lawfully acquired; and the second being that the trial court expressly found and recited in its judgment that the defendant had been "duly served with process herein," which finding must also be presumed to be correct unless other parts of the record show it to be incorrect. *Black*, Judgm. §§ 270, 271, 273. To overcome the force and effect of these presumptions, it is urged by the defendant company that the law under which the service was obtained, of which this court will take judicial notice, only applies to actions founded on policies or certificates of insurance on the lives of persons which are issued by fraternal societies, such as the Knights of Honor, or other like societies, and that the record in the present instance shows that the suit was brought on a policy of accident insurance; also that the record fails to show that the defendant company is a fraternal society like the Knights of Honor. For both of these reasons the judgment below is said to be erroneous.

Concerning the last of these suggestions it is only necessary to observe that, in so far as the record is silent as to material facts affecting the service, the judgment below derives adequate support from the presumptions heretofore mentioned. If it should be conceded that the record does not clearly show that the defendant is a fraternal society like the Knights of Honor, yet, as it does not appear in any part of the record that it does not belong to that class of societies, it would be necessary to presume in aid of the judgment that the trial court rightly decided that it is a fraternal organization, and subject to be sued as such. It would be inaccurate, however, to say that the record is silent as respects the question whether the defendant com-

pany is a fraternal society, since the complaint alleges that "one of the objects of said association is to create and provide a fund to aid and assist any of its members who may be disabled by accident, or, in case of death, to provide for the family of such deceased member, and to that end, and in consideration of dues paid and to be paid, has caused its beneficial certificates to be issued to its members," while the return of service shows that it transacts its business, like other fraternal societies, through the agency of local or subordinate lodges.

The other suggestion mentioned above, namely, that the suit is not founded on a certificate of insurance on a human life, and on the strength of which it is claimed that the judgment was rendered without proper service, seems to be equally untenable. According to the averments of the complaint, the certificate on which the suit is founded did promise indemnity to the wife of the deceased member in the sum of \$5,000 in the event that his death was occasioned by accident. The life of the deceased member was, therefore, insured, and the contract, in a strict sense, was one of "insurance on the life of a person." The fact that indemnity was promised by the certificate for certain injuries which might be sustained by the member that did not result fatally, should not prevent it from being classified as a policy of insurance on a human life, when it appears that indemnity in the event of death was promised, as well as indemnity for other injuries that were less serious. Moreover, the act of the legislature of the state of Arkansas under which the process was served was passed for the obvious purpose of providing a special and convenient method of obtaining service on numerous fraternal societies, so termed, which in these days are engaged in business, and differ from ordinary insurance companies in that they act in many different localities by means of subordinate lodges, and do not employ regularly constituted agents or solicitors. The aim was, doubtless, to authorize all such societies to be sued in the mode prescribed by the act in all suits which might be brought to compel the payment of such indemnities as they ordinarily engage to pay. The words, "a policy or certificate of insurance on the life of a person," which are found in the act, were intended, as we think, to comprehend all agreements for indemnity which such societies are in the habit of making; and, in view of the manifest purpose of the law, they should not be construed narrowly so as to embrace only a particular kind of insurance contract. But, be this as it may, the suit at bar was brought to enforce a contract of insurance upon the life of a person, and, being a suit of that character, it is fully within the language of the statute. We conclude, therefore, that the presumption of validity which attends the judgment of the trial court, it being a court of superior jurisdiction, is neither overcome nor affected by any facts disclosed by the record of which this court can take notice. For aught that appears, the defendant company was a fraternal society of the same character as the Knights of Honor, which transacts its business through the agency of subordinate lodges, while the instrument sued upon is clearly a contract which insured the life of the plaintiff's husband. Counsel for the defendant company suggest that under an act that was passed in the state of Arkansas in the year 1897, which is quoted

above in the statement, the defendant company might have been served in a different manner than that which was actually adopted. It is possibly true that a valid service might have been obtained in pursuance of the provisions of the last-mentioned statute upon the theory that the policy in suit was one of accident insurance. But it seems wholly unnecessary to discuss that question, since it is clear, we think, that the later act did not operate to repeal the act under which the service was obtained, and was not intended to have that effect. If the service actually made was valid,—and we find no reason to doubt that it was,—it matters not that service might possibly have been made under the provisions of some other act.

The next point to be considered is whether the complaint is so fatally defective that it will not support the judgment. It will be observed that the judgment recites that it was rendered after the production of proof. Hence it affirmatively appears that, even if there was any shortage of averment, the omitted facts may, nevertheless, have been proven to the entire satisfaction of the trial court. With respect to this question it may be said, however, that the complaint, considered by itself, is clearly sufficient to sustain the judgment. No allegations of any sort are wanting in the complaint, which, according to the strictest rules of pleading, can be regarded as essential to make it a good complaint. Counsel for the defendant company insist, however, that this court shall look beyond the complaint, and consider the certificate of membership on which the suit was founded, basing their contention upon the ground that the certificate formed a part of the complaint, and may be read in connection therewith for the purpose of ascertaining whether, in view of some of its provisions, the defendant company did not have a valid defense to the action. This we must decline to do, for the reason that the present record shows that the certificate of membership was not filed with the complaint as a part thereof. It appears to have been produced for the first time on the day of the trial, and to have been read in evidence upon the trial; but, as no bill of exceptions was signed or allowed, the certificate of membership is not a part of the record, and cannot be considered as a part thereof. If a mere exhibit is treated as a constituent part of the declaration for the purpose of raising the question, after a verdict or judgment has been rendered, whether the declaration stated a cause of action, it should, at least, appear that the exhibit was filed with the declaration, and formed an integral part thereof, and that it was not produced merely as an instrument of evidence. The certificate of membership was not so filed in the present instance, but was used, if at all, merely as an instrument of evidence; and, after being so used, it was not brought upon the record by a bill of exceptions. We are constrained to hold that the record fails to disclose any fact which would warrant this court in vacating the judgment by default, which was not assailed in any form until after the lapse of the term at which it had been rendered. The judgment is therefore affirmed.

GENTRY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1900.)

No. 1,261

1. JUDGMENTS—CONFORMITY TO PLEADINGS—DEPARTURE FROM ISSUES.

A complaint by the United States, in conversion, for the recovery of \$5,000, as the value of 500,000 feet of lumber alleged to have been taken by defendants from public lands, will not support a judgment for the possession by the plaintiff of 540,000 feet of lumber and a number of logs, stated in the charge of the court, but not shown by the evidence, to be in the custody of the marshal under a writ of replevin issued in the case, and shown by the evidence to be of the value, in its manufactured state, of over \$40,000.

2. PUBLIC LANDS—CONVERSION OF TIMBER—ACTION FOR DAMAGES.

In an action by the United States for the conversion of timber alleged to have been cut from public lands, in which the defendants seek to justify the cutting under the act of June 3, 1878 (20 Stat. 88), authorizing the cutting and removal of timber from mineral lands for certain purposes, they are entitled, upon proper evidence, to have submitted to the jury the question whether the cutting was done in good faith, in the honest belief that they were exercising a lawful right; and in case such issue is found in their favor their liability, if found liable, is limited to the value of the timber in its original place.

In Error to the District Court of the United States for the District of Colorado.

Clyde C. Dawson (Charles D. Hayt and Earl M. Cranston, on the brief), for plaintiff in error.

Greeley W. Whitford and T. E. McClelland, for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. One may not bring a suit for one cause of action, and recover judgment for another. A court can consider only what is in issue under the pleadings. Averments without proofs, and proofs without averments, are unavailing. The judgment may not go beyond a determination of the issues presented by the pleadings, nor beyond the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest upon the basic principles of our jurisprudence, that no man shall be deprived of his life, liberty, or property without due process of law; and due process of law must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which gives notice of the issue to be determined, which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Burton v. Platter*, 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. 901, 905; *Taussig's Ex'rs v. Glenn*, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; *Merrill v. Rokes*, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452; *Live-Stock Co. v. Blackburn*, 30 U. S. App. 571, 579, 17 C. C. A. 532, 536, 70 Fed. 949, 954; *Wood v. Collins*, 23 U. S. App. 224, 230, 8 C. C. A. 522, 525, 60 Fed. 139, 142.

The judgment in this case violates all these rules. The suit was an action of conversion brought by the United States against the

plaintiff in error, James C. Gentry, and another, henceforth called the "defendants." The complaint consisted of three counts. In the first the plaintiff, the United States, alleged that the defendants had cut down and carried away from the land of the United States yellow pine and spruce trees sufficient to make 500,000 feet of lumber, which was worth \$5,000; that this lumber was the property of the United States; and that the defendants had converted it to their own use, to the damage of the plaintiff in the sum of \$5,000. In the second the plaintiff alleged that in September, 1898, it was the owner and in possession of 500,000 feet of wood, board measure, of the value of \$5,000, and that the defendants took the same from the plaintiff's possession and converted it to their own use, to the damage of the plaintiff in the sum of \$5,000. In the third count it alleged that in June, 1898, it was the owner of 500,000 feet of wood, of the value of \$5,000, and entitled to the immediate possession of the same, but that defendants were in possession thereof, and thereupon converted the same to their own use, to the damage of the plaintiff in the sum of \$5,000. The prayer of the complaint was for judgment against the defendants for \$5,000, with legal interest thereon from the 22d day of September, 1898, and for the costs of the action. The defendants denied the allegations of the complaint, and the defendant Gentry further answered that the three causes of action set forth in the plaintiff's complaint all related to one supposed cutting and conversion of timber; admitted that he had cut certain timber and trees, sufficient to make about 500,000 feet, board measure, of lumber; and justified his cutting under the act of June 3, 1878 (20 Stat. 88), which provides that citizens of the United States who are bona fide residents of the states of Colorado and Nevada, and of certain territories and mineral districts of the United States "are hereby authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes." He further alleged in his answer that the possession of the unsold lumber made by him from the timber which he had cut had been taken from him under a supposed writ of replevin issued in this case, and prayed that he might go hence without day, and might have judgment for the possession of the lumber taken by the officers of the court. The United States filed a replication in which it denied all the averments of this answer, including the allegation that a writ of replevin had been issued in this case, and that the property had been taken from the defendant thereunder; and it again prayed for judgment for \$5,000, interest, and costs, on account of the conversion. There is a bill of exceptions in the record, which purports to contain all the testimony. There is no evidence in this bill that any writ of replevin was ever issued, or that any property was ever taken thereunder. There is in

the record preceding the bill of exceptions the copy of an affidavit in replevin, of a writ in replevin, and of a return thereon; but these copies are not material to the determination of this case, nor can they be considered a part of the evidence herein, because they were not introduced in evidence, and do not constitute a part of the bill of exceptions, because there is no evidence that any of the property referred to in the pleadings was taken under this writ, and the writ itself was issued without authority and in violation of the statutes and practice of Colorado. No writ of replevin may be issued under the Code of Colorado until an action in claim and delivery is commenced by the filing of a complaint which alleges the right of the plaintiff to the possession of personal property, and claims the delivery thereof (Mills' Ann. Code, §§ 79, 80), and no such action was commenced or complaint filed.

In the course of the trial the defendants introduced evidence which tended to show that the lands from which they cut the timber had been located as mineral claims under the acts of congress; that these claims were in existence, and had not been abandoned; that the lands were mineral in character; and that the defendant Gentry had cut the timber from them under contracts or permits from the locators of the mineral claims for the purposes specified in the act of June 3, 1878, although he failed to show that he had strictly complied with all the rules and regulations which the secretary of the interior had prescribed for the protection of the timber and of the undergrowth under that act. If he was guilty of trespass in taking the timber, there was ample evidence in the case to raise the question whether he had taken it unintentionally and in the honest belief that he was lawfully exercising a right which he had, or with the willful intention to take property to which he knew he had no right. There was evidence in the case that the value of the standing timber was \$1 per 1,000, while that of the lumber after the defendant had manufactured it into boards was \$8 per 1,000.

At the close of the trial the opening address of counsel for the United States to the jury was in these words:

"Gentlemen of the jury: These defendants are charged in the complaint in this case with having cut down 500,000 feet of timber from the lands belonging to the government. The value of the lumber made from this timber is alleged to be \$5,000, and we ask you to return a verdict for this sum. This is all the plaintiff cares to say in the opening."

At the close of the arguments, counsel for the defendants requested the court to instruct the jury that, if they believed that the defendants were liable in the action, yet if they further believed from the evidence that the trespass committed by them was unintentional on their part, then the measure of damages would be the value of the lumber, less the value of the labor and expenditure the defendants had added thereto. But the court refused to give this instruction, and instructed the jury that after the complaint was filed in this case the government took out a writ of replevin for certain lumber alleged to have been made from the timber mentioned in the complaint, and took possession of 539,905 feet of lumber and 300 logs, according to the return of the marshal; that the government was

entitled to recover this timber which was in the possession of the marshal, and the value of such timber as the defendants sold. Pursuant to this instruction, the jury returned a verdict that the lumber in the possession of the United States marshal was the property of the United States, and that they found the issues joined in this case for the plaintiff, and fixed its damages at \$21.50. The judgment was that the United States recover of the defendant Gentry \$21.50 and costs; that the United States recover from said Gentry the lumber cut from the public land, and taken by the marshal in replevin, as shown by the return of the marshal on said writ of replevin; and that the net proceeds of said lumber should be paid into the treasury of the United States. A more flagrant violation of the rule that a judgment must be according to the allegations and the proofs would be difficult to imagine. The action was for the conversion of 500,000 feet of lumber, and the recovery sought was \$5,000 damages for the conversion. If, as the plaintiff alleged, the lumber had been converted by the defendants to their own use, and the plaintiff was entitled to damages for that conversion, its right and title to the lumber were gone, and it had no right to its possession. The verdict and judgment are utterly inconsistent with the averments and prayer of the complaint. The complaint was for the recovery of \$5,000 damages for the conversion of 500,000 feet of lumber. The verdict and judgment are for the recovery of the defendant Gentry of 539,905 feet of lumber and 300 logs,—an amount of lumber far in excess of that in controversy under the pleadings. Neither the pleadings, nor the course of the evidence at the trial, nor the opening address of the counsel for the government to the jury, gave any notice to the defendants that this action had been brought by the government to recover the possession of this 539,905 feet of lumber and these 300 logs. The issue they were called into court to try was whether or not they were liable to pay \$5,000 damages for the conversion of 500,000 feet of lumber. Upon that issue they presented their evidence. Under that evidence they were entitled to an instruction to the jury that if they believed that the defendants had cut and taken this timber unintentionally, and in the honest belief that they were lawfully exercising a right which they had, they were liable in damages for the value of the timber in its original place, or in this case for \$1 per 1,000 feet, and for no more. *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Benson M. & S. Co. v. Alta M. & S. Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; *Durant Min. Co. v. Percy Consol. Min. Co.*, 35 C. C. A. 252, 254, 93 Fed. 166, 168, and cases there cited. Under the charge of the court they were deprived of this instruction, and the right of Gentry to the 539,905 feet of boards and the 300 logs seized under the unauthorized writ of replevin was foreclosed, without any pleading or issue concerning them, and without any opportunity on his part to obtain any allowance for the labor he had bestowed and the expense he had incurred in preparing this lumber for market, if, as he claims, he cut and removed it in the honest belief that he had the right to do so. The proceeding which resulted in this judgment was not pursued in the ordinary manner prescribed by the law. The judgment was not

in accordance with the averments of the complaint or with the proofs in the record, and it does not conform to the scope and object of the prayer in the plaintiff's pleading. The facts indispensable to the maintenance of the judgment are fatal to the claim presented by the complaint, and they were not in issue in this case. The judgment must be reversed, and the case remanded to the court below, with directions to grant a new trial.

COLUMBUS CONST. CO. v. CRANE CO.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1900.)

No. 548.

APPEAL—EXCEPTIONS TO CHARGE—CONSTRUCTION OF RULE.

Rule 10 of the circuit court of appeals, Seventh circuit (31 C. C. A. cxlv., 90 Fed. cxlv.), requiring a party excepting to a charge to "state distinctly the several matters of law in the charge to which he excepts," is intended to require that each particular proposition of law excepted to shall be stated, together with so much of the charge as is supposed to embody the proposition deemed erroneous, and such construction is in harmony with that given the similar rule of the supreme court. The rule does not require the different grounds of objection to be enumerated in the exceptions.

On Petition for Rehearing. Denied.

For former opinion, see 98 Fed. 946.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge. The petition for rehearing is devoted mainly to an effort to demonstrate that by our opinions in this case, and in *Stewart v. Morris*, 37 C. C. A. 562, 96 Fed. 703, we have placed on our rules concerning the saving of exceptions to instructions and the assignment of error thereon a construction which is unwarranted by the terms of the rules, and is inconsistent with the construction placed by the supreme court on similar rules. For the purposes of this case the discussion is not important, since in no instance was an exception to the giving or refusing of an instruction disposed of on the ground that it was not properly saved or the error inadequately assigned. With a single exception the questions presented by the briefs were considered on their merits. It is, however, of great importance to know whether we may abide by a construction of our rules that will prevent the presentation of questions upon a jury charge for review which were not brought to the attention of the trial court, or must yield to the contention that it is and ought to be enough for counsel to "state the parts of the charge to which he excepts." The rule is not so worded. On the contrary, the language is that the party excepting shall "state distinctly the several matters of law in the charge to which he excepts." It is another rule, No. 11 (31 C. C. A. cxlvi., 90 Fed. cxlvi.), which requires that "when the error alleged is to the charge of the court each specification of error shall set out the part referred to [not 'excepted

to'] totidem verbis." This record affords examples of exceptions to parts of the charge which embraced a number of propositions both of law and fact. Evidently this may often be true of a single sentence, but it is only to matters of law that exceptions can be taken, and, the rule requiring a distinct statement of the several matters of law to which exception is taken, a single exception to a part of the charge which embraces more than one proposition or matter manifestly does not meet the requirement. The evident meaning of the rule is that the particular proposition or matter of law excepted to shall be distinctly stated, and, when not shown by the bill of exceptions to be stated in the words of the charge, the part of the charge supposed to embrace it must be shown by the bill and be set out totidem verbis in the assignment of error. The following form is suggested: "The plaintiff excepts to the ruling that (state a single proposition or matter of law), as shown by the following portion of the charge (setting it out)." It is an erroneous assumption that our construction of this rule requires the excepting party to state the grounds of exception. It only requires him to state distinctly the proposition or matter of law excepted to. It is quite another thing to state the grounds of objection, which may be few or many, according to the nature of the question and the facts of the case. Doubtless, in many, if not most, cases, once the proposition excepted to is definitely stated, the ground of objection may be so apparent as not to need statement, but the essential difference between a statement of what is excepted to and a statement of the reasons supposed to justify the exception must be manifest; and there is no just ground for the suggestion that "in the courts of trial exceptions will be elaborated with great prolixity and verbosity, under the painful apprehension lest something under this practice deemed essential may be otherwise omitted." The grounds of objection to an instruction given are required by rule 11, as recently amended, to be stated in the assignment of errors, and there can be no hardship in that. The further suggestion, that "the tendency is and always must be in developing the formal or technical requirements of the law to sacrifice the substance," is sufficiently guarded against by the fourth subdivision of rule 24 (31 C. C. A. clxiv., 90 Fed. clxiv.), as amended, that "the court at its option may notice a plain error involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested, and not waived, in the court below."

The cases in the supreme court to which reference has been made are: *Carver v. Jackson*, 4 Pet. 1, 81, 7 L. Ed. 761; *Ex parte Crane*, 5 Pet. 190, 198, 8 L. Ed. 92; *Conard v. Insurance Co.*, 6 Pet. 262, 280, 8 L. Ed. 392; *Magniac v. Thompson*, 7 Pet. 348, 390, 8 L. Ed. 709; *Stimson v. Railroad Co.*, 3 How. 553, 556, 11 L. Ed. 722; *Zeller's Lessee v. Eckert*, 4 How. 288, 297, 11 L. Ed. 979; *United States v. Morgan*, 11 How. 154, 158, 13 L. Ed. 643; *Johnson v. Jones*, 1 Black, 209, 219, 17 L. Ed. 117; *Pomeroy's Lessee v. Bank*, 1 Wall. 592, 602, 17 L. Ed. 638; *Thompson v. Riggs*, 5 Wall. 663, 675, 18 L. Ed. 704; *Railroad Co. v. Varnell*, 98 U. S. 479, 485, 25 L. Ed. 233; *U. S. v.*

Carey, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67; Railroad Co. v. Hart, 114 U. S. 654, 663, 5 Sup. Ct. 1127, 29 L. Ed. 226; Hanna v. Maas, 122 U. S. 24, 7 Sup. Ct. 1055, 30 L. Ed. 1117; Reagan v. Aiken, 138 U. S. 109, 113, 11 Sup. Ct. 283, 34 L. Ed. 892.

Rule 4 of the supreme court, first promulgated at the January term, 1831, as rule 38, and given its present form on January 7, 1884, is substantially the same as the first subdivision of rule 10 of this court (31 C. C. A. cxlv., 90 Fed. cxlv.), each containing the two provisions that a bill of exceptions shall not be allowed which shall contain the charge of the court at large upon a general exception to the whole charge, and that the party excepting "shall be required to state distinctly the several matters of law in such charge to which he excepts." The second of these provisions is not merely the converse of the first, as the petition before us seems to assume, and the expressions of the supreme court in the cases referred to in condemnation of the practice of bringing up the entire charge upon a general exception are not to be regarded as indicating the scope or construction of the latter provision. They point plainly, however, to the construction declared by this court. In *Carver v. Jackson*, after refusing to consider exceptions to comments in the charge on the evidence, the court said that "if, indeed, in summing up, the court should mistake the law, that would justly furnish a ground for an exception; but the exception should be strictly confined to that misstatement, and, by being made known at the moment, would often enable the court to correct an erroneous expression, or to explain or qualify it in such a manner as to make it wholly unexceptionable, or perfectly distinct." In *Ex parte Crane* this is reaffirmed, and the common-law rule recognized, as stated by Blackstone (2 Bl. Comm. 372), that "if, either in his directions or decisions, he [the judge] misstates the law, by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a bill of exceptions, stating the point wherein he is supposed to err." "It is also stated in the books," the court proceeded to say, "that a bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge on some matter of law, arising upon a fact not denied, in which either party is overruled by the court. * * * If an exception may be taken in such form as to bring the whole charge of the judge before the court, * * * the exception will not be on a single point; it will not bring up some matter of law arising upon a fact not denied." It is to be observed that these decisions preceded only by a short time and presumably led to the adoption of rule 38, and the intention that as at common law an exception should "be on a single point" was well expressed in the requirement that the excepting party should "state distinctly the several matters of law in such charge to which he excepts." In *Magniac v. Thompson*, it was said to be "wholly inadmissible to take single and detached passages, and to decide upon them, without attending to the context"; and conversely it is equally inadmissible, under an exception to a portion of a charge, which contains two or more passages, to treat a single passage as the subject of the exception. In this respect the two rules of this court are

complementary,—one requiring the exception to be to a distinct matter or proposition, and the other requiring the bill of exceptions to show the context by setting out the part of the charge which is supposed to contain the matter excepted to. In *Zeller's Lessee v. Eckert* it was said that a bill of exceptions "is the creature of statute and restricted to the points stated." In *Johnson v. Jones* is this significant expression: "The first part of the charge, as thus set out, contains a distinct legal proposition. To this the plaintiff distinctly excepted. This was proper." In *Pomeroy's Lessee v. Bank* it was said that "where the objection is to the ruling of the court it is indispensable that the ruling should be stated." Exception to a part of a charge containing more than one proposition does not meet the requirement. It does not state the ruling. In *Railroad Co. v. Varnell* it was said that "the part of the charge to which the exception is addressed ought to be distinctly pointed out"; but manifestly that is not done by an exception to a part of the charge which contains other matter than that which is supposed to be erroneous. In *Hanna v. Maas* it was ruled that the excepting party must have a bill of exceptions "stating distinctly and specifically the rulings or instructions of which he complains," and of the bill in the record it was said that "instead of stating distinctly, as required by law and by the fourth rule of this court, those matters of law in the charge excepted to, and those only, does not contain any part of the charge, * * * undertakes to supply the want by referring to the exhibits," etc. The other citations have little bearing upon the question, but there are later cases which seem to be quite in point. In *Ward v. Cochran*, 150 U. S. 597, 604, 14 Sup. Ct. 230, 37 L. Ed. 1195, after reference to the case of *Hanna v. Maas*, supra, the court said: "The present record presents a very different condition of facts, as the bill of exceptions, in so far as it relates to the charge, specifies with distinctness the parts of the charge excepted to and the legal propositions to which exceptions were taken." A statement of the parts of the charge and of the legal propositions excepted to is just what the rules, as we have construed them, require. In *Thiede v. Utah Territory*, 159 U. S. 510, 521, 16 Sup. Ct. 62, 40 L. Ed. 237, it was said that "one object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so." In *Valley Co. v. Pace*, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887, it was declared to be "the duty of counsel excepting to propositions submitted to a jury to except to them distinctly and severally." "Propositions," it is to be observed, is the word which was used, and not "parts" or "paragraphs of the charge"; and accordingly, in *Holloway v. Dunham*, 170 U. S. 615, 620, 18 Sup. Ct. 784, 42 L. Ed. 1165, the latest case touching the subject, the rule is declared that, when the paragraphs of a charge contain two or more propositions of law, "a general exception taken to any of such paragraphs would be insufficient if one of the several propositions were correct." See, also, *Railway Co. v. Callaghan*, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628.

It is urged that one of the special requests for instruction was not considered. Special reference to it was not thought necessary because it was deemed to be essentially the same as another request which was considered. It is in itself objectionable, because if given it might have been understood by the jury to mean that the contract called for pipe capable of making a line absolutely tight at the pressure of 1,000 pounds, and because of the concluding statement that if not of that capacity "the plaintiff was neither bound to receive it under the contract, nor to pay the contract price for it." The plaintiff had received and used the pipe, and there was therefore no question in the case of what the plaintiff was bound to receive. Having kept and used the pipe, the obligation, as explained in the opinion, was to pay for it whatever it was worth, even up to the contract price, if it was worth that price notwithstanding its incapacity to bear the stipulated pressure.

The petition is denied.

WESTLAND v. GOLD COIN MINES CO.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1900.)

No. 1,246.

1. MASTER AND SERVANT—INJURY OF SERVANT—SAFE PLACE TO WORK.

A mining company, which erects a stull or platform across a narrow and dark fissure in its mine, 70 feet from the bottom, on which its employes are required to work, is bound to the exercise of reasonable care to see that the timbers are of adequate strength and number, and securely fastened, to render it a safe place on which to work.

2. SAME—ACTION FOR DEATH OF EMPLOYE—QUESTIONS FOR JURY.

Plaintiff's husband was killed, with other workmen, by the breaking and falling of a stull in defendant's mine, on which he was working in stopping ore 70 feet from the bottom. The stull was erected by defendant by placing lagging on timbers running across a fissure in which it was built, and supported in its sides, and was intended to be of sufficient strength to sustain the weight of 20 feet of earth and rock upon its top, although there was but 9 feet in depth upon it when it broke and fell. *Held*, that the fact of its falling under such circumstances was in itself evidence from which a jury might infer that it had not been properly constructed, and that, when taken in connection with the fact that a number of the cross timbers were broken in the middle, and with the testimony of two competent witnesses, who stated their opinions that the timbers were insufficient in strength or number to carry the load placed upon them, it could not be held, as matter of law, that defendant was not negligent, but the question was one for the jury.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

Edmund F. Richardson (Thomas M. Patterson and Horace N. Hawkins, on the brief), for plaintiff in error.

James L. Blair (James A. Seddon and Robert A. Holland, Jr., on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The question of principal importance which this record presents, and it is the only one which we deem it necessary to consider, is whether the trial court was justified in withdrawing the case from the jury at the conclusion of all the testimony. The action was brought by Ellen A. Westland, the plaintiff in error, to recover damages from the Gold Coin Mines Company, the defendant in error, on account of the death of her husband, Andrew Westland, who was killed on January 12, 1898, while stoping ore for the defendant company in one of its mines in Gilpin county, Colo. The deceased was working at the time of his death about 900 feet beneath the surface of the earth, on a stull that had been erected by the defendant in one of the levels of its mine for the purpose of enabling its employes to stand thereon while breaking down the mineral-bearing rock. The stull that had been so erected fell while the deceased was working thereon, and precipitated him, together with a mass of rock and earth resting thereon, to the floor of the level, a distance of about 70 feet, causing his instant death. Concerning these facts there was no controversy. The complaint charged negligence on the part of the defendant company in that the stull timbers were of insufficient size and strength to sustain the mass of rock and earth which was liable to fall upon it when the miners were engaged in stoping ore; that the stull timbers were also insufficient in number, having been placed too far apart; and that the ends thereof were not properly let into the side walls.

The evidence adduced during the trial tended to the establishment of the following facts: The stull which fell was constructed by the defendant, about six weeks or two months prior to the accident, of ordinary spruce or white pine timber which was grown in the vicinity of the mine. The vein in which the stull was set up varied in width from 2 to 12 feet, and was 10 or 12 feet wide at the place where the accident occurred, and was nearly vertical; having very little dip as it descended into the earth. The stull timbers, at their respective ends, rested in headings in the hanging wall and in hitches in the foot wall, and corresponded very nearly in width with the width of the vein where they happened to be set. The stull timbers where the accident occurred were 10½ feet long according to the estimates of some witnesses, and 12 feet long according to other testimony, and were set from 5 to 6 feet apart, and were from 9 to 12 inches in diameter at the smaller ends. The timbers in question were covered with lagging that was laid lengthwise of the vein, so as to form a flooring to support the ore as it was broken down by blasting. The deceased took no part in erecting the stull which fell, and had little opportunity, prior to the accident, to observe the size of the stull timbers or the manner in which they were placed, as there was no light in the mine other than that made by the candles which the miners carried, and as the floor of the stull was usually covered with a mass of earth or rock, and was about 70 feet above the bottom of the level, so that it could not be inspected from below. On the day of the accident the deceased and his fellow workmen fired a shot about 10 o'clock a. m. which had the effect of loading the stull, taking into account the rock previously broken down, to a depth of about 9 feet. Shortly after

they had returned to the stull to resume work, at 11:45 a. m., the stull fell, while they were standing on it and working in the usual way, carrying with it the deceased and his fellow workmen. The stull was constructed for the purpose of supporting a mass of earth and rock from 18 to 20 feet thick. After the accident three or more of the stull timbers were found, at the bottom of the level, which were broken about in the center. One witness for the plaintiff, who was a practical miner, testified without objection that the lagging gave way on the occasion of the accident because "the stull timber broke." Two other witnesses (one of them being an assistant mining inspector for the bureau of mines of the state of Colorado, and the other a practical miner) expressed the opinion, in substance, that the stull timbers employed in constructing the stull, in view of their length and the space between them, were insufficient to support the weight which the stull was designed to carry. There was some conflict in the testimony with reference to the length and diameter of the timbers that had been used in constructing the stull, and their distance apart. The defendant company offered some testimony which tended to show that the stull in question was constructed in the usual manner, and with timbers of the same kind, size, and strength that were usually employed by mine owners in constructing stulls for stoping purposes in such vias as the one where the accident occurred. The defendant also offered some testimony which tended to show that, a day or two preceding the accident, the deceased and his fellow workmen had been cautioned by the foreman of the mine against firing such heavy blasts as they had once fired.

It is obvious, we think, that the defendant company is responsible in damages for the death of the plaintiff's husband, if his death was occasioned by any defect or insufficiency in the stull which might have been avoided by the exercise of ordinary care when the stull was constructed. The defendant caused the structure in question to be erected for the use of its employes in a narrow and dark fissure 900 feet beneath the surface of the earth, expecting that it would be weighted at times with tons of earth and rock, and with knowledge that its fall meant instant death to all who happened to be standing on or underneath the structure. It had provided a place for its employes to work, and it was its duty to make that place safe and secure, in so far as that object could be accomplished by the exercise of reasonable care in providing stull timbers of adequate size and strength, and by placing them sufficiently close together, and by making the proper hitches and headings in the foot and hanging walls, so that the structure would support the weight that it was expected to carry. Moreover, the deceased and his fellow workmen had the right to assume, unless they were advised to the contrary, that these duties of the master had been discharged, that the stull was of sufficient strength to support at least 20 feet of earth and rock, and that the defendant, in constructing it, had exercised a degree of care commensurate with the location of the stull, the character of the work to be done thereon, the weight it would be required to carry, and the dire results that would inevitably follow if it should chance to fall. A rule of law devolving such duties on the master in cases like the one in

hand is so reasonable, just, and humane that we deem it unnecessary to do more than refer to a few of our own decisions in which it has been stated and enforced. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 3 C. C. A. 433, 53 Fed. 65; *Mining Co. v. Ingraham*, 36 U. S. App. 1, 17 C. C. A. 71, 70 Fed. 219; *Railway Co. v. Jackson*, 27 U. S. App. 519, 522, 12 C. C. A. 507, 65 Fed. 48; *Manufacturing Co. v. Johnson*, 60 U. S. App. 661, 669, 670, 32 C. C. A. 309, 89 Fed. 677, 681.

This leads to the inquiry whether the evidence adduced at the trial was of such a nature as would warrant a jury in drawing the inference that the stull was of insufficient strength, or that it had been improperly constructed, by reason of the failure of the defendant company to exercise a reasonable degree of care and diligence while erecting it; and this question, we think, should be answered in the affirmative. The fact that the stull fell demonstrates that it was insufficient to support the load with which it was burdened at the time it fell. The case in hand, then, is not of that kind of which it may be said that the occurrence of the accident affords no evidence of negligence. If the stull had been constructed as it should have been, it would easily have borne the weight that was upon it at the time it fell. Hence the fall of the structure suggests forcibly that the stull timbers were insufficient either in strength or number, or that the supports let into the side walls of the vein were insufficient, and that proper care had not been exercised by those who erected it. *Barnowski v. Helson*, 89 Mich. 523, 50 N. W. 989; *Mulcairn's Adm'x v. City of Janesville*, 67 Wis. 25, 29 N. W. 565; *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167. A reasonable person might very well have reached the conclusions last stated by force of the maxim, "*Res ipsa loquitur*."

Such a conclusion is re-enforced by the evidence, which showed without contradiction that the several broken stull timbers that were found at the bottom of the mine after the accident were broken about in the center, where one would naturally expect them to be broken if the fall of the structure was occasioned because the stull timbers were deficient in strength or number to support the partial load which was upon it when it fell. It must also be borne in mind that two witnesses for the plaintiff, who were fully competent to form a reliable judgment on that subject, expressed the opinion, in substance, that the stull timbers were insufficient to carry the load that the stull was expected and designed to carry. In opposition to the view that it was of insufficient strength, and that some one blundered who was concerned in its erection, we have merely an hypothesis that the deceased and his fellow workmen had fired a blast which was too heavy, and by that means had jarred the stull timbers out of place, so that they did not have a proper bearing on the side walls. This hypothesis may be entitled to some weight, although it appears that the structure did not fall when the last blast was fired, nor for more than an hour thereafter. But what weight should be accorded to the latter hypothesis was clearly a question for the jury, whose province it was to settle all controverted issues of fact, and to draw such inferences from the facts found as they deemed reasonable. In view of the fall of the stull under the

circumstances heretofore detailed, it was also the province of the jury to determine what weight they would give to the testimony of those witnesses who testified, in behalf of the defendant company, that the stull was constructed in the usual manner and with timbers of the usual size and strength. Surely a court would not be authorized, in the light of what happened and all the circumstances of the case, to accept the evidence on that subject as conclusive, and as leaving nothing for the jury to determine. In view of all the evidence which the record contains, we are constrained to hold that the jury might well have concluded that the stull in question was inadequate to support the weight which it was designed to carry, and that its insecurity was due to a want of ordinary care on the part of the defendant company. It is accordingly ordered that the judgment below be reversed, and that the cause be remanded for a new trial.

SANBORN, Circuit Judge (dissenting). The court below was of the opinion that this case disclosed no substantial evidence that the defendant in error was guilty of negligence in the construction of the stull, and a careful reading of the record has led my mind to the same conclusion. Ordinarily the discussion of the sufficiency of the evidence in a case to warrant the submission of an issue of fact to a jury is profitless. But there seems to me to be such a misapplication of a familiar rule of law by the majority of the court in the decision of this case that I am constrained to protest against it. The decision really rests upon the proposition that the fact that the stull fell is in itself sufficient evidence that the fall was caused by negligence of the company in its construction, and that it was not caused by the negligence of the employes in its use, to warrant a verdict against an employer upon that issue. It is said in the opinion of the majority:

"The fact that the stull fell demonstrates that it was insufficient to support the load with which it was burdened at the time it fell. The case in hand, then, is not of that kind wherein it may be said that the occurrence of the accident affords no evidence of negligence. If the stull had been constructed as it should have been, it would easily have borne the weight that was upon it at the time it fell. Hence the fall of the structure suggests forcibly that the stull timbers were insufficient in strength or number, or that the supports let into the side walls of the vein were insufficient, and that proper care had not been exercised by those who erected it. *Barnowski v. Helson*, 89 Mich. 523, 50 N. W. 989; *Mulcairn's Adm'x v. City of Janesville*, 67 Wis. 25, 29 N. W. 565; *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167. A reasonable person might very well have reached the conclusions last stated by force of the maxim, '*Res ipsa loquitur*.'"

The portion of the opinion quoted is determinative of the decision, and it seems to me to make a misapplication of the maxim, "*Res ipsa loquitur*," and to determine the question whether the fall of the stull was caused by a fault in its construction, or by negligence of the workmen in its use, by a presumption which does not really exist. The complaint in the case charged that the fall of the stull was the result of the negligence of the defendant in its construction. The answer denied this charge, and averred that it was caused by the negligence of the plaintiff and his fellow servants in its use. The real issue was whether the fall of the stull was the effect of the use of in-

sufficient stull timbers in its construction, or the effect of the use by the plaintiff and his fellow servants, who were at work upon it, of unnecessarily and unreasonably heavy blasts of powder. Upon the trial the evidence was uncontradicted that the rock and earth upon the stull were only 9 feet deep when it fell; that the stull timbers were not more than 12 feet long; that timbers of the same size, 16 feet long and placed the same distance apart, were supporting rock and earth 20 feet deep in this mine without breaking or difficulty; that the timbers which supported this stull were of the size generally in use to support 20 feet of earth in similar places, and that they were put the usual distance apart and secured in the usual way; that the plaintiff and his fellow workmen on this stull had, on one occasion before, used an excessive amount of powder, and made so heavy a blast that it knocked one end of one of these stull timbers out of its place; that the use of heavy blasts was calculated to break the timbers; that the plaintiff had been cautioned not to use them; and that the weight of 9 feet of rock and earth, which was upon the stull when it fell, could not have broken the stull timbers. None of this evidence was contradicted. The evidence detailed in the opinion of the majority in support of the theory that the accident was caused by the negligence of the defendant was that some of the stull timbers were found broken in the middle, that one witness testified that the lagging gave way because "the stull timber broke," and that two witnesses testified that in their opinion the stull timbers were insufficient to sustain the weight of the 20 feet of rock and earth which they were intended to support. No witness testified, however, that the weight of only 9 feet of rock and earth, the amount on the stull when it fell, could have caused these timbers to break, and the testimony of the defendant's witness to the contrary stands uncontradicted. The breakage of the timbers in the middle has no more tendency to show that the break was caused by a defect in the timbers than it has to show that it was caused by an excessive blast. That the lagging gave way because "the stull timber broke" was a self-evident fact, since the lagging rested on the stull timbers. But it has no tendency to prove that the break was not caused by an excessive blast, or that it resulted from the insufficiency of the timber to support the 9 feet of rock and earth. Thus it appears that the issue was squarely presented whether the accident was caused by the insufficiency of the timbers to sustain the 9 feet of rock and earth upon them, or by the excessive blasts made by the employes who were at work upon the platform which they made; that there was substantial evidence from which the jury might have inferred that the fall was caused by the excessive blasts, and no substantial evidence that it resulted from the insufficiency of the timbers to sustain the weight of the 9 feet of rock and earth upon them; and that there was no evidence whatever that the defendant knew, or in the exercise of ordinary care could have known, that these timbers were insufficient, or could have anticipated the fatal accident.

The case turns, therefore, upon the proposition of the majority that where a platform, building, structure, or machine furnished by the employer for the employé to work upon, which is in use by his em-

ployé, gives way or falls, and the issue is presented whether the fall was the effect of negligence in its construction or negligence in its use, the mere fact that it fell or gave way constitutes sufficient evidence to warrant a jury in finding that the accident was caused by negligence in its construction, and not by negligence in its use. The proposition finds no support in the cases cited, and is contrary to the general current of the authorities. The cases cited in the opinion of the majority are suits in which an accident occurred in the construction of work which was proceeding under the direct management and superintendence of the defendant. The accidents were unusual, could not have occurred if the defendant had used ordinary care, and no charge was made that they were the result of the negligence of the plaintiffs. In *Barnowski v. Helson*, 89 Mich. 523, 50 N. W. 989, the defendant was engaged in raising a roof, and it fell because he failed to brace it properly. In *Mulcairn's Adm'x v. City of Janesville*, 67 Wis. 25, 29 N. W. 565, the city was building a cistern, and its walls fell of their own weight, and on account of the pressure of the earth behind them. There was no charge that their collapse was caused by the negligence of the person injured. In *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167, the plaintiff, an employé, was injured by an explosion upon the premises of his employer, and the court held that the accident was no evidence of the negligence of defendant, and sustained a nonsuit. In none of these cases was the issue presented whether the accident was caused by the negligence of the employé or by that of the employer. In each of them the defendant was in the active superintendence and use of the structure which caused the damage, and each of the first two is an admitted exception to the general rule that the happening of an accident or injury is neither proof nor evidence that the negligence of any particular person caused it. The rule, "*Res ipsa loquitur*," applies to cases of injuries to passengers carried under contracts of safe passage, and to some cases where the superintendence of work in progress is in the direct control of the defendant and there is no claim of negligence on the part of the plaintiff. But it never has application to an accident or injury where the question is at issue whether it resulted from the negligence of the employer or the negligence of the employé, and the latter was in the exclusive use and control of the work and the structure at the time of the accident. The reasonable and the true rule is that where injury is caused by the breakage or fall of a platform, building, structure, or machine furnished by the employer and in the exclusive use of the employé, and the issue is presented whether the break or fall was caused by the negligence of the master in its construction or by the carelessness of the employés in its use, the break or fall constitutes no evidence and raises no presumption for or against either cause, but the burden of proof is upon the employé to show, by evidence outside of the break or fall, not only that it was caused by a fault or defect of construction, but also that the employer knew of the fault or defect, or that a person of reasonable care, skill, and prudence would have known of it, from the material used and the method adopted in its construction, and would have anticipated the fatal result which followed. The rule, "*Res ipsa loquitur*," is inapplicable to

such a case. *Peirce v. Kille*, 80 Fed. 865, 26 C. C. A. 201, 53 U. S. App. 291; *Railroad Co. v. Stewart*, 13 Lea, 432, 438; *Dobbins v. Brown*, 119 N. Y. 188, 194, 23 N. E. 537; *Breen v. Cooperage Co.*, 50 Mo. App. 202, 213, 214; *Blanchette v. Manufacturing Co.*, 143 Mass. 21, 22, 8 N. E. 430; *Jones v. Yeager*, 2 Dill. 64, 68, Fed. Cas. No. 7,510; *Mining Co. v. Kitts*, 42 Mich. 34, 37, 39, 41, 3 N. W. 240; *Early v. Railway Co.*, 66 Mich. 349, 352, 33 N. W. 813; *Sorenson v. Pulp Co.*, 56 Wis. 338, 341, 344, 14 N. W. 446; *Huff v. Austin*, 46 Ohio St. 386, 387, 390, 21 N. E. 864; *Epperson v. Cable Co.* (Mo. Sup.) 50 S. W. 795, 807; *Searles v. Railway Co.*, 101 N. Y. 661, 662, 5 N. E. 66; *Smith v. Bank*, 99 Mass. 605, 612.

The burden is on the employé to show, not only that the fall was the direct result of the defect of construction, but also that the employer had notice of the defect, or that a person of ordinary care, skill, and prudence would have been aware of it, from the material used and the method adopted in the construction of the stull, and would also have anticipated the fatal result. *Dixon v. Telegraph Co.* (C. C.) 68 Fed. 630, 632; *Railway Co. v. Meyers*, 24 U. S. App. 295, 305, 11 C. C. A. 439, 444, 63 Fed. 793, 798; *Wood, Mast. & S.* (2d Ed.) § 414.

The result is that the fall of the stull constituted no evidence whether the fall was caused by a defect in its construction or by the negligence of the employés in the use of their blasts. There was no other substantial evidence in the case either that the fall was caused by the insufficiency of the stull timbers, or that the defendant knew, or might by the use of reasonable care and foresight have known, that these timbers were not sufficient, or that it or any person in the exercise of ordinary care could have anticipated that the stull would fall on account of any defect or fault in its construction. The judgment below should, therefore, in my opinion, be affirmed.

MCCULLEN v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1900.)

No. 1,275.

1. RAILROADS—ACTIONS FOR FIRES—QUESTIONS FOR JURY.

In an action against a railroad company to recover the value of property alleged to have been set on fire by sparks from passing engines on defendant's road, where the evidence as to whether the fire originated in the manner alleged was conflicting and indecisive, the case was one for the jury, and it was error to direct a verdict for defendant, especially when four successive juries before whom the case was tried had failed to agree.

2. SAME—PROOF OF NEGLIGENCE—PRESUMPTION FROM FACT OF CAUSING FIRE.

Proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption of negligence on the part of the railroad company or its employés, either in the construction or handling of the locomotive or in failing to keep it in proper repair.

3. SAME—PROVINCE OF JURY.

When the evidence for the plaintiff, in an action against a railroad company to recover damages resulting from a fire alleged to have been caused by sparks from a passing engine, is sufficient to establish such fact, and thus creates a presumption of negligence on the part of defendant, the case

should be submitted to the jury, unless the rebutting evidence as to due care is so clear and circumstantial that no reasonable person could doubt its verity.

In Error to the Circuit Court of the United States for the District of South Dakota.

George C. Cooper, for plaintiff in error.

C. I. Crawford (A. W. Burt, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought by Maggie McCullen, the plaintiff in error, against the Chicago & Northwestern Railway Company, the defendant in error, to recover the value of a steam flouring mill located in the town of St. Lawrence, county of Hand, state of South Dakota, which was destroyed, as she claimed, on December 2, 1895, by being set on fire by sparks that were negligently suffered to escape from one of the defendant company's locomotives, which was at the time in charge of its employes and was hauling one of its freight trains. The action was brought originally in a state court, but was removed to the federal court. After the case had been under consideration for about 31 hours by the jury which was impaneled to try the same, and the jurors had failed to agree upon a verdict, they were recalled and directed to return a verdict in favor of the defendant, upon which verdict, so returned by direction of the court, a judgment was subsequently entered. The plaintiff below excepted to such action on the part of the trial court, and brought the case here for review.

We are advised by the record, and also by the statements of counsel, that there had been three previous trials of the case upon substantially the same evidence which is contained in the present record, and that in each instance the jury had failed to agree. It has been repeatedly held since the decision in *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, that when the facts proven are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of that issue is for the jury; and inasmuch as 48 men, who have at various times listened to the evidence in this case, have differed in opinion as to whether the defendant was or was not negligent, we would perhaps be justified in regarding that test as conclusive, and in remitting the case to the lower court to be retried. In view of the numerous trials that have taken place, we have thought it best, however, to consider the testimony attentively, and decide as to its sufficiency to sustain a verdict for the plaintiff, as it would have been our duty to do if the trial court, at the conclusion of the first trial, had of its own motion directed a verdict for the defendant.

The point at issue necessitates a statement somewhat in detail of the facts which were developed at the trial. The defendant's railroad track passes through the town of St. Lawrence from east to west. The plaintiff's mill that was destroyed was situated on the south side thereof, and 302 feet distant therefrom in a direct line. Between the mill and the track were an elevator, close to the track, which was 57 feet high, and on the south side thereof a lower wooden

warehouse. The plaintiff's mill was three stories in height. A considerable space of vacant ground intervened between the buildings last described, and the territory south of the railroad track was generally open and unoccupied. On the roof of the mill, at its northeast corner, was a small ventilator which extended above the top of the roof a few feet. The four sides thereof consisted of thin wooden slats similar to those which are usually employed in constructing window blinds or shades. Directly underneath the ventilator on the third floor was a cyclone dust collector which, when in operation, blew some dust through the slats of the ventilator into the open air. The mill was closed down on Friday previous to the fire, which occurred about 10:30 a. m., on Monday, December 2, 1895, and there were no fires in or about the premises save in a small cannon stove which was located in a one-story office building at the northwest corner of the mill. This office building was not a part of the mill proper, but was connected therewith. In this stove there was a small fire on the morning of December 2, 1895, but the pipe leading therefrom extended above the roof of the mill, and such smoke as escaped from this pipe on that morning drifted in a direction which did not bring it within 20 feet of the ventilator heretofore mentioned. The wind was blowing from the north or from the northwest or from an intermediate point at a rate which was variously estimated by the witnesses at from 10 to 15 miles per hour. About 10:30 a. m. on the morning of the fire a freight train of the defendant company, containing about 30 cars and drawn by 2 engines, passed through the town of St. Lawrence from east to west without stopping. As this train moved through the town opposite to the mill, and for some distance west thereof, it was climbing an upgrade, and the engines were seen by several witnesses to emit considerable smoke, which was described by some of them as being dense and black. Shortly after the passage of the train, and within a period variously estimated at from 10 to 20 minutes, the mill was discovered to be on fire. Two witnesses located the fire when it was first seen as being on the slats on the outside of the ventilator heretofore described, and all agree that the fire was first observed from the outside on or around this ventilator. The plaintiff's husband testified, in substance, that on the first alarm of fire he stepped out of the small office building, and from that point saw a small blaze on the outside of the ventilator; that he entered the mill, and went immediately to the third story or floor, and found no fire on that floor on the inside of the mill underneath the ventilator, nor anywhere else, but that the fire at that time was wholly confined to the slats of the ventilator.

With respect to the issue whether the fire in question was occasioned by a spark from one of its locomotives, the defendant offered much expert testimony to the effect that a spark could not have been emitted by either of its locomotives, and carried a distance of 302 feet from its track, which would have retained sufficient vitality to have set fire to the slats of the ventilator under the conditions which existed at the time the fire took place. On the other hand, a railroad engineer who was called by the plaintiff testified, in substance, that

under such conditions as prevailed on the day of the fire,—with the wind from the north, blowing about 10 miles an hour, and the train moving on an upgrade,—a spark might have been carried 302 feet, and might have set fire to such slats as were in the ventilator, although the ventilator was at a height of 35 feet above the ground, provided the spark arrester of either engine was at the time in a defective condition. Another witness, who met the train in question on the day of the fire a few miles east of the town of St. Lawrence, also testified that the leading or head locomotive was then emitting large sparks, which floated 264 feet from the track, as ascertained by a subsequent measurement. Another witness testified, in substance, that he had, on one occasion previous to the fire, seen sparks emitted by locomotives which were in use by the defendant company that rose to a considerable height, and floated as much as 600 feet from the track, before they expired.

It is hardly necessary to observe that it is not the province of this court to say in which way the issue as to the origin of the fire ought to have been determined. Our sole function is to decide whether, in view of all the testimony, reasonable men, listening to the evidence as it was adduced, might have concluded that the fire was occasioned by a spark from one of the locomotives; and this question must be determined under and subject to the rule that it is the special province of a jury to determine to what extent witnesses are credible, and how far, if at all, their evidence is trustworthy, or is influenced by prejudice, self-interest, or other causes. We have reached the conclusion that there was substantial testimony enough, as we think, to sustain a finding that the mill was set on fire by a spark from one of the defendant's locomotives, provided the jury credited the statements of the plaintiff's witnesses. The considerations which lead us to hold that such a conclusion might have been formed by reasonable men are the following: First, the near relation in point of time between the passage of the defendant's train and the outbreak of the fire; second, the evidence tending to show that the fire caught on the outside of the ventilator, in the slats; third, the positive testimony of one witness that, when it was so discovered, there was no fire on the inside of the mill, underneath the ventilator; fourth, the direction and strength of the wind, which would naturally carry the sparks to the mill; fifth, the testimony tending to show that, as the train passed through the town of St. Lawrence, one or both of the locomotives were emitting volumes of smoke, and were laboring to some extent on an upgrade; sixth, the testimony that the same locomotives were emitting sparks of considerable size, which floated for some distance, when they were only a few miles distant from the town of St. Lawrence on the day of the fire; seventh, the evidence which tended to show that it was by no means impossible for sparks issuing from a locomotive to be carried as far as 302 feet; and, lastly, the lack of evidence as to any other adequate cause for the fire, if the testimony of the plaintiff's witnesses is credible. These facts and circumstances, which the evidence tended to establish, rendered it necessary, in our judgment, to take the opinion of the jury as to the origin of the fire, and would have warranted them in finding that it was kindled by a spark from one of the locomotives.

It is contended, however, by counsel for the railroad company, that even if it be true that there was substantial testimony which tended to show that the fire was occasioned by sparks which were emitted by the passing locomotives, and that even if the jury had so found, yet the fact so established would not have created a presumption that the defendant company or its employes were in any respect negligent. On this ground it is urged that the case was properly withdrawn from the jury, inasmuch as the defendant offered considerable testimony which tended to show that its engines were properly handled, and were provided with spark arresters, which were in a good state of repair on the day of the fire; whereas, the plaintiff produced no direct evidence to the contrary. It is true that there are some cases which hold that the mere fact that sparks have escaped from a locomotive and set fire to adjoining property creates no presumption of negligence on the part of the railway company, either in constructing or handling its locomotive; but the weight of judicial opinion is the other way, and it is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property. This doctrine is supported by the consideration that it is the duty of railroad companies, in constructing their locomotive engines, to adopt suitable appliances and safeguards, such as experience has shown will best serve to prevent them from emitting sparks and destroying property, and by the further consideration that such companies or their employes either know or should know whether such a degree of care has been exercised, and what appliances, if any, are actually in use on its engines, and whether they are in a good state of repair; whereas, third persons whose property is destroyed have no such knowledge or means of knowledge, and as a rule can neither prove nor disprove the aforesaid facts without great inconvenience and expense. These reasons have led most courts to hold,—and the doctrine, as we think, should be adhered to,—that proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption that, through a want of proper care on the part of the owner thereof or its employes, the locomotive in question was not provided with a proper spark arrester, or that it was not at the time in a good state of repair, or that its locomotive was carelessly handled. *Spaulding v. Railway Co.*, 30 Wis. 110, 121; *Ellis v. Railroad Co.*, 24 N. C. 138, 141; *Burke v. Railroad Co.*, 7 Heisk. 451, 462; *Railroad Co. v. Reese*, 85 Ala. 497, 5 South. 283; *Railway Co. v. Horne* (Tex. Sup.) 9 S. W. 440; *Coates v. Railway Co.*, 61 Mo. 38; *Railroad Co. v. Stanford*, 12 Kan. 354; *Railway Co. v. Campbell*, 86 Ill. 443. See, also, *Burroughs v. Railroad Co.*, 38 Am. Dec. 71, and cases cited in the note; *Eddy v. Lafayette*, 4 U. S. App. 247, 256, 1 C. C. A. 441, 49 Fed. 807, 812; *Frankford & Bristol Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 350; *Steinweg v. Railway*, 43 N. Y. 123; *Gibson v. Railway Co.*, 1 Fost. & F. 23; *Greenfield v. Railway Co.*, 83 Iowa, 270, 49 N. W. 95; *Dean v. Railway Co.*, 39 Minn. 413, 40 N. W. 270; *Karsen v. Railway Co.*, 29 Minn. 12, 11 N. W. 122.

It is urged, finally, by the defendant company, that even if its last position is untenable, and if it be conceded that the evidence was

sufficient to raise against it a presumption of negligence, yet, as it offered direct proof that its locomotives were provided with proper spark arresters, which were in good condition, and that they were properly handled on the morning of the fire, it thereby fully rebutted the presumption of negligence which the plaintiff's proof had raised, and that on the latter ground the verdict below should be sustained. We cannot assent to that view of the case. When the plaintiff offered evidence which was sufficient to raise a presumption of negligence, it was the province of the jury to decide whether the defendant's rebutting proof was adequate to overcome that presumption. As was said, in substance, by the supreme court of Minnesota, in *Karsen v. Railway Co.*, supra, a jury is not necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the evidence and circumstances bearing upon the condition and mode of operating the engine, as well as the circumstances under which the fire took place. Moreover, if the jury were satisfied, and so found, that the mill was ignited by a spark which came from one of the defendant's locomotives, it may well be that this fact alone would have led them to discredit the statements of the defendant's witnesses concerning the condition of the locomotives and how they were handled, and the right of the jury to discredit them for that reason cannot be denied. *Greenfield v. Railway Co.*, 83 Iowa, 270, 276, 49 N. W. 95. We are of opinion that the correct view is that, when the evidence which is offered by a plaintiff to make out his cause of action creates a presumption of negligence, the case should be submitted to the jury, unless the rebutting evidence is so clear and circumstantial that no reasonable person could doubt its verity. We are not prepared to hold that the presumption of negligence in the case at bar was rebutted by the kind of proof last described, and, not being able to so decide, the case should have gone to the jury. It is accordingly ordered that the judgment below be reversed, and the cause remanded for a new trial.

HARKISON v. HARKINSON.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1900.)

No. 1,256.

1. LIMITATIONS—ACTION FOR FRAUD—COLORADO STATUTE.

By a statute passed in Colorado in 1861 (Sess. Laws 1861, p. 341) it was provided that actions on the case should be brought within six years after the cause of action accrued, and bills for relief on the grounds of fraud within three years from the time of the discovery of the fraud. In 1877 the state adopted a Code of Civil Procedure, by which the distinction between actions at law and suits in equity was abolished. *Held*, that the change in the form of action did not affect the operation of the prior statute of limitations, but whether an action based upon fraud was governed by the limitation of three or six years depended on whether it was in substance an action on the case or for equitable relief.

2. TRIAL—ACTION OF COURT—MISLEADING REMARKS.

An expression of opinion by the court on overruling a motion for a non-suit at the close of plaintiff's case, as to the nature of the action, which was at variance with the instructions subsequently given to the jury, and which may have misled the defendant to his prejudice in introducing his evidence, is ground for reversal of a judgment against the defendant.

Thayer, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

Henry J. O'Bryan (J. Grattan O'Bryan, on the brief), for plaintiff in error.

Ralph Talbot (John H. Denison and William H. Wadley, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On June 30, 1897, the defendant in error, David Harkinson, brought an action against the plaintiff in error, Charles T. Harkison. The ground of his complaint was that on October 12, 1892, he delivered to Harkison, as his agent, \$8,000, and directed him to purchase with it the stock of the Anaconda Gold-Mining Company; that on October 18, 1894, Harkison bought 8,000 shares of the stock, which was of no greater value than \$4,000, and paid \$4,000 for it; that, maliciously and with willful deceit, he represented to the defendant in error that this stock was worth \$8,000, and that he had paid \$8,000 for it; and that he retained \$4,000 of the money sent him by his principal, and converted it to his own use. The prayer of the complaint was that the defendant in error might have judgment for \$10,000 and costs, that he might have execution against the body of the plaintiff in error, and that the plaintiff in error might be imprisoned for a term not exceeding one year, or until the judgment was paid. The latter part of this prayer is based on section 2164, Mills' Ann. St. Colo., which provides that in any civil action founded upon tort, in which there is a verdict for the plaintiff, and the jury shall find that in committing the tort complained of the defendant was guilty of malice, fraud, or willful deceit, the plaintiff may have execution against the body of the defendant. To this complaint the plaintiff in error answered. In his answer he denied the allegations of the complaint, and averred that on October 12, 1892, the defendant in error purchased of him the stock of the gold-mining company in controversy, for the agreed sum of \$8,000, and paid him for it. There was a trial of the issue before the jury, and a verdict and judgment for the defendant in error for \$5,520.24 and costs; that execution should issue therefor, and that, upon its being returned unsatisfied, the defendant in error should have execution against the body of the plaintiff in error; and that he should be imprisoned in the common jail of Arapahoe county for the full period of one year unless the judgment should be sooner paid.

One of the chief specifications of error is that this action was barred by the statute of limitations of the state of Colorado. This contention is founded upon the following provisions of the statutes: In 1861 the legislature of the territory of Colorado enacted a statute

for the limitation of actions, which provided that actions on the case, except actions for slanderous words and for libels, should be commenced within six years next after the cause of action should accrue, and not afterwards, but that bills for relief on the ground of fraud should be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterwards. Sess. Laws Colo. 1861, pp. 341, 342, §§ 1, 12. These provisions of the statute have continued in force in the territory and state of Colorado from 1861 to the time of the commencement of this action. Mills' Ann. St. Colo. 1891, §§ 2900, 2911. In 1877 the legislature of the state of Colorado adopted a Code of Civil Procedure, the first section of which contained this provision:

"That the distinction between actions at law and suits in equity and the distinct forms of actions and suits heretofore existing are abolished and there shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity, and which shall be denominated a civil action, and which shall be prosecuted and defended as prescribed in this act." Code Civ. Proc. Colo. 1877.

It is claimed that the abolition of forms of action abolished the six-years limitation upon actions on the case for fraud, and extended to them the three-years limitation upon bills for relief on the ground of fraud. This claim, however, does not seem to be supported either by reason or by authority. Forms of action were abolished by the provisions of the Code, but the natures of actions at law and bills in equity remain as clear and distinct as ever. There is nothing in the Code to indicate that it was the intention of the legislature by its enactment to modify or repeal any of the provisions of the statutes of limitations which were then in force in the state of Colorado. It would be as reasonable to suppose that the six-years limitation prescribed for an action on the case was extended to bills for relief on the ground of fraud, as to imagine that the three-years limitation upon the latter was applied to the former. Any attempt to construe or interpret the statutes of limitations of this state upon any such theory must result in nothing but doubt, uncertainty, and conjecture. The truth is that the adoption of the Code had no effect upon the statutes of limitation of the state which were then in force, and which have been repeatedly re-enacted, and that actions on the case for fraud remain limited to six years, while bills for relief on that ground are barred in three years. The suit at bar is an action on the case. It was not for slanderous words or for libel. It was commenced within six years after it accrued. It was governed by section 2900, Mills' Ann. St., and it was rightly sustained by the court below.

After the defendant in error had produced his evidence and rested his case, the counsel for the plaintiff in error moved for a nonsuit on the ground that the action was barred by the limitation of three years. Upon the presentation of this motion the following colloquy resulted:

"The Court: The case does not necessarily stand upon any question of fraud or deceit. If the defendant was the agent of the plaintiff for purchasing stock, and he received more money than he laid out in the purchase, he may be liable for the excess in an ordinary action of assumpsit. It does not

stand upon any idea of fraud or deceit at all, and whether he was agent or not is a question for the jury. We are not to determine that. That is a question for the jury to decide. I do not think there is any question of the statute of limitations in relation to the accusations of fraud and deceit in the case. It is true, it is averred in the complaint that the defendant fraudulently converted this money to his own use; but that does not make the case an action in tort, and for the recovery of damages for a tort. The case stands more in the way of an ordinary action of assumpsit for money had and received to the plaintiff's use. Mr. O'Bryan: In regard to the suggestion as to that, I might say that, if your honor will take the trouble to read the complaint, your honor will find that the entire action in this complaint sounds in tort; that they have asked in this matter for the arrest of the defendant's body, which alone, under the statutes of the state of Colorado, could sound in tort. The doctrine that has been maintained is that the action is tort, and sometimes we must, even in the presence of the Code, look to the question of the prayer to find out what their action is. If it is conceded this is a simple action of assumpsit, and your honor holds this an action of assumpsit, and not of tort, I would like to have that holding converted into a finding. The Court: I think it stands in that way, sir. Mr. O'Bryan: Then I ask that the question as to the arrest of the body be absolutely stricken from the complaint. The Court: We will come to that. I wish to have it noted that Mr. O'Bryan's motion is overruled."

The defendant thereupon proceeded to introduce his evidence, and at the close of the trial the court charged the jury in this way:

"You are instructed that this is an action on the case, founded upon tort; and, if you shall find for the plaintiff herein, you may state in your verdict that, in committing the tort complained of, the defendant was either guilty of fraud or willful deceit, as you may believe the case to be from the evidence."

Under this instruction the jury found that, in committing the wrong complained of, the plaintiff in error was guilty of willful deceit, and the judgment of imprisonment followed. The statement of the court at the close of the case of the defendant in error that the suit did not stand upon any idea of fraud or deceit at all; that the allegation in the complaint that the defendant fraudulently converted the money to his own use did not make the case an action in tort, and for the recovery of damages for a tort; and its statement that, in its opinion, this was a simple action of assumpsit, and not an action of tort,—were well calculated to lead the plaintiff in error to suppose that the question of deceit and fraud was eliminated from the case. He proceeded to present his evidence, and a careful perusal of it fails to show that any testimony was elicited regarding the intent of the plaintiff in error to deceive or defraud the defendant in error. His counsel insist that they put in his defense in reliance upon this ruling of the court, and asked no questions relative to the intent, knowledge, or purpose of their client, because they relied upon the statement of the court that the charge of fraud and deceit was no longer in issue. After the evidence had been introduced, however, the court instructed the jury that they might find the existence of deceit and fraud, and rendered a judgment of imprisonment upon that finding. This was undoubtedly a surprise to the plaintiff in error and his counsel, and the declaration of the court at the close of the case of the defendant in error probably misled them, and justified them in omitting any evidence upon this issue. For this reason, the trial was not a fair one, and the judgment must be reversed, and a new trial granted.

There is one item of testimony to which we call attention, as the

case is to be tried again. For the purpose of laying the foundation for impeachment, the plaintiff in error was asked if he did not state to Miss Mary Harkinson that he had none of his stock for sale, and he answered that he did not think he did. Miss Buck was then permitted to testify, over the objection of the plaintiff in error, that he had refused to buy any stock for her, and had refused to sell any of his stock to her. This was not competent impeaching testimony, because it was on an immaterial issue, and because Harkinson had not testified that he refused to buy for or sell to Miss Buck. The judgment is reversed, and the case is remanded for a new trial.

THAYER, Circuit Judge (dissenting). I deem it wholly unnecessary to reverse the judgment in this case because of the colloquy between the court and counsel which is referred to in the majority opinion. The complaint on which the case was tried charged fraud, in that the defendant below had received \$8,000 from the plaintiff below to buy stock, and had reported that he had expended it in purchasing 8,000 shares at \$1 per share, when it only cost 50 cents per share. The proof was in accordance with the allegations, and was of such a nature as would have warranted any jury in finding, as they did, that the defendant "was guilty of willful deceit." Fraud inhered in the transaction as charged and proven, although the action might be treated as one in assumpsit on the case; and the defendant had ample opportunity to exculpate himself, which he failed to do to the satisfaction of the jury. No evidence which he might have offered as to what his intent was would have served to overcome the intent which the law presumes from the nature of his acts. I think the judgment should not be disturbed.

HOBBS v. NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO.

(Circuit Court of Appeals, Second Circuit. April 11, 1900.)

No. 157.

LIMITATION—ACTIONS AGAINST STOCKHOLDERS—NEW YORK STATUTE.

The term "moneyed corporations," as used in Code Civ. Proc. N. Y. § 394, which prescribes the limitation governing actions against directors and stockholders of moneyed corporations, if defined in accordance with the new corporation law of 1892, is broad enough to include a mortgage trust company of another state, authorized to issue and sell its debenture bonds secured by mortgages, if it does business within the state of New York.

On petition for rehearing. For former opinion, see 96 Fed. 396. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. A decision upon the plaintiff's petition for a rehearing of this case has been delayed because the principal question which originally existed had been argued and was pending before the supreme court in *Whitman v. Bank*, 20 Sup. Ct. 477, Adv. S. U. S. 477, 44 L. Ed. —, which was decided on March 5th of the present year, in affirmance of the judgment of this court. The plain-

tiff and petitioner makes the point that the supreme court held that the liability made effectual by the statutes of Kansas was created by the constitution, and that the New York court of appeals had held in *Clark v. Commissioners*, 148 N. Y. 1, 42 N. E. 414, that a liability created by the constitution was not a liability created by statute, and therefore not within the provisions of subdivisions 1 and 2 of section 382 of the Code of Civil Procedure. The supreme court said that the constitution and laws of Kansas were to be taken together, as making one body of law, and described the liability as "statutory in its origin." In addition, the section of the Code of Civil Procedure which is the statute of limitations in this case is section 394, which, under the amendment of 1877, treated of an action to enforce a liability created by law, which, as defined by the New York court of appeals, included pre-existing statutory liabilities and "those created by other statutes and by the constitution of 1846." *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663. The dissimilar language of the two sections makes the plaintiff's point unimportant, even if the decision of the supreme court could bear the weight attempted to be placed upon it.

The next point relates to the definition of a "moneyed corporation." The point presented in all the briefs when the case was argued was whether section 394 of the Code was broad enough to include actions against directors and stockholders of both foreign and domestic moneyed corporations. The definition of such corporations was taken to be that which existed when the section was enacted, and it was argued by the plaintiff that a moneyed corporation could mean only a New York corporation. It now appears that in 1892 a new corporation law of the state of New York was passed, and a broader definition of moneyed corporations was made. The old definition was not restricted, but the petitioner desires that the new definition should be read into section 394, states truly that the definition is a corporation "formed under or subject to the banking or the insurance law," and asserts that a corporation formed under the law of New York must have been intended. The conclusion does not follow, for the banking law expressly includes both domestic and foreign corporations, and is declared to be applicable to the corporations and individuals which are specified, and which are, a bank, individual bankers, a domestic savings bank, a domestic trust company, building and mutual loan corporations and co-operative loan associations doing business in New York, mortgage loan or investment corporations, domestic or foreign, doing business in New York, and domestic safe-deposit companies. The term "bank" means "any moneyed corporation authorized by law * * * to receive deposits of money or commercial paper, and to make loans thereon." It is not necessary to decide whether this definition is broad enough to include foreign banks which receive deposits and make loans thereon, for the term "mortgage loan or investment company" is defined to be any corporation, other than an insurance company, formed under the laws of this or any other state, and doing business in this state, for the purpose of selling or offering for sale bonds or notes secured by mortgage of real estate, and, when ap-

plied to any foreign corporation doing business in this state, it shall include any association organized or existing under the laws of any other state or country, and engaged in this state in any such business. The Western Farm Mortgage Trust Company was formed, among other things, to loan money upon real estate, to negotiate loans on real estate, and to issue and sell its debentures secured by pledges of notes or bonds, which are, according to the course of such business, secured by mortgages. If the definition of the statute of 1892 is to govern, section 394 is applicable to foreign corporations of the class of which the mortgage company in question was a member, if it did business within the state of New York. The decision of the majority of the court was not based upon the amendment of 1897. It will be recollected that the opinion did not decide that the statute of limitations of Kansas, which was for three years, was not controlling, but that, if the *lex fori* was to control, the three-years statute of New York was applicable. The application for reargument is denied.

LACOMBE, Circuit Judge. I concur fully in the memorandum filed on denying petition for rehearing. Nevertheless, I am individually of opinion that the statute of limitations applicable to cases of this sort is the statute of limitations of the state whose lawmaking power has created the liability; or, rather, that the action cannot be maintained in another state when a period of time has elapsed which would defeat the action in the home state, although, possibly, that period may be still further curtailed by the statute of limitations of the state in which the action is brought.

NORTHERN ASSUR. CO. OF LONDON v. GRAND VIEW BLDG. ASS'N.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1900.)

No. 1,248.

1. INSURANCE—ESTOPPEL TO AVOID POLICY FOR BREACH OF CONDITION—KNOWLEDGE OF AGENT.

An insurance company is estopped to avoid a policy on the ground of the breach of a condition therein against concurrent insurance, unless with the consent of the company, indorsed in writing on the policy, where it appears that when its agent, who had authority to issue or withhold the policy, delivered the same, and collected the premium thereon, he knew of the existence of the other insurance, which, if at all, rendered the policy void from the moment of its delivery.

2. SAME.

When an insurance company delivers a policy, and accepts the premium thereon, it is presumed that its intention is to make a contract which, in the light of all the facts then known to it, will afford indemnity; and it is beyond its power, by any provision which it may insert in the policy, to overcome the force of that presumption, or to avoid the effect of acts or declarations which, from an equitable standpoint, are sufficient to create an estoppel in pais.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Nebraska.

Ralph W. Breckenridge (Charles J. Greene, on the brief), for plaintiff in error.

Halleck F. Rose, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The general question which arises in this case is whether an insurance company should be permitted to take advantage of a condition contained in one of its policies to avoid the payment of a loss that has been sustained thereunder, when it appears that the fact rendering the policy void, by the terms of the condition which is pleaded as a defense, was an existent fact, known to the insurer at the time it issued its policy and accepted the premium, which for that reason rendered the policy void, if at all, from the moment it was delivered. The question arises in this way: The Northern Assurance Company of London, England, the plaintiff in error, insured certain household and kitchen furniture belonging to the Grand View Building Association, the defendant in error, that was situated in a certain building in the city of Lincoln, Neb. The policy which it issued contained the following provisions:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered, in whole or in part, by this policy. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

At the time the policy in suit was executed the insured property was covered to the amount of \$1,500 by a policy issued by the Firemen's Fund Insurance Company. A jury found that an agent of the plaintiff in error by the name of A. D. Borgelt, who had authority to make contracts of insurance in its behalf, and to countersign and issue its policies and collect premiums thereon, and who solicited the policy in suit, had knowledge of the existence of the policy issued by the Firemen's Fund Insurance Company at the time he issued the policy in suit, but no indorsement appears to have been made upon the policy in suit relative to the existence of the prior policy. A fire having occurred by which the insured property was totally destroyed, and an action having been brought against the plaintiff in error, which was the defendant below, to recover the amount of the loss, it pleaded the aforesaid provisions of its policy, and the existence of the prior insurance as a defense to the action. The verdict below was special, and on the state of facts heretofore recited, which were either found by the jury or disclosed by the record, the trial court rendered a judgment against the insurer, which it seeks to reverse.

The general question stated at the outset of this opinion has been

answered in the negative in many well-considered decisions. It was so answered by this court in *Insurance Co. v. Norwood*, 32 U. S. App. 490, 16 C. C. A. 136, 69 Fed. 71, and the same conclusion has been reached in other circuits. Thus, in the case of *Insurance Co. v. Fischer*, 34 C. C. A. 503, 92 Fed. 500 (decided by the circuit court of appeals of the Sixth circuit), it was said to be "well settled in the law of fire insurance that the insurer is estopped to plead as a defense the breach of conditions against other insurance or incumbrances, without the consent of the company in writing on the face of the policy, if it appears that when the agent of the company, with authority to deliver or withhold policies, delivered the policy in question he then knew of the existence of the other insurance or the incumbrance." The same doctrine was enforced by the circuit court of appeals for the Ninth circuit in the case of *McElroy v. Assurance Co.*, 36 C. C. A. 615, 94 Fed. 990, wherein it appeared that an agent of an insurance company had issued a policy with knowledge of an existing incumbrance on the insured property, and had failed to indorse the fact on the policy, although it contained a provision, in substance, that it should be void if there was a mortgage on the property, unless the consent of the insurer thereto was shown by a written indorsement on its policy. It was also held by the circuit court of appeals for the Fourth circuit in the case of *Glover v. Insurance Co.*, 30 C. C. A. 95, 85 Fed. 125, that the fact that the insured property was erroneously described as a "dwelling house" when it should have been described as a "Keeley Institute," which would have rendered it a more hazardous risk, would not avail the insurer as a defense to its policy when a loss had occurred, it appearing that the agent of the insurance company had knowledge of the misdescription when he solicited the risk and issued the policy. And in *Putnam v. Insurance Co. (C. C.)* 4 Fed. 753, Judge Blatchford held, after a careful review of the authorities, that an insurance company could not take advantage of a provision in its policy rendering it void if there was other concurrent insurance not indorsed thereon, when it was proven that its soliciting agent had knowledge of existing insurance on the insured property to the amount of \$6,000 at the time he issued its policy, and only indorsed thereon permission to carry other concurrent insurance to the amount of \$3,000.

The point now under consideration has been adjudicated so frequently that it is doubtless unnecessary to do more than refer to the cases already mentioned and the authorities therein cited. We will call attention, however, to the fact that the doctrine as heretofore stated has the approval of the supreme court of the state of Nebraska, from which state this case comes, and is also stated and re-enforced by numerous citations by the leading text writers on the law of insurance. *Insurance Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Joyce, Ins.* § 515; *Ostr. Ins.* § 243; *May, Ins.* (2d Ed.) § 497. The doctrine in question rests upon the ground that facts made known to the agent of an insurance company, who is empowered by it to solicit insurance, countersign and issue policies, and collect premiums, is the knowledge of his principal, and that a fraud would be perpetrated if an insurance company, through the medium of its agents, was al-

lowed to deliver one of its policies, and accept the premium thereon, with knowledge of facts which under its provisions rendered it void ab initio. To prevent the perpetration of such frauds, the courts have very generally held the insurer estopped from taking advantage of a condition or conditions found in one of its issued policies which, in the light of known facts, rendered the same void from the time of its delivery, or they have indulged in the charitable presumption that the insurer intended to waive the benefit of such a provision, or that, through accident or mistake, it failed to modify the condition before the delivery of its policy, as it intended to do, so as to render it valid.

It is contended, however, in behalf of the insurer, that, by virtue of the conditions of its policy above quoted, the rule of law heretofore stated is inapplicable to the case in hand. It is said, in substance, that no provision of its policy, as printed and delivered to the insured, can be denied its legitimate force and effect, except by virtue of a written indorsement on the policy; that the insurance company has effectually deprived itself of the power to waive any of the conditions of its policy except by a written indorsement thereon; and that it has succeeded in framing a contract which is wholly exempt from the equitable doctrine of estoppel and waiver. This court decided, however, in *Insurance Co. v. Norwood*, 32 U. S. App. 490, 499, 16 C. C. A. 140, 69 Fed. 71, 75, that "parties to contracts cannot disable themselves from making a contract allowed by law in any mode in which the law allows contracts to be made," and that "a written contract may be changed by parol, and a parol one changed by a writing, despite any provision in the contract to the contrary"; and the law to that effect is, as we think, well established by the authorities there cited, as well as by other authorities that are referred to in *Farnum v. Insurance Co.*, 83 Cal. 246, 261, 23 Pac. 869. It has also been held that such clauses as those that are relied upon by the insurer to deprive itself of the power to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made, or attempted to be made, after it has been delivered and taken effect as a valid instrument, and that they should not be considered as having relation to acts done by the company or its agents at the inception of the contract which are sufficient, notwithstanding provisions that it may contain, to render it valid through the operation of the doctrine of estoppel or waiver. *Walsh v. Insurance Co.*, 73 N. Y. 5, 11; *Woodruff v. Insurance Co.*, 83 N. Y. 134, 141; *Insurance Co. v. Robison*, 19 U. S. App. 266, 274, 7 C. C. A. 444, 58 Fed. 723, 728, 22 L. R. A. 325. When an insurance company delivers a policy and accepts the premium thereon, it is presumed that its intention is to make a contract which, in the light of all facts then known to it, will afford indemnity, and it is beyond its power, by any provision that may be found in its policy, to overcome the force of that presumption, or to avoid the effect of acts or declarations which from an equitable standpoint are sufficient to raise an estoppel in pais. Thus, in the case of *Wood v. Insurance Co.*, 149 N. Y. 382, 44 N. E. 80, it appeared that an agent of the insurance company issued a policy with knowledge of a fact which under its terms rendered it void ab initio; but notwithstanding the fact

that the policy in suit was a standard policy, which contained conditions similar to those that are invoked in the case at bar, it was held that the condition under which the forfeiture was asserted must be regarded as having been waived, as otherwise the insurer would be put in the attitude of accepting a premium for a policy which was known at the time to be of no force and effect. The court said, in substance, that it had long been settled that general agents of an insurance company may waive stipulations and provisions contained in a policy with respect to the conditions upon which it shall have inception and go into operation as a contract, by delivering it with knowledge of all the facts and receiving the premium. A similar ruling was made in *Robbins v. Insurance Co.*, 149 N. Y. 477, 44 N. E. 159, where a policy was issued by the agent of an insurance company with knowledge of the existence of an incumbrance on the insured property, which fact was not indorsed in writing on the policy, as it should have been, by the terms thereof, to render it operative. The policy in that case contained a provision to the effect that no officer, agent, or other representative of the company should have power to waive any condition or provision thereof, except such as might by the terms of the policy be indorsed thereon or added thereto, and that no such officer or agent should be deemed to have waived any provision of the policy unless the waiver was written thereon. Nevertheless, it was ruled that the insurance company had either waived the condition rendering the policy void, or was estopped by the conduct of its agent from pleading the condition and the existence of the incumbrance as a defense. And in the case of *Farnum v. Insurance Co.*, 83 Cal. 246, 259, 23 Pac. 869, it was also held, in substance, that an insurance company was estopped from denying that one of its policies had taken effect, when it appeared that it had been delivered by one of its agents, who had power to deliver policies, and who had extended credit for the premium by an oral agreement, although the policy contained a provision that the company should not be liable thereon until the premium was paid, and a further provision that nothing less than a specific agreement indorsed on the policy should operate as a waiver of any of its provisions.

We are of opinion, therefore, that the delivery by the agent of the insurance company of the policy in suit, with knowledge at the time of the existence of the prior insurance, estops the insurer from pleading the prior insurance as a defense. Its agent by whom the delivery of the policy was made had power to deliver it and collect the premium, and to receive notice of any existing insurance. In doing these acts he was for the time being the company, and no obligation rested on the insured to insist that the existence of the outstanding insurance should be indorsed on the policy in suit if the insurer, with knowledge of its existence, did not elect to do so, but delivered the contract without such indorsement. He had the right to assume, because of the delivery of the policy under the circumstances aforesaid, that the insurer had determined to accept the risk, notwithstanding the other insurance.

The point seems to be made in the brief that the plaintiff below, in its petition and reply, pleaded a waiver, and that the judgment

below cannot be supported, because it is founded on estoppel. With reference to this suggestion, it is only necessary to say that the plaintiff pleaded the facts and circumstances under which the policy was issued, and the knowledge possessed by the insurer at the time, substantially as hereinbefore set forth, and, in view thereof, alleged that the defendant company had not only waived the provision of its policy on which it relied as a defense, but was also estopped from asserting it. We perceive no error in this method of pleading, nor was any exception taken thereto in the trial court. Judgment below is accordingly affirmed.

SANBORN, Circuit Judge (dissenting). The question which this case presents has long been the subject of conflicting decisions. In *Carpenter v. Insurance Co.*, 16 Pet. 495, 496, 511, 10 L. Ed. 496, 510, the policy contained this stipulation: "And provided, further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon the policy, then this insurance shall be void and of no effect." There was other insurance upon the property at the time this policy was issued. Mr. Justice Story expressed the unanimous opinion of the supreme court upon the question in controversy in this case in these words:

"The third instruction prayed the court to instruct the jury that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that 'was, in law, a compliance with the terms of the policy.' The court refused to give the instruction as prayed; but instructed the jury that at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on, but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise, the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy, and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect."

This decision was rendered in 1842, has never been overruled, and in 1897 the circuit court of appeals for the Seventh circuit reached the same conclusion. *Union Nat. Bank of Oshkosh v. German Ins. Co.*, 34 U. S. App. 397, 402, 18 C. C. A. 203, 206, 71 Fed. 473, 476; *Insurance Co. v. Thomas*, 53 U. S. App. 517, 521, 27 C. C. A. 42, 44, 82 Fed. 406, 408.

A careful reading of the cases upon both sides of the question has forced my mind to the conclusion that the supreme court and the circuit court of appeals for the Seventh circuit are right, and for the following reasons:

1. If the solicitor of this company had had unlimited power to act for it, had known of the prior insurance, and had made a parol agreement or representation before or at the time of the delivery of the policy that the policy should be valid without the indorsement of the permission to carry the prior insurance, that agreement or representation would have been futile, and the written stipulation that

the policy was void without the indorsement would have prevailed over the parol contract, under the familiar rule that all prior and contemporaneous oral negotiations are merged in the written agreement. Since the decision in *Insurance Co. v. Norwood*, to which the writer has never assented, this court has frequently held that no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail over the plain provisions and just interpretation of the written contract. *Insurance Co. v. Henderson*, 32 U. S. App. 536, 540, 543, 547, 16 C. C. A. 390, 391, 393, 395, 69 Fed. 762, 764, 766; *Insurance Co. v. McMaster*, 57 U. S. App. 638, 648-652, 30 C. C. A. 532, 538-540, 87 Fed. 63, 69-72; *Insurance Co. v. Mowry*, 96 U. S. 544, 547, 24 L. Ed. 674; *Assurance Co. v. Norwood*, 57 Kan. 610, 611, 613, 47 Pac. 529, 530, 532; *Association v. Kryder*, 5 Ind. App. 430, 435, 31 N. E. 851; *Union Nat. Bank of Oshkosh v. German Ins. Co.*, 34 U. S. App. 397, 18 C. C. A. 203, 71 Fed. 473; *Casualty Co. v. Teter*, 136 Ind. 672, 673, 676, 679, 36 N. E. 283; *Burt v. Bowles*, 69 Ind. 1; *Clodfelter v. Hulett*, 72 Ind. 137; *Hudson Canal Co. v. Pennsylvania Canal Co.*, 8 Wall. 276, 290, 19 L. Ed. 349; *Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246; *Pearson v. Carson*, 69 Mo. 550; *Insurance Co. v. Neiberger*, 74 Mo. 167; *Lewis v. Insurance Co.*, 39 Conn. 100. As a prior or contemporaneous oral agreement that the policy should be valid without the indorsement of the prior insurance could not avoid the written stipulation that it should be void, much less would the mere knowledge of both parties that the prior insurance existed without any agreement concerning it have that effect.

Moreover, this stipulation of the policy is a wise and salutary one, and it ought to be enforced. Its purpose is to prevent fraud and perjury by reducing to writing the entire agreement of the parties relative to the amount of indemnity upon the property insured, and, if enforced, it admirably accomplishes that object. A refusal to enforce it or any evasion of it throws wide the door to fraud and perjury, and practically deprives the insurance companies of their right to contract for a limitation of the amount of insurance on the property; for, if that limitation may be avoided by testimony that some agent knew of the existence of other insurance which was not indorsed, the temptation to find such testimony will often be great, and there is no way in which the companies can protect themselves against its discovery. "A company which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the insured has assented to be bound." *Kyte v. Assurance Co.*, 144 Mass. 43, 46, 10 N. E. 518; *Hale v. Insurance Co.*, 6 Gray, 169; *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. 265.

2. The solicitor of the insurance company had no authority by oral agreement, by knowledge, by waiver, by estoppel, or in any other way, to make a valid contract of insurance here, without the indorsement upon the policy of the permission to carry the prior insurance, and the insured knew that he had no such authority when it took

its policy. It is an established principle of the law of agency that a principal may limit the powers of his agent, and that all parties who deal with the agent with knowledge of the limitation are bound by it. The insurance company had the right, under this rule, to limit the power of its solicitor to consent to other insurance to a written consent indorsed on the policy, and it had the right to limit his power to deliver valid policies to those upon which all other existing insurance was indorsed in writing. The company made these limitations upon the powers of this solicitor by the express terms of its policy, and the insured, by accepting the policy, was not only charged with knowledge of the existence of these limitations, but it expressly agreed to their terms and their effect. It was beyond the power of the solicitor to deliver any valid policy upon which the concurrent insurance was not indorsed, and the insured knew it, and agreed that any policy he should so deliver should be void when it received it. This policy was of that character, and was consequently void. "When a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority, and the consent or act of the agent not so indorsed is void." *Quinlan v. Insurance Co.*, 133 N. Y. 356, 364, 31 N. E. 33; *Walsh v. Insurance Co.*, 73 N. Y. 5, 10; *Marvin v. Insurance Co.*, 85 N. Y. 278, 283; *Moore v. Insurance Co.*, 141 N. Y. 219, 224, 36 N. E. 191; *Kyte v. Assurance Co.*, 144 Mass. 43, 46, 10 N. E. 518; *Ruthven v. Insurance Co. (Iowa)* 60 N. W. 663, 666; *Insurance Co. v. Gibbons*, 43 Kan. 15, 22 Pac. 1010; *Cleaver v. Insurance Co. (Mich.)* 39 N. W. 571; *Weidert v. Insurance Co. (Or.)* 24 Pac. 242; *Smith v. Insurance Co. (Vt.)* 15 Atl. 353, 1 L. R. A. 216; *Hankins v. Insurance Co. (Wis.)* 35 N. W. 34; *Gould v. Insurance Co. (Mich.)* 51 N. W. 455; *Clevenger v. Insurance Co. (Dak.)* 3 N. W. 313; *Enos v. Insurance Co. (Cal.)* 8 Pac. 379; *Gladding v. Association*, 66 Cal. 6, 4 Pac. 764; *Insurance Co. v. Mize (Tex. Civ. App.)* 34 S. W. 670. "When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein either by parol or writing, and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers of the agent in opposition to limitations and restrictions in the policy." *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660, 663.

3. No fraud was perpetrated on the insured in this case, for there could have been no fraud without deceit, and the insured was not deceived. It knew that there was other insurance upon the property, and it knew that the solicitor of the company had no power to deliver a valid policy unless the concurrent insurance was indorsed upon it, and it agreed with the company that any policy which this solicitor should deliver should be void if the concurrent insurance was not indorsed. The insured was therefore neither deceived nor defrauded. It is the insurance company that was deceived, and the

insurance company that is defrauded, if it is compelled to pay this indemnity. Its agent, acting without authority, and the insured, who knew he had no authority, make a void contract, and agree that it shall be void, and then by the plea of a waiver that was never intended, and an estoppel that did not exist, seek to charge the company with the penalty of their conspiracy or carelessness.

There seems to me to be no ground for a waiver by, or an estoppel of, the insurance company in this case, for several reasons: (1) Because the company expressly limited the power of its solicitor to make waivers or work estoppels of the character here invoked to those made in writing by indorsement upon the policy, and it brought notice of this limitation home to the insured by an express stipulation in the policy, which the insured accepted. (2) Because an indispensable element of an estoppel is some act, statement, or representation which tends to deceive the insured, and thereby induces it to adopt a course of action or a state of inaction that it would not otherwise have taken, and this case contains no such element. The insured knew that there was other insurance. It knew that it was not indorsed upon the policy. It knew that the solicitor had no power to deliver a valid policy without such an indorsement, and it knew that it agreed that, without this indorsement, its policy should be void; for all these things were written in the contract, and the insured was charged with knowledge of its contents. (3) Because there can be no waiver without an intent to waive, and no intent to waive can be deduced or inferred from the mere fact of knowledge, in the face of an express written stipulation to the contrary, made and delivered at the time. (4) Because no estoppel or waiver based on acts or knowledge prior to, or contemporaneous with, the making of an express written agreement on the subject, can prevail over the express terms of that contract, which as conclusively merges and supersedes all prior and contemporaneous negotiations and understandings by estoppel and by waiver as by words. *Insurance Co. v. Mowry*, 96 U. S. 547, 548, 24 L. Ed. 674; *Insurance Co. v. Thomas*, 27 C. C. A. 42, 82 Fed. 409. In my opinion, the judgment below should be reversed, and judgment should be entered for the insurance company.

BRIGHAM CITY v. TOLTEC RANCH CO.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1900.)

No. 1,302.

APPEAL—RIGHT TO REVIEW—PARTY HAVING NO LEGAL INTEREST.

A defendant in an action in ejectment cannot maintain a writ of error to review a judgment therein awarding possession to the plaintiff, on the ground that the title is in a third person, where, by his answer, he disclaimed any interest in the property affected by such judgment, and has therefore no legal interest in the question he seeks to have reviewed.

In Error to the Circuit Court of the United States for the District of Utah.

The Toltec Ranch Company, the defendant in error, brought an action of ejectment against Brigham City, the plaintiff in error, to recover the possession

of a quarter section of land. The city answered "that it did not claim or pretend to have, nor does it now claim, any right, title, or interest of, in, or to the estate and premises described in the complaint," except the parcel thereof covered by the reservoir, and pipes leading thereto and therefrom, embracing "in all about $\frac{15}{100}$ of an acre," which was described by metes and bounds. The answer concluded with this disclaimer: "And this defendant does disclaim all right, title, and interest to the said lands in the said complaint mentioned, and every part thereof, excepting the aforesaid $\frac{15}{100}$ of an acre covered by the Brigham City reservoir, and the pipes leading to and from said reservoir." With its answer the defendant city filed what it termed a "cross complaint," in which it set out, in substance, that the city had erected a water reservoir on the $\frac{15}{100}$ of an acre, which reservoir was used for supplying the city and its inhabitants with water, and prayed that that parcel of the quarter section be condemned to the use of the city for that public use; and thereupon proceedings were had accordingly for that purpose,—presumably under some statute of the state authorizing them,—which resulted in the condemnation, to the use of the city for a site for its water reservoir and pipes, of the $\frac{15}{100}$ of an acre, as prayed for in the city's cross complaint. The jury assessed the value of the $\frac{15}{100}$ of an acre at \$1, and, the city having paid into court the \$1 assessed as damages and the cost of the condemnation proceedings, the court rendered this judgment of condemnation: "Now, therefore, it is considered, ordered, and adjudged by the court that the hereinafter described property be, and the same is hereby, condemned to the use of said defendant for the purpose of a reservoir and pipe line; and that of the said property so sought to be condemned the fee-simple title of the following land for a reservoir site, to wit there follows a description of the $\frac{15}{100}$ of an acre, be, and the same is hereby, divested of and from the said plaintiff, the Toltec Ranch Company, and forever vested in said defendant, Brigham City, for the uses and purposes aforesaid." In the main action judgment was rendered for the plaintiff for the quarter section of land, less the $\frac{15}{100}$ of an acre condemned to the use of the city for its water reservoir. There is in the record a stipulation of facts relating to the title of the quarter section, and which was intended to raise the question of law whether upon this agreed statement of facts the Central Pacific Railroad Company acquired title to this quarter section of land under the act of congress granting lands to that company to aid in the construction of its road, or whether the land still belongs to the United States. The railroad company conveyed the land to the plaintiff. The lower court, upon the stipulated facts, decided the title to the land was in the plaintiff as the grantee of the railroad company, and rendered judgment accordingly, and thereupon the city sued out this writ of error. The proceedings to condemn to the city's use for the purposes of a reservoir the $\frac{15}{100}$ of an acre were taken upon the petition of the city, and for its benefit, and it paid the damages assessed, and the costs of the proceedings, and is not here complaining of those proceedings, and assigns no error upon them. The sole error assigned and counted upon is that the court erred in refusing to instruct the jury as matter of law that the land in dispute was public land of the United States.

B. H. Jones, for plaintiff in error.

Lindsay R. Rogers and John M. Zane, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ROGERS, District Judge.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There were in the end two distinct suits in the court below,—one, the original action of ejectment brought by the Toltec Ranch Company against Brigham City to recover the possession of 160 acres of land; and the other an action brought by Brigham City, by a cross complaint, against the Toltec Ranch Company, to condemn to the use of the city for a public use $\frac{15}{100}$ of an acre of the 160 acres.

The suit on the cross complaint filed by Brigham City for the condemnation of the $\frac{15}{100}$ of an acre was proceeded with, and resulted in the condemnation of the $\frac{15}{100}$ of an acre to the use of the city, as prayed for in its cross complaint. The damages for the land so condemned were assessed at the nominal sum of one dollar. This sum, together with the cost of that proceeding, the city paid. Neither party excepted to any action taken in the condemnation proceedings, nor has either party appealed from the judgment in that suit, so that the condemnation proceedings and judgment rendered therein are final and conclusive upon both parties. When the city, by its cross complaint, acquired all the land it asked for, and expressly disclaimed ownership of the remainder, it ceased to have any interest in the controversy, and, having no interest in the subject-matter in dispute, it cannot prosecute this writ of error. It is a fundamental principle that no one can prosecute a suit who has no interest, either individually or in a representative capacity, in the subject-matter in dispute. Those only can appeal whose interests are affected by the judgment or decree appealed from. *Idley v. Bowen*, 11 Wend. 227; *Elliott*, App. Proc. § 150 et seq.; *McGregor v. Pearson*, 51 Wis. 122, 8 N. W. 118; *Cuyler v. Moreland*, 6 Paige, 273.

There are many decisions of the supreme court of the United States illustrating the operation of this rule. We cite two of them: Where a shareholder in a national bank, who owed no debts to be deducted from the assessed valuation of his shares, sought to attack the constitutional validity of the state statute, because it made no provision for deducting such debts, the supreme court said:

"What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of congress in a case where he has no rights to protect? Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?" *Supervisors v. Stanley*, 105 U. S. 305, 311, 26 L. Ed. 1044.

Another—a recent—case in that court (*Clark v. Kansas City* [opinion handed down Jan. 15, 1900] 20 Sup. Ct. 284, Adv. S. U. S. 284, 44 L. Ed. —) also illustrates the rule. In that case the validity of a state statute was assailed because it discriminated, as was alleged, between the owners of agricultural lands by excepting such lands from its operation when owned by individuals, and including them within its operation when owned by corporations. The corporation which assailed the constitutionality of the act owned no agricultural lands to be affected by it, and the court said:

"Of the discrimination between owners of agricultural lands, the supreme court of Kansas said the defendants in error (plaintiffs here) cannot be heard to complain. Their lands are not agricultural lands; at least, they do not allege them to be such lands, but, on the contrary, allege that parts of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands, held and possessed for railroad purposes. Owning no agricultural land, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kind

of land, and they cannot, therefore, be heard to complain on that score. A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.' Cooley, Const. Lim. (6th Ed.) 196; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044. We concur in this view, and it would be difficult to add anything to its expression."

When the defendant in an action of ejectment disclaims having any right or title to the land or to its possession, and judgment is thereupon rendered for the plaintiff, the defendant will not be permitted to carry on the litigation for the purpose of showing that some third person, not a party to the suit, has a better title than the plaintiff. The defendant in such case stands in no better position than any other stranger to the controversy. And manifestly, if one should apply to the court to be admitted as a defendant in such an action, stating in his application that he had himself no interest whatever in the land, but that he desired the court to determine for his own and others' satisfaction the relative merits of the plaintiff's title and the title of some third person, not a party to the suit, his application would be denied. If a court should take jurisdiction in such a case, and render judgment, the absent party would not be bound thereby. If this court should assume jurisdiction of this case, and undertake to determine whether the Toltec Ranch Company or the United States was the owner of the land in controversy, the United States would not be bound by its judgment, because it is not a party to the suit.

In the brief of counsel for the plaintiff in error it is said: "The plaintiff in error claims that the land in dispute is, and was at all times in complaint mentioned, public land of the United States;" and "the court erred in its refusing to instruct the jury, as a matter of law, that the land in dispute was public land of the United States." It will thus be seen that the plaintiff in error makes no pretense of claiming any right, title, or interest in the land, but simply invites the court to determine whether the land belongs to the plaintiff below or to the United States, for what reason is not disclosed. But courts are created for the purpose of deciding real controversies between parties having, or claiming to have, adverse interests in the subject-matter in suit, and not for the purpose of determining speculative, abstract, or theoretical questions merely to gratify the curiosity of one having no legal right or interest to be affected by the decision. The writ of error is dismissed."

SANBORN, Circuit Judge. I concur in the result in this case, because the record discloses the following facts: To a complaint for the recovery of the possession of 160 acres of land, Brigham City answered that the plaintiff had no title to it; that the city was in possession of only about $\frac{16}{100}$ of an acre of it; that its reservoir for water and pipes were situated upon this small tract, that it claimed no right or title to any other portion of the quarter section, but that it was a municipal corporation; that it was using the reservoir and pipes for the purpose of storing and conveying water to its inhabitants; and it prayed that, if the Toltec Ranch Company was the owner of the land upon which the reservoir and pipes stood, this land

might be condemned for its use. The latter portion of the answer, in which the city sought the condemnation of this small tract of land, was the only cross complaint in the case. Upon the complaint in ejectment and upon this answer the case was tried to a jury, which found that the damage for the condemnation of the $\frac{15}{100}$ of an acre for the use of the city was one dollar. Thereupon, upon the pleadings which have been recited and this verdict of the jury, the court rendered a judgment on January 9, 1899, that the Toltec Ranch Company was entitled to and should recover from Brigham City the possession of the entire 160 acres and \$107.50 costs. If the city had stopped here, and sued out its writ of error to reverse this judgment, it would undoubtedly have been entitled to a hearing and decision upon the questions presented by the alleged errors in the trial of this case. It did not do so. After this judgment was rendered, it paid the \$107.50 costs adjudged against it, and the \$1 damages assessed by the jury for the taking of the $\frac{15}{100}$ of an acre upon which its reservoir and pipes were situated, and then, by its own motion, caused the court to enter on February 20, 1899, a judgment of condemnation of this tract for its use upon the very verdict upon which the prior judgment of January 9, 1899, was based. The city's application for the judgment of condemnation under this verdict was necessarily a concession that the title to the land condemned was in the ranch company, because it was upon that theory alone that such a judgment could be lawfully rendered in this case. The result is that the city has of its own motion accepted and received the benefits of the trial, verdict, and judgments in this case, and has thereby secured and paid for all the rights it ever claimed in the premises, so that it cannot now be heard to attack any of the proceedings in the case.

When the verdict had been rendered, and the court had entered judgment against it for the possession of the entire 160 acres, the city had the option to refrain from conceding the validity of that adjudication, from paying the costs under it and the dollar assessed by the verdict as damages for the taking of the small tract which it sought to hold, and to sue out a writ of error to reverse that judgment, or to concede its correctness, take advantage of the verdict, pay the costs and damages, and procure the right to the property it sought by condemnation under the verdict. It chose the latter alternative. It took the benefit of the condemnation offered to it by the verdict of the jury and the judgment of the court, and it is now too late for it to escape from the conclusions reached, or the burdens imposed thereby. One who accepts the benefits of a verdict, decree, or judgment is thereby estopped from reviewing it or from escaping from its burdens. *Albright v. Oyster*, 19 U. S. App. 651, 9 C. C. A. 173, 60 Fed. 644; *Chase v. Driver*, 34 C. C. A. 668, 674, 92 Fed. 780, 786.

BLACKFORD v. WESTCHESTER FIRE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1900.)

No. 1,314.

ASSIGNMENT—VALIDITY—PERSONS ENTITLED TO ATTACK.

The validity of an assignment of a chose in action cannot be attacked by the debtor in an action thereon by the assignee on the ground that it was in fact an assignment for the benefit of creditors, and void, as such, because of a failure to comply with statutory requirements, as, conceding the facts alleged to be true, the assignment is voidable only, and subject to attack only by creditors of the assignor.

In Error to the United States Court of Appeals in the Indian Territory.

On the 14th day of February, 1893, the Westchester Fire Insurance Company, the defendant in error, issued to Mrs. M. G. Dane a policy insuring her storehouse and office fixtures from loss by fire in the sum of \$133, and her stock of goods in the storehouse in the sum of \$600. On the 15th day of April, 1893, the property insured was destroyed by fire. On the 24th day of April, 1893, Mrs. Dane executed the following assignment of the policy to G. L. Blackford, the plaintiff in error:

"For value received I hereby transfer, assign, and set over unto G. L. Blackford, trustee, and his assigns, all my title and interest in this policy, and all advantage to be derived therefrom. Witness my hand and seal this 24th day of April, 1893.
M. G. Dane."

On the 5th day of May, 1893, Mrs. Dane executed another instrument, by which she assigned to the plaintiff in error the policy in suit, and other policies on the property burned, authorizing and directing the assignee to collect the losses on the several policies, and, after paying costs and expenses, to apply the remainder of the proceeds ratably among certain creditors therein named. The trustee brought this suit on the policy. In the trial court the defendant objected to the introduction of the assignment of the policy upon the grounds that it was, in effect, an assignment for the benefit of creditors, and that, the trustee having failed to file an inventory and give bond, and otherwise qualify as required by the statute in force in the Indian Territory governing assignments for the benefit of creditors, the assignment was void, and the trustee could not maintain this action. The trial court overruled this objection, and there was a verdict and judgment for the plaintiff. The defendant thereupon appealed the case to the United States court of appeals in the Indian Territory, which court sustained the contention of the defendant, and reversed the judgment of the trial court. Thereupon the plaintiff sued out this writ of error.

N. B. Maxey, for plaintiff in error.

William T. Hutchings, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

In the view we take of this case it is unnecessary to determine whether the assignment of the policy was in fact an assignment for the benefit of creditors, and subject to the provisions of the statute governing such assignments. Granting it was such an assignment, it would not be absolutely void, but only voidable as against the creditors of the assignor. If they see proper to waive the defects, and are willing to accept the benefits thereof, no one else can complain. This question was before this court in *Railway Co. v. Fuller*, 36 U. S.

App. 456, 72 Fed. 467, 18 C. C. A. 641, which also arose in the Indian Territory. In that case the assignee for the benefit of creditors brought his action as such assignee to recover from the railway company the value of assigned property destroyed by fire through the negligence of the railway company. The defense in that case, as in this, was that the assignment was void; but this court held that the assignment was merely voidable as against the creditors of the assignor who elected to attack it, and was valid and unimpeachable as against the assignors, their debtors, and all other creditors who did not elect to disaffirm and avoid it, and that the railway company, a debtor of the assignor, could not successfully attack it on the ground that it was voidable as to creditors. And to the same effect are *Rohrer v. Turrill*, 4 Minn. 407 (Gil. 309); *Sheridan v. Mayor, etc.*, 68 N. Y. 30; *Coe v. Hinkley*, 109 Mich. 608, 67 N. W. 915; *Marshall v. Shibley*, 11 Kan. 114; *Norton v. Kearney*, 10 Wis. 443. *Falconer v. Hunt*, 39 Ark. 68, and *Thatcher v. Franklin*, 37 Ark. 64, which are relied upon to sustain the decision of the United States court of appeals in the Indian Territory, have no application to the case at bar. In both of those cases the contest was between the assignee and creditors of the assignor or officers who represented them. As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so. Until the assignment is set aside by a court of competent jurisdiction, the assignee has the right to collect the assets assigned to him, and his quitance to a debtor who paid the money in good faith would be a complete bar to any other action by any other party. Even payments to beneficiaries made by an assignee under an assignment which is thereafter set aside as fraudulent will entitle him to credit therefor, and he will not be compelled to account a second time for money so paid. *Riggs v. Murray*, 2 Johns. Ch. 565; *Cullumb v. Read*, 24 N. Y. 505, 515; *Hunt v. Weiner*, 39 Ark. 70, 77. The judgment of the United States court of appeals in the Indian Territory is reversed, and that of the United States court for the Northern district of the Indian Territory in favor of the plaintiff in error affirmed.

ALEXANDER et al. v. GORDON et al.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1900.)

No. 1,254.

1. EJECTMENT—EVIDENCE—ARKANSAS STATUTE.

The statute of Arkansas (Sand. & H. Dig. 1894, §§ 2578-2580) requiring each party in an action of ejectment to file with his pleading copies of all deeds or other written instruments of title on which he relies, and providing that the adverse party shall by his pleading except to any of such documentary evidence to which he may wish to object, which exceptions shall be passed on by the court, and that all objections not so taken shall be waived, prescribes a statutory rule of evidence, which will be enforced by the federal courts in the state; and a party who, after filing exceptions to a deed or other document set out by his adversary, withdraws the same, waives any right to object to such document on the trial.

2. LIMITATION—EXTENSION BY PRIOR SUIT—IDENTITY OF SUITS.

Under Sand. & H. Dig. Ark. 1894, § 4841, which provides that when an action is commenced within the time limited by the statute of limitations, in which the plaintiff suffers a nonsuit, etc., he may commence a new action within one year thereafter, the record in an equity suit to recover possession of land, which was dismissed without prejudice, is admissible to avoid the bar of limitation in an action of ejectment for the same land commenced within a year thereafter by the same plaintiffs, claiming in the same right, and against the successors in interest of the former defendant.

3. TAX SALE—SUIT TO RECOVER PROPERTY SOLD—SPECIAL STATUTORY LIMITATION.

Sand. & H. Dig. Ark. 1894, § 4819, which provides that no action for the recovery of lands sold for taxes, or for possession thereof, shall be maintained unless it appears that the plaintiff or his predecessor in title was seised or possessed of such lands within two years next preceding the commencement of such action, while it may be given effect to protect the title of a tax purchaser from attack on account of mere irregularities in the proceedings upon which it rests, cannot operate to deprive an owner of his lands, or the right to recover possession thereof, because they have for two years been in possession of a purchaser at a tax sale, which appears on the face of the proceedings to be void, because the officer who made it, by reason of the failure to record with the county clerk the list of lands and notice of sale, which is made by the statute a condition precedent to the power of sale, was without jurisdiction or authority to effect such sale, and because it was made for taxes levied in excess of the limit prescribed by law. Such construction would make it an arbitrary enactment depriving an owner of his property without due process of law.

4. LIMITATIONS—SPECIAL STATUTE—RECOVERY OF PROPERTY SOLD AT JUDICIAL SALE.

Sand. & H. Dig. Ark. 1894, § 4818, providing that all actions against the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter, cannot be invoked to sustain the title to land acquired under a judicial sale in a partition suit between strangers to the true title, as against the real owner, who was not a party to such suit.

5. SAME—POSSESSION.

Under such statute the possession of the premises is not an element in the limitation prescribed, which runs from the date of the sale, regardless of possession.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

On April 22, 1896, the defendants in error, John T. Gordon, Hattie Gordon Ralston, Malcomb Musgrave, and Julia M. Sargent, brought an action of ejectment against William N. Young for the possession of the W. $\frac{1}{2}$ of section 11, township 2 S., of range 9 W., in Lonoke county, in the state of Arkansas. They alleged in their complaint that this land was granted by the United States to the state of Arkansas, and by the state of Arkansas to Theron Brownfield; that Brownfield sold the land to James G. Gordon on April 24, 1854, and conveyed it by his deed on February 7, 1857, to the legal heirs of said Gordon; that the plaintiffs were his legal heirs; that he had died before said deed was made, and by his last will and testament had devised all his property to the plaintiffs; that on July 7, 1891, they commenced a suit on the equity side of the court against Young's grantor to quiet their title, and to procure possession of the land here in controversy; and that on the 11th day of February, 1896, such suit was dismissed without prejudice to the maintenance of another action. They also allege that defendant Young was in the unlawful possession of the premises. They attached as exhibits to their complaint copies of the grants of the land from the state of Arkansas to Brownfield, of the deed from Brownfield to the executor and heirs of James

G. Gordon, and of the will, and the probate of the will, of Gordon. The defendant Young answered that the plaintiffs were not owners of the land; that his (the defendant's) possession was lawful; that in March, 1868, one W. J. Rogers bought the land in the name of his brother P. V. Rogers for the taxes of 1867, and obtained a certificate of purchase, which was lost, and that for this reason no deed for the tax sale was executed; that Rogers conveyed the land to one Doughtry; that Doughtry conveyed it to England; that England and Rogers conveyed to M. P. S. Boyd, as administrator of the estate of Emily Rogers; that in a certain suit in partition pending in the Lonoke circuit court, in which M. P. S. Boyd and others were plaintiffs and James Blanton and others were defendants, on the 11th day of January, 1883, it was decreed that said lands should be sold; that at the sale under the decree W. F. Jackson purchased the lands on December 12, 1883, and received a commissioner's deed therefor; that Jackson mortgaged the land to the defendant Young, who foreclosed the mortgage in due form. The defendant attached to his answer copies of the record of the tax sale of this land to Rogers in 1868, referred to in his complaint; of the deed from Rogers to Doughtry; of the deed from Doughtry to England; of the deed of England and Rogers to Boyd, as administrator; of the decree in partition, which disclosed the fact that neither the plaintiffs nor any of their grantors were parties to that decree, or to the suit in which it was rendered; of the commissioner's deed to Jackson; and of the decree and deed of the commissioner to Young upon the foreclosure of the Jackson mortgage. On September 20, 1897, the defendants in error filed a petition which alleged that since the making of the answer the defendant Young had died intestate; that Charles N. Alexander had been appointed administrator of his estate; that his surviving heirs were his minor children, Maggie Young, Futey Young, Roger Young, Leta Young, Harold Young, and Ruth Young; that Charles N. Alexander was their legal guardian, —and prayed that the suit might be revived against the administrator and against the minor children and their guardian. An order of revivor was made, and thereafter the plaintiff in error Charles N. Alexander, as administrator of the estate of W. N. Young, deceased, appeared in this suit, and answered that he was the administrator, and was in possession of the lands in controversy; that the answer of the decedent was true; and that he adopted the same. He then proceeded to allege in detail the various proceedings from the assessment to the sale upon which the tax sale of 1868 to Rogers was based, and alleged that he, as the administrator, held the lands, and that the heirs of Young owned them in fee under said tax sale and the mesne conveyances set out in the answer of their decedent. For a further answer, he pleaded that those under whom he and the heirs of Young claimed the property had paid the taxes thereon from 1868 to 1898, inclusive, and that they had made improvements upon the premises of the value of \$9,500. He also alleged that he was the legal guardian of the minor heirs of the decedent, Young, and that as such guardian he entered his appearance, and, for his wards, adopted the answer of the decedent as amended by his answer. D. E. Bradshaw, one of the attorneys for the plaintiffs in error, was appointed attorney ad litem for the minor heirs, and filed a report in the court below, in which he alleged that he had seen personally one of the minors, and had addressed letters to the others, informing them of the nature and pendency of the suit, and had consulted with Charles N. Alexander, and was informed and believed that Alexander had put in a defense for the minor children. Upon these pleadings the case was tried to a jury, and the result was a verdict and judgment that the defendants in error should recover the possession of the land, and that the plaintiffs in error should recover the sum of \$3,500 for the improvements on the land, the taxes paid thereon, and the interest on the amount so paid, and for the costs incident to this recovery. The administrator and the heirs of Young sued out a writ of error to reverse this judgment. The alleged errors which they assign are considered in the opinion.

Sam W. Williams and D. E. Bradshaw, for plaintiffs in error.

P. C. Dooley and Jacob Trieber, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

1. The first two errors assigned are that the court received in evidence the deed of Theron Brownfield to the executor and heirs of James G. Gordon, deceased, dated on February 7, 1857, a copy of which was attached to the complaint, and that it received in evidence a copy of the will of James G. Gordon, deceased, and of its probate, which was a duplicate of one of the exhibits attached to the complaint. These specifications of error are untenable under the statutes of Arkansas relative to pleadings and evidence in actions of ejectment. Those statutes provide that the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies, and shall file copies of the same as exhibits therewith, and that the defendant shall plead in the same manner. They require the defendant in his answer to set forth exceptions to any of said documentary evidence relied on by the plaintiff to which he may wish to object, and they impose the same duty upon the plaintiff regarding the documentary evidence disclosed by the defendant. They provide that all such exceptions shall be passed on by the court, and shall be sustained or overruled as the law may require, and they expressly declare that "all objections to such evidences not specifically pointed out in the manner provided shall be waived." Sand. & H. Dig. Ark. 1894, §§ 2578-2580. The original defendant, Young, filed an exception to the deed of Brownfield, but not to the will or its probate. Before the trial, however, the plaintiffs in error withdrew all their exceptions to the documentary evidence of the plaintiff, and in this state of the record the case proceeded to trial. The purpose of the statutory provisions to which we have referred is to prevent surprise, and to enable parties to correct immaterial defects in their evidences of title before they enter upon the trial. The object is a worthy one, and the provisions to attain it are wise and salutary, and should be enforced. The plaintiffs in error waived all objections to the receipt in evidence of the deed and the will by their withdrawal of their exceptions to them before the trial, and their specifications of error in that regard are futile.

2. The next complaint is that the court received in evidence the record of the suit in chancery between James G. Gordon and W. F. Jackson to settle the title to the land in controversy, and place the possession of it in Gordon, which was commenced on the 7th of July, 1891, and was dismissed on the 15th day of February, 1896, over the objection of the plaintiffs in error that it was not a possessory action, and did not stop the statute of limitations from running. Defendants in error claimed the title and the possession of the property under the complainant in that suit, and the plaintiffs in error claimed them under the defendant in that suit. One of the provisions of the statutes of limitations of the state of Arkansas is:

"If any action shall be commenced within the time respectively proscribed in this act and the plaintiff therein suffer a nonsuit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on appeal or writ of error, such plaintiff may commence a new action within one year after such nonsuit suffered or judgment arrested or reversed.

* * * And if the cause of such action survive to his heirs or survive to his executors or administrators they may in like manner commence a new action or take out a mandate within the time allowed such plaintiff." Sand. & H. Dig. Ark. 1894, § 4841.

The record of the suit in equity was introduced in evidence by the defendants in error, under this section of the statutes, to avoid the bar of limitation; and no argument can make it clearer that it had that effect than does the statement of the facts and of the law which has already been made. The suit in equity was between parties claiming in the same right as the parties to this action. It was, among other things, for the recovery of the possession of the same land. By the plain terms of the statute, it prevented the bar of limitation when these defendants in error commenced their new action within a year from its dismissal. *Bank v. Magness*, 11 Ark. 344; *Biscoe v. Madden*, 17 Ark. 533; *Walker v. Peay*, 22 Ark. 103; *Railway Co. v. Manees*, 49 Ark. 246, 4 S. W. 778; *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. Ed. 262.

3. It is insisted that the court erred because it refused to hold that the defendants in error were barred from the maintenance of this suit by the fact that they were not seised or possessed of the lands within two years next before the commencement of the suit in equity, on July 7, 1891. This contention is based upon the fact that the evidence tended to show that the plaintiffs in error and their ancestor Young, under whom they claimed, were in the actual and notorious possession of this land from January, 1887, until this suit was brought, and that the statutes of Arkansas provide:

"No action for the recovery of any lands or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector or commissioner of state lands for the non-payment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for the non-payment of taxes, or who may hold such lands under a donation deed from the state, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the lands in question within two years next before the commencement of such suit or action." Sand. & H. Dig. Ark. 1894, § 4819.

The plaintiffs in error were in possession of this land, and were holding it by virtue of the sale of 1868 for the nonpayment of taxes, for more than two years before the suit of 1891 was commenced. They therefore fall within the literal terms of the statute of limitations which has been quoted. An examination of the proceedings which resulted in the tax sale, however, discloses the facts that no deed had ever been issued upon the sale; that the sale itself was not only irregular, but void, because it was made for the collection of a tax in excess of the amount which the county court was authorized by the statutes to levy, and because the officer who made the sale was without jurisdiction or authority to effect it. The levy of a higher rate of taxes than that allowed by law vitiates the sale. *Worthen v. Badgett*, 32 Ark. 496; *Cope v. Collins*, 37 Ark. 649; *Parr v. Matthews*, 50 Ark. 390, 8 S. W. 22. Section 117, c. 148, *Gould's Dig. Ark. 1858*, under which this sale was made, provides:

"The collector shall before the day of the sale mentioned in said notice cause to be recorded in the office of the clerk of the county court in a book to be by him provided and kept for that purpose such list and notice [the list of property proposed to be sold and the notice of the sale] and such clerk shall make the record from the list and notice published in the newspaper and shall certify at the foot of the record the name of said newspaper and the length of time such list and notice was published before the day of sale, which record shall be evidence of the facts therein stated."

No such record was made before the day of sale. The statute made the record of this notice a condition precedent to the vesting of the power in the collector to effect the sale. Without a compliance with this condition, he had neither power nor jurisdiction to sell this land. The pretended sale which he made was therefore made without authority, and was void. *Martin v. Barbour* (C. C.) 34 Fed. 701, 705, 707; *Id.*, 140 U. S. 634, 646, 647, 11 Sup. Ct. 944, 35 L. Ed. 546.

The real question here is, therefore, whether or not one who holds the possession of land for two years, under a sale which is clearly void upon the face of the proceedings which evidence it, may thereby deprive the owner of the land of his title to it, under this statute, without a trial, hearing, or notice. Our attention has been called to a dictum of the supreme court of Arkansas, found in *Woolfork v. Buckner*, 60 Ark. 163, 167, 29 S. W. 372, which declares that this is the effect of the two-years statute of limitation under consideration. This declaration was, however, unnecessary to the determination of the questions presented in that case, and it seems to be contrary to sound principles of jurisprudence and of construction. The constitution of the United States and the constitution of the state of Arkansas contain the basic principle of English jurisprudence,—that no person shall be deprived of his life, liberty, or property without due process of law. Const. U. S. Amend. art. 14; Const. Ark. art. 2, § 21. Chancellor Kent says, "The better and larger definition of 'due process of law' is that it means law in its regular administration through courts of justice." 2 Kent, Comm. 13. While it is difficult and unwise to undertake to accurately define the term, it is certain that "due process" must be a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case, and just to the party affected. It must give to the parties affected an opportunity to be heard respecting the justice of the disposition of the property whose title it seeks to divest. It is plain that the mere fiat of a legislature that the property of A. shall become the property of B. falls within the ban of the constitutional provision. It is undoubtedly competent for the legislative department to enact reasonable statutes of limitation, to provide that the adverse possession of lands for a reasonable time under a tax or judicial sale shall cure the mere irregularities in the proceedings upon which it rests. But a provision that the possession of land for the limited term of two years under a purchase at a tax sale which clearly appeared upon its face to be void because the officer who made it had no jurisdiction or authority to effect it, and because it was made for taxes levied in excess of the limit prescribed by the law, is not process of law, but is a mere legislative fiat, and in violation of the funda-

mental principle of our jurisprudence. If this was the purpose and intent of the legislature of Arkansas in the passage of this act of limitation, the law could not be sustained. It may, and perhaps does, have a more limited operation. It may serve the purpose, after the tax purchaser has had possession of the property for two years under a sale made by an officer having jurisdiction and authority to make it for the collection of taxes legally levied, to bar the former owner from recovering his property on account of mere irregularities in the proceedings upon which the sale is based. This is the effect given to this statute by the supreme court of the United States in the case of *Redfield v. Parks*, 132 U. S. 239, 241-252, 10 Sup. Ct. 83, 33 L. Ed. 327. It is the effect given to a somewhat similar statute, limiting to two years an attack upon a tax sale, by the supreme court of Arkansas in *Radcliffe v. Scruggs*, 46 Ark. 96, 106. That court there approved the principle upon which we rest the decision in this case. It said:

"Neither the validity nor the construction of this statute has been settled by previous decisions of this court, further than that it does not operate to deprive the former owner of any meritorious defense. And by 'meritorious defense' we mean any act or omission of the revenue officers in violation of the law, and prejudicial to his rights or interests, as well as those jurisdictional and fundamental defects which affect the power to levy the tax, or to sell for its nonpayment. But, while the act cannot have the free course that its framers intended, it is still our duty to give it such effect as may be consistent with legal and constitutional principles. And this may be best accomplished by restricting the operation to mere irregularities or informalities on the part of the officers having some duty to perform in relation to the assessment, levy of taxes, or sale. Our legislation and previous decisions have always distinguished between this class of defects, which have no tendency to injuriously affect the taxpayer, and substantial defects, such as go to the jurisdiction of the levying court, to levy a particular tax, or to the power of the officer to sell for nonpayment, or the omission of any legal duty which is calculated to prejudice the landowner."

Our conclusion is that two years of possession of land by a purchaser at a tax sale which appears on the face of the proceedings to be void, because the officer who made the sale had no jurisdiction or authority to effect it, and because the levy of the tax for which it was made was contrary to law, does not deprive the owner of his title to the land, or of his right to recover possession of it, under section 4819, Sand. & H. Dig. Ark. 1894.

4. Another contention of counsel for plaintiffs in error is that this judgment should be reversed because neither this suit, nor the suit in equity which was commenced on July 7, 1891, was brought within five years after the judicial sale in the partition suit, which was made on December 12, 1883. This position is based upon the following section of the statutes of Arkansas:

"All actions against the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales shall be brought within five years after the date of such sale, and not thereafter; saving to minors and persons of unsound mind the period of three years after such disability shall have been removed." Sand. & H. Dig. Ark. 1894, § 4818.

But neither the defendants in error, nor any of those under whom they claim, were parties to the partition suit under which this sale was made. That suit was brought by parties claiming under the tax

sale against other parties claiming under the same sale, for the purpose of determining their rights against each other under that supposed title. No question of title to the property was involved or could have been tried in that suit. No notice of the suit was given to any of the real owners of the land. May the legislature of a state provide that strangers to the title to land may institute and maintain a suit between themselves, and obtain a judicial sale of the property without notice to the real owners, and thereby, or by the lapse of time thereafter, without adverse possession or notice to the owners, divest their title? The question is susceptible of but one answer. Such an act would fall under the ban of the constitutional provision which has been already considered. It would give to the parties whose title was to be divested no opportunity to be heard respecting the judgment recovered, or the effect of the proceedings had. It would be a proceeding which condemns without hearing, proceeds without inquiry, and renders judgment without trial. It would not be due process of law. If the purpose of this statute was to divest the title of the owner of land in this way, it is unconstitutional and void. It is not probable that the legislature intended to work such an injustice. The true interpretation of the statute probably is that those who claim under the parties whose rights were heard and adjudicated in a given suit may not attack the title of the purchaser under a judicial sale in that proceeding five years after the date of the sale. Such a construction avoids the constitutional difficulty, because the persons thus barred stand in privity with the parties to the suit, and have had constructive notice of, and an opportunity for a hearing and a decision of, their claims. Any broader construction renders the statute ineffectual. Laws of this character have frequently been enacted by the legislatures of the various states. They generally limit attacks upon judicial sales made in proceedings in the nature of proceedings in rem, such as guardians' sales, administrators' sales, sales in proceedings to collect taxes, and other sales of this nature, in which jurisdictional notices run against all the world, or all the persons interested in the property or in the estates. But the rule is, even in these cases, that special statutes of limitations have no application to cases in which the notices required to be given are so insufficient in themselves, or so defectively served, that no jurisdiction to take the proceedings against the parties interested is conferred. Thus, in *Pursley v. Hayes*, 22 Iowa, 11, 25, which was an attack by a ward upon a guardian's sale protected by this statute: "No person can question the validity of such sale after the lapse of five years from the time it was made,"—it was held that where one without semblance of authority acted as a guardian in making the sale, or one who was lawfully appointed guardian made the sale without any notice to the ward or pretense thereof, the purchaser could not use the statute to protect him in his title. In *Boyles v. Boyles*, 37 Iowa, 592, the heir of a deceased person attacked an administrator's sale more than five years after it was made, and the purchaser sought to sustain it under this statute: "No action for the recovery of real estate sold by an executor can be sustained by any person claiming under the deceased unless brought

within five years next after the sale." But the sale had been made without the notice required by law, and the court held that the statute had no application to cases where there was no valid sale on account of the want of the jurisdictional notice; citing *Good v. Norley*, 28 Iowa, 188. To the same effect is *Rankin v. Miller*, 43 Iowa, 11, 21. In the state of Minnesota the collection of taxes against real estate is enforced by means of the entry of a judgment in the court of general jurisdiction upon a publication of a list of the real estate, and of notice of the time and place when the application for judgment will be made. After this tax judgment is rendered, a sale of the property is made under a proper notice. The statute then provides: "The judgment and sale herein provided for shall not be set aside unless the action in which the validity of the judgment or sale shall be called into question, or the defense to any action alleging its validity, be brought within nine months of the date of said sale." Numerous cases have arisen in which the published list and notice of application for judgment failed to properly describe the real estate in controversy, and the purchaser has endeavored to sustain his title under this statute. The supreme court of Minnesota has uniformly held that it was not within the power of the legislature to declare that a mere claim of title on paper should ripen into good title as against the lawful owner of the property, and that the effect of this statute must be restricted to cases in which the jurisdictional notice was sufficient in itself and properly served. *Feller v. Clark*, 36 Minn. 338, 340, 31 N. W. 175; *Kipp v. Fernhold*, 37 Minn. 132, 134, 33 N. W. 697; *Baker v. Kelley*, 11 Minn. 480 (Gil. 358, 371); *Smith v. Kipp*, 49 Minn. 119, 125, 51 N. W. 656. If these special statutes of limitations are insufficient to sustain the title of purchasers in proceedings of this nature unless the jurisdictional notices are given to the parties interested, much less can a statute be sustained which undertakes to enable strangers to the title to land to divest it from the owner by a judicial sale in a suit between themselves without any notice to the owner of the property, or any adverse possession. It will be noticed that this statute is not in any proper sense a statute of limitation. It does not operate as the foundation of title to property in possession. By its terms it gives to the purchaser at a judicial sale in a proceeding to which the owner is not a party the absolute title to the owner's property five years thereafter although the owner may during all this time be in possession of the property, or it may be vacant and unoccupied, so that he could not maintain an action for its possession. The five years run regardless of the possession from the time of the sale. *Mitchell v. Etter*, 22 Ark. 178, 181, 183; *Keatts v. Fowler's Devisees*, Id. 483, 485, 487. The statute does not take away certain forms of remedy and leave the property right of the parties unaffected. It divests the property of the owner and vests it in the purchaser at the judicial sale five years after it is made regardless of possession and regardless of notice to the owner. It was not within the power of the legislature to produce such a result by the mere enactment of a statute. The conclusion is that section 4818, Sand. & H. Dig. Ark. 1894, cannot be invoked to sustain the title to land under a judicial sale against strangers to the judicial proceeding in which the sale was made.

5. It is assigned as error that the court below refused to instruct the jury that if the plaintiffs in error, and those under whom they claimed, had held possession of the lands under the judicial sale of 1883 for a period of five years next before July 7, 1891, they were entitled to the possession of the lands. There was no error in the refusal. Possession of the premises is not an element in the five-years limitation prescribed by the section of the statute we have been considering. The time under that statute runs from the date of the sale, regardless of possession.

6. Section 4815, Sand. & H. Dig. Ark. 1894, provides, in effect, that no person shall maintain any action at law for any lands, except within seven years next after his cause of action has accrued; and several errors are assigned relative to the charge of the court in reference to this provision of law. The evidence is, however, conclusive that there never was any possession by the plaintiffs in error, or those under whom they claim, prior to the year 1887; and this statute of limitations ceased to run on July 7, 1891, when the suit in equity for the recovery of these lands was brought by the ancestor of the defendants in error. This statute therefore had no application to the case, and there was no error in the charge of the court concerning it.

7. After the court had charged the jury, and they had retired to consider the verdict, they returned to the court room. An objection is made that the court then told them, with reference to the suit, "that there was a question of the statute of limitations at one time in it, but it was conceded not to be in it at its present status." This does not appear to be a correct statement of the claims of the parties to the suit. There is nothing in the record to show that the plaintiffs in error ever conceded that any of the statutes of limitations were not in the case. It is clear, however, from the evidence, that the plaintiffs in error could not maintain their right to the possession of the property under any of these statutes. The statement of the court was therefore error without prejudice, and no ground for reversal.

The objections to this judgment which have now been considered dispose of all of the specifications of error contained in the record. There is an extended argument in the brief of the plaintiffs in error in support of the view that this judgment should be reversed because no proper notice of the application to revive it was served upon the minor plaintiffs in error. No such objection was made in the court below. One of the attorneys for the plaintiffs in error acted as the guardian ad litem for the minors, and, if they were never properly in the case, the possession of the property was in the administrator, Alexander, and the judgment for recovery of possession against him is right, and should be affirmed. If counsel for plaintiffs in error, upon further consideration, are of the opinion that they do not represent the plaintiffs in error who are minors, and that they ought not to recover or receive any part of the \$3,500 which was awarded to their clients by the judgment in this case, they can undoubtedly find some means of escape from receiving it. The judgment is affirmed.

MASTERS v. VILLAGE OF BOWLING GREEN.

(Circuit Court, N. D. Ohio, W. D. November 18, 1899.)

MUNICIPAL CORPORATIONS—FALSE IMPRISONMENT—INVALID ORDINANCE.

Where a municipality acts in good faith, without malice, in the arrest of one charged with violating an ordinance, it is not liable in damages, although the ordinance be invalid.

E. L. Twing and James & Beverstock, for plaintiff.

T. F. Conley and F. A. Baldwin, for defendant.

RICKS, District Judge. The plaintiff sues the defendant, for that the defendant is a municipality, duly incorporated under the laws of the state of Ohio, in the United States of America. Plaintiff says that he is a resident of the state of Pennsylvania, in the United States of America; that he is agent for the firm of the Boyd Ointment Company, having its principal office and place of business in the city of Kittanning, in the state of Pennsylvania, in the United States of America, in which city and state the plaintiff is also a resident. Plaintiff says that he is engaged as an agent for said firm, in the business of distributing circulars, bills, and advertisements of, and selling and delivering, a certain medicine or salve known as "Boyd's Ointment," to various persons in the United States of America. Plaintiff says that the authorities of the village of Bowling Green caused the plaintiff to be arrested and taken before the Hon. Almer C. Campbell, mayor of said village aforesaid; that he was arrested on an affidavit made by one Davenport, and upon a pretended warrant issued by Mayor Campbell for his said arrest. Plaintiff says that after his arrest, and on the 29th day of May, 1899, the said Hon. Almer R. Campbell, as mayor of the said village of Bowling Green, as aforesaid, commanded the said Davenport, as marshal of said village, to cause this plaintiff to appear before the mayor of said city, at his office in said city, on the 29th day of May, 1899, to answer the charge set forth in said warrant. Plaintiff alleges that the ordinance under which he was arrested is an illegal ordinance, and in conflict with the constitution and laws of the United States, and especially the interstate commerce act; wherefore he claims damages from the village authorities.

The question presented is whether an action can be maintained against the authorities of a village or municipality who have acted in good faith, without malice, in the arrest and punishment of commercial travelers. A great many authorities have been cited on this proposition, but the weight of authority, it seems to me, is against plaintiff's contention. In 34 Ark. 105, in the case of Trammell v. Town of Russellville, the supreme court squarely hold that such an action cannot be maintained. The court says:

"It is a universally recognized principle that one acting judicially in a matter within the scope of his jurisdiction is not liable to an action for his conduct. Judge Cooley says: 'Whenever the state confers judicial powers upon an individual, it confers them with full immunity from private suit.' Cooley, Torts, 408. In effect, the state says to the officer that those duties are confided to his judgment; that he is to exercise his judgment fully, freely,

and without favor, and he may exercise it without fear; that his duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that, if he shall fall in the faithful discharge of them, he shall be called to account as a criminal, but that, in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the state, speaking by the mouth of the common law, says to the judicial officer."

This declaration is quoted with approval by Judge Cooley in his work on Torts. It seems, from the authorities, to make no difference whether the ordinance under which the arrest and punishment were made was valid or invalid. In this case, therefore, it is not necessary to determine whether the ordinance is valid or not. Cities and towns incur no liability to persons who may be injured by acts of their officers in the discharge of their duties in their public capacity. The opinion of the court, therefore, is that the demurrer to the petition should be sustained, and the petition dismissed.

GARRETT et al. v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. March 15, 1900.)

No. 750.

RAILROADS—FIRES SET BY SPARKS FROM ENGINE—NEGLIGENCE—BURDEN OF PROOF.

In an action against a railroad company for damages from fire alleged to have been set by sparks from defendant's locomotive, the burden is on the plaintiff to prove, not only that the fire was caused by sparks from defendant's engine, but that the emission of such sparks was due to defendant's negligence.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

C. G. Bond and J. M. Boone, for plaintiffs in error.

W. J. Lamb and F. P. Poston, for defendant in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

TAFT, Circuit Judge. This is a writ of error brought to review a judgment for the defendant, the Southern Railway Company, in a suit filed against the company by G. W. Garrett and H. E. Ray for \$20,000 damages for alleged negligence of the company resulting in the burning and destruction of the planing-mill plant and stock of lumber of the plaintiffs at Pocahontas, Tenn., on December 27, 1898. The declaration alleged that the fire which destroyed the property was caused by sparks emitted from an engine negligently constructed and operated by the defendant company on its switch track in front of the plaintiffs' mill. The cause was originally brought in the circuit court of McNairy county, Tenn., and was removed to the court below by the railway company on the ground of diverse citizenship of the parties. The defendant denied that sparks from its engine caused the accident, and further denied any negligence in the con-

struction or operation of its locomotives. The case was heard, and the jury returned a verdict for the defendant.

The sole question presented by the record for our consideration is whether the rule which the court laid down as to the burden of proof was correct. There is not in Tennessee, as there is in many other states, a statute defining the rule to be enforced as to the burden of proof in such cases. The question presented to the court below and presented here is one of common law. The court below, in effect, instructed the jury that, as the plaintiffs charged the defendant with negligence, the burden was on the plaintiffs to show the defendant's negligence by a preponderance of the evidence; that, when the plaintiffs established by such preponderance the mere fact that the fire was caused by sparks from an engine of the defendant, it still remained for him to prove that the emitting of such sparks was due to defendant's negligence; that, if the jury found as a fact that under the present approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence, then the jury would be justified in inferring as a fact, from the mere circumstance of the fire and its origin in the emission of sparks, that the fire was caused by the negligence of the defendant. The court declined to charge the jury, as matter of law, that mere proof that the fire was caused by sparks from an engine was *prima facie* evidence of the negligence of the defendant. There is great contrariety of opinion in the cases upon the question whether the mere communication of fire by sparks of an engine is *prima facie* evidence of negligence in a railway company. The question is further complicated by the fact that in many states statutes have been passed which make such evidence *prima facie* evidence of negligence. Without examining the cases, we think we may say that nearly all the earlier cases hold that the burden is upon the plaintiffs not only to show that the fire was caused by the sparks, but that the sparks were emitted through the negligence of the defendant. In later cases the effect of the state statutes, and the difficulty attending the proof of negligence, arising from the fact that the condition of the engine is a matter wholly within the knowledge and control of the defendant company, have led courts into making this an exception to the ordinary rule in cases of negligence.

The real point in controversy here is whether the art of burning coal in a locomotive, and of providing the preventives for the emission of sparks, is judicially known to the court to have reached that stage of perfection that it is improbable that a fire could be communicated except through the negligence of the railroad company either in the construction or operation of the locomotive. It is urged upon us that in the state of Tennessee, in *Burke v. Railroad Co.*, 7 Heisk. 451, and *Simpson v. Railroad Co.*, 5 Lea, 456, the law of Tennessee has been settled in favor of the contention of the plaintiffs in error here that proof of fire from sparks is *prima facie* evidence of negligence. As we have said, this question is not controlled by any statute in Tennessee, and the rules of evidence in the federal court are questions of general law, not controlled by state decisions. We think we must take as our guide in this action the intimation of the su-

preme court of the United States in the Nitroglycerin Case, 15 Wall. 524, 21 L. Ed. 206. In that case a lessor attempted to hold a lessee for damages for injuries to the building leased by the explosion of nitroglycerin while in charge of the defendants. Upon this point the court, speaking by Mr. Justice Field, held as follows:

"This action is not brought upon the covenants of the lease. It is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants. Unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant by his act, or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of. The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a prima facie case, which the carrier must overcome. His contract is shown, prima facie, at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and, if he has not, the plaintiff must prove it. Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. This principle is recognized and affirmed in a great variety of cases,—in cases where fire originating in one man's building has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running away, or by blasting rocks; and in numerous other cases which will readily occur to every one."

We think that this language indicates that the supreme court of the United States would adhere to the older and more conservative view that the mere ignition by sparks is not prima facie evidence of negligence of the railroad company as a matter of law. It may be that evidence as to the approved methods for preventing emission of dangerous sparks may justify an inference of fact that the fire could not have been thus communicated without negligence. This was the charge of the court. The jury were given permission, from the mere fact of the ignition by sparks, to infer, if they could as a matter of fact, that it was caused by negligence; but the court declined to charge them, as a matter of law, that it raised a presumption of negligence. The course of the court, we think, was well within the rule, as we understand the cases, which the supreme court of the United States has followed, and that no prejudice was done to the plaintiffs in the charge which was given. The judgment is affirmed.

In re WILDER.

(District Court, S. D. New York. April 19, 1900.)

1. BANKRUPTCY—PROOF OF DEBT—AMENDMENT.

A court of bankruptcy has power, in its discretion, to allow a creditor who has proved his claim as an unsecured debt to amend such proof by adding thereto a statement of a lien or security which he holds.

2. SAME—WHEN DENIED.

A creditor of the bankrupt, who was plaintiff in a pending suit against the bankrupt and his wife to set aside a conveyance of land to the latter,

proved his debt in the bankruptcy proceedings as an unsecured claim, but afterwards applied for leave to amend his proof by setting up his claim to an equitable lien on the real estate in controversy under a notice of lis pendens in said suit, alleging, as a reason for the application, that he might be prejudiced in his pending suit by a contention that he had waived such lien by proving his debt in bankruptcy as unsecured. *Held*, that the application should be denied.

In Bankruptcy.

Henry D. Hotchkiss, for the motion.

George W. McElroy and John J. Beattie, opposed.

BROWN, District Judge. This is a motion in behalf of James McCormick, one of the creditors of the bankrupt, to amend his proof of claim heretofore filed, by adding thereto a statement of a security in the nature of a claim to an equitable lien upon certain real estate under a notice of lis pendens in a suit pending against the bankrupt and his wife prior to the adjudication in bankruptcy, no mention of which was made in the proof of claim filed. The reason assigned for asking leave to amend is, in order that the complainant in that suit may not be embarrassed in its prosecution by the contention that the complainant had waived his lien by the filing of his claim in bankruptcy as a wholly unsecured claim. *Stewart v. Isidor*, 5 Abb. Prac. (N. S.) 68; *In re Jaycox*, 8 N. B. R. 241, Fed. Cas. No. 7,242.

There is no doubt of the power of the court to allow the amendment asked for; but in the administration of the bankruptcy law, its fundamental principle of equal distribution among creditors, seems to me to forbid the exercise of this discretionary power in the interest of one creditor to the prejudice of others, where there is no perfected lien or established security in the creditor's favor, but only a contingent and inchoate lien in the effort to secure a preference by litigation. See *In re Lesser* (C. C. A.) 99 Fed. 913. The equities of the general creditors through the trustee should be preferred.

If the omission of the creditor to disclose the existence of his suit and the lien claimed thereby, would have the effect of disabling him from obtaining a judgment for his own benefit alone, the court should not aid the creditor in securing a preference by granting the present application. If there was fraud as respects creditors in the transaction by which the real estate in question was vested in the name of the bankrupt's wife, the benefit of that transaction, under the system of the bankruptcy law, ought to inure to the trustee in bankruptcy for the benefit of all creditors alike; and the trustee is authorized to maintain that suit in behalf of all the creditors in the same manner that any judgment creditor might maintain it for his own interest. On this ground the amendment asked for should, I think, be denied. See *In re Wiener*, 14 N. B. R. 216, Fed. Cas. No. 17,620.

In re BEAUCHAMP et al.

(District Court, D. Maryland. April 9, 1900.)

No. 348.

1. BANKRUPTCY—EXEMPTIONS—FOLLOWING STATE DECISIONS.

On the question of the right of the individual members of a bankrupt firm to have set apart to them, out of the partnership assets, the exemptions allowed by the law of the state, the court of bankruptcy will follow the rule established by the decisions of the highest court of the state, if any such have been rendered.

2. SAME—PARTNERSHIP ASSETS.

In the absence of any decision of the state courts allowing partners to claim exemptions out of the firm property, *held*, that in case of the bankruptcy of a partnership, where there is partnership property, but no individual assets, the members of the firm are not entitled to have any portion of the firm property set apart to them as their individual exemptions, unless there should remain a surplus of such property after the payment of all firm debts.

In Bankruptcy.

Daniel Greenbaum and Milton D. Greenbaum, for trustee in bankruptcy.

William A. Wheatley, for bankrupts.

MORRIS, District Judge. The facts in this case, briefly stated, are these: Henry C. Beauchamp and Elizabeth Lippincott, as individuals and as partners trading as Beauchamp & Co., were adjudicated bankrupts on February 3, 1900, upon their voluntary petition. The schedules filed with their petition show partnership assets and liabilities, but no individual assets; but the bankrupts, in their petition, claim the exemption provided by the Code of Public General Laws of Maryland (article 83, § 8), out of the proceeds of sale of said partnership assets. Milton D. Greenbaum, the trustee, converted the estate into cash, and thereupon moved the court to rule that said bankrupts were not entitled to any exemption out of the partnership assets in his hands.

Article 83, § 8, of the Code of Public General Laws of Maryland, which is the act of 1861, c. 7, § 1, provides that "one hundred dollars worth of property of each defendant therein shall be exempt from execution * * * in any civil proceeding whatever"; and it is upon the language of this act that the attorney for the bankrupts relies. Though statutes allowing exemptions are liberally construed, the spirit of the act should govern; and I cannot, in the absence of an express decision by the court of appeals of Maryland construing the Maryland exemption law, extend its meaning to include partners. If the court of appeals of Maryland had decided that partners were entitled to their exemptions out of partnership property, it would be the rule of decision to be followed by this court; but in the absence of such decision the question must be determined upon precedent, principle, and weight of authority. Partnership property is a trust fund for the payment of partnership creditors, and the interest of the partners is an interest in the surplus only. The unquestioned weight of authority supports this

proposition. The partnership is dissolved immediately upon adjudication, and the individual members and their individual creditors have no claim until partnership debts are paid. In re Sauthoff, 16 N. B. R. 181, Fed. Cas. No. 12,380; In re Hughes, 16 N. B. R. 464, Fed. Cas. No. 6,842; In re Croft, 17 N. B. R. 324, Fed. Cas. No. 3,404; In re Stewart, 13 N. B. R. 295, Fed. Cas. No. 13,420; In re Corbett, 5 Sawy. 206, Fed. Cas. No. 3,220; In re Hafer, 1 N. B. R. 547, Fed. Cas. No. 5,896; In re Handlin, 12 N. B. R. 49, Fed. Cas. No. 6,018; In re Tonne, 13 N. B. R. 170, Fed. Cas. No. 14,095; In re Blodgett, 10 N. B. R. 145, Fed. Cas. No. 1,555; In re Boothroyd, 14 N. B. R. 223, Fed. Cas. No. 1,652; In re Jackson, 2 N. B. R. 508, Fed. Cas. No. 7,127; In re Smith, 2 Hughes, 307, Fed. Cas. No. 12,979; In re Melvin, 17 N. B. R. 543, Fed. Cas. No. 9,406; In re Lentz, 2 Nat. Bankr. N. 190, 97 Fed. 486; *Gilmore v. Land Co.*, Fed. Cas. No. 5,448; *Lyndon v. Gorham*, Fed. Cas. No. 8,640. In *Re Price*, 6 N. B. R. 400, Fed. Cas. No. 11,410, Judge Giles, construing a like provision of the bankrupt act of 1867 with reference to the Maryland act of 1861, c. 7, § 1, decided that an exemption cannot be allowed to an individual partner out of the partnership estate, as such exemption can only be allowed in case there is a surplus after paying partnership creditors. As this decision was rendered by my predecessor in this district, construing the same provision of the Maryland statute law now in force, I shall follow his decision, strengthened as it is by such decided weight of authority. It results that the exemption claimed out of the partnership assets in the hands of the trustee by the individuals composing the firm cannot be allowed, except out of any surplus that may remain after paying partnership creditors in full, and it is so ordered.

In re KINDT.

(District Court, S. D. Iowa, E. D. May 1, 1900.)

1. BANKRUPTCY—PREFERENCES—SALE OF PROPERTY.

The title of one who purchases property from an embarrassed debtor cannot be impeached by the latter's trustee in bankruptcy, subsequently appointed, on the ground that the purchase was made for the purpose of enabling the debtor to pay some of his creditors in preference to others, in fraud of the bankruptcy law, the proceeds having been so used, when the sale and the payments to creditors occurred more than four months before the filing of the petition in bankruptcy.

2. SAME—FRAUDULENT CONVEYANCES.

One of two partners, for an adequate consideration in cash, purchased from the other the latter's interest in certain property which had been bought with receipts of the business, and was used in connection therewith, and a release from the contract of partnership. The vendor remained in the active conduct of the business, but on a salary, and retained the possession and use of the property, no bill of sale being recorded nor other notice given of the change of title. More than four months thereafter the vendor was adjudged bankrupt. *Held*, that the purchaser's title was good as against the trustee in bankruptcy, and he was entitled to recover possession of the property.

In Bankruptcy. On review of decision of referee in bankruptcy with respect to claim of F. W. Chamberlain, intervener.

Ely & Bush, for intervener.

Isaac Petersberger, for trustee in bankruptcy.

SHIRAS, District Judge. The property in dispute in this matter consists of a piano and other stage property used in connection with the theater in Davenport, Iowa, and also some 500 feet of billboards used for advertising purposes. The intervener, F. W. Chamberlain, is the lessee of the theater building, and he made an arrangement with the bankrupt, Charles T. Kindt, by which the latter had charge of the management of the theater in question, the business being conducted in the name of Chamberlain, Kindt & Co.; Kindt being paid 50 per cent. of the net profits realized from running the theater, as compensation for his services. The piano and other property now in dispute were purchased from the gross receipts of the business, and were used in connection therewith. In March, 1899, Kindt was being pressed by creditors for payment of debts due them from him; and thereupon Chamberlain bought his interest in the property, and a release from the existing contract, for the sum of \$1,000, which amount Kindt used in paying off his more pressing debts; it being also agreed between the parties that Kindt was to continue the actual management of the business at Davenport at a salary of \$75 per month. There was no visible change made in the business in question, it continuing in the name of Chamberlain, Kindt & Co., nor was any bill of sale or other evidence of the purchase made by Chamberlain put upon record. On the 12th of December, 1899, Kindt filed his petition in bankruptcy, and in due season a trustee was appointed, who took possession of the piano and other property purchased in the March preceding by Chamberlain; and thereupon the latter intervened in the proceedings before the referee, and asked that the trustee be directed to deliver up the property to him. Upon the hearing the referee held that the trustee was entitled to hold the property, and dismissed the petition of intervener, placing this ruling upon two grounds, to wit: That no bill of sale or evidence of change of title was placed on record, the possession of the property remaining unchanged; and, second, that the intervener cannot be held to be a bona fide purchaser of the property, because the effect of the sale to him was to enable the bankrupt to effect a preference of certain creditors over others.

In the second of these conclusions, the view seems to be that the intervener could not assert a right and title to the property by him purchased from Kindt, because the purpose and effect of the sale were to enable Kindt to effect a preference of certain creditors over others, in fraud of the bankrupt act. The evidence shows that the purchase was made by the intervener, and the money by him furnished to Kindt was paid by the latter to his creditors, fully nine months before Kindt filed his petition in bankruptcy; and therefore the payments made to the creditors cannot be recovered back from them, because the petition in bankruptcy was not filed within four months after the payments were made. If Kindt had transferred the property directly to the creditors in payment of their claims, the trustee could not now recover back the property from them, owing to the lapse of time, and

it would be a curious anomaly to hold that the intervener who bought and paid for the property has not a title thereto, simply because the money realized therefrom was used in making payments to creditors, which payments cannot be invalidated on the theory that they amounted to preferences. There is nothing in the evidence from which it can be rightfully inferred that, in making the purchase of the property, it was expected that Kindt would become a bankrupt.

The preferences upon which reliance is placed were created by the payment of the \$1,000 received by Kindt to certain of his creditors, and, as the lapse of time has placed these payments beyond attack by the trustee on the ground that they were preferences, it must be equally true that it is not open to the trustee to question the title to the property bought by the intervener, on the theory that the intervener aided in making these preferential payments. It is not claimed that the intervener did not pay full value for the property, and therefore there is no ground for holding that the sale to the intervener was invalid, unless it be upon the theory that the property was left in possession of the bankrupt without recording a bill of sale, or otherwise giving notice of the change of title. The evidence shows beyond question that the property never was the sole property of the bankrupt. He acquired an interest therein by reason of his association in business with the intervener under the name of Chamberlain, Kindt & Co. Even if it should be true that, against the creditors of Kindt, the sale of Kindt's interest is invalid, that would not transfer the property into the individual ownership of Kindt.

So far as the control of this property is concerned, it must be held, if it is not the individual property of intervener, then it was the partnership property of Chamberlain, Kindt & Co., and therefore it could not pass into the possession of the trustee of Kindt except by consent of Chamberlain; it being expressly declared, in section 5 of the bankrupt act, that, in the event of one or more, but not all, the partners being adjudged to be bankrupt, the partnership property shall not be administered in bankruptcy. Neither does it seem to be a case for the application of the rule requiring a record of a bill of sale or other evidence of change of title, in cases wherein the possession of the property is left in the hands of the vendor. If Chamberlain, Kindt & Co. had sold the property to a third party, retaining possession, then the provisions of section 2906 of the Code of Iowa might be invoked for the protection of the creditors of Chamberlain, Kindt & Co.; but I see no ground for holding that the creditors of Charles T. Kindt are entitled to the possession of the property, under the facts of this case. As already stated, the piano and other property were used in the theater building of which the intervener was the lessee, and the management of the business was under the name of Chamberlain, Kindt & Co. The property never was in the individual possession of Kindt, in such sense that third parties would be justified in dealing with him on the assumption that he was the owner of this property, and the case comes within the rule laid down by the supreme court of Iowa in *Thomas v. Hillhouse*, 17 Iowa, 67, *Case v. Burrows*, 54 Iowa, 679, 7 N. W. 130, and *Campbell v. Hamilton*, 63 Iowa, 293, 19 N. W. 220, wherein it is held that the statute does not

require the recording of a bill of sale if the property is in possession of a third party. These cases recognized the rule to be that a change of possession, or the recording of a bill of sale in lieu thereof, is only necessary in cases wherein the absence thereof would justify third parties in assuming that the property actually belonged to the vendor. The situation of the property in this case was not such, at any time, as to justify third parties in assuming that it belonged to the bankrupt, but the situation was such as to charge third parties with notice of the fact that the intervener had an interest therein, and there is nothing shown in the evidence that justifies the finding that any person dealt with Kindt on the assumption that he was the owner of the property. The ruling of the referee is therefore reversed, and the record is returned to the referee, with instructions to enter an order directing the trustee to deliver up possession of the property to the intervener.

In re DREEBEN.

(District Court, N. D. Texas. April 13, 1900.)

No. 170.

BANKRUPTCY—ATTORNEY'S FEE.

Where the attorney of a voluntary bankrupt files his claim for fees for professional services rendered to the bankrupt, but the referee is not satisfied with the evidence introduced by the attorney as to the amount which should be allowed, he has power to suspend action on such claim for a reasonable length of time, in order to procure the testimony of the bankrupt in relation thereto; but if it is then impossible to secure such evidence, in consequence of the bankrupt having left the jurisdiction, the referee should decide the question upon such evidence as is before him.

In Bankruptcy. On question certified by referee in bankruptcy.

Israel Dreeben and John Church, for the bankrupt.

MEEK, District Judge. Upon the application of Israel Dreeben, Esq., and John Church, Esq., who have presented a claim against the bankrupt estate of Louis I. Dreeben, the following question is certified by Eugene Marshall, Esq., referee in bankruptcy, for my opinion thereon:

"Whether I, as referee in bankruptcy, had the right to suspend the claim of said Israel Dreeben and John Church for attorney's fees until the testimony of Louis I. Dreeben, the bankrupt, could be taken in relation to said claim?"

From the record before me, it appears that Israel Dreeben and John Church were the attorneys for Louis I. Dreeben, the bankrupt. They prepared his petition in voluntary bankruptcy and his schedules, and performed other services usual and necessary to be performed for a voluntary bankrupt who brings a fund into court with him for distribution among his creditors. The creditors in due course made application to the referee to require Louis I. Dreeben, the bankrupt, to be examined. The examination was ordered, and the bankrupt's testimony was taken, but he absconded and left the territorial jurisdiction of the court before his testimony was written out and signed by him. Subsequently his attorneys presented their claim to the

referee for allowance. The referee, after taking the testimony of the attorneys in relation to the services they had performed for the bankrupt, was not fully satisfied, and entered his order to the effect that the claim of these attorneys be suspended until the testimony of the bankrupt could be taken in relation thereto, and it is of this action of the referee that the attorneys complain. I am of the opinion that the referee, not being satisfied with the evidence introduced before him relative to the reasonableness of the claim of the attorney's fees, had the right to suspend action on said claim for a reasonable time in which to secure the testimony of the bankrupt himself in relation thereto. In event, however, it should appear that it is impossible to secure the testimony of the bankrupt upon the question, I think it would be the duty of the referee to pass upon the claim, in view of the evidence in relation to it which is now before him. Those who have claims are, by the terms of the bankruptcy act, limited to a specific time within which to prove them up, and it would not be fair to the claimants to withhold action on their claims until the time provided by statute in which claims can be proven up had fully expired. The referee is directed to proceed in accordance with the views herein expressed. The costs incurred by reason of the certification of this question to the judge for his review should be paid out of the funds belonging to the estate of the bankrupt.

UNITED STATES v. MORRIS EUROPEAN & AMERICAN EXP. CO.,
Limited.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 84.

CUSTOMS DUTIES—CLASSIFICATION—STATUARY.

Carved figures or statues in wood, made by a professional statuary or sculptor from designs made by another professional statuary or sculptor, shown by full-sized drawings, in the making of which statues it was necessary to first model them in clay, and then take a plaster cast, from which the work in wood was done, are "statuary," entitled to free entry, under paragraph 575 in the free list of the tariff act of 1894, and are not dutiable as manufactures of wood, under paragraph 181.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York (94 Fed. 643), reversing a decision of the board of general appraisers which affirmed a decision of the collector of the port of New York touching the classification for duty of certain merchandise imported under the tariff act of 1894.

Henry C. Platt, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The articles in question are two carved or sculptured figures in oak wood, about 3½ feet in height, representing adoring angels of conventional design, produced in

France from drawings executed in this country. The collector assessed them for duty under paragraph 181, which reads:

"House or cabinet furniture of wood, wholly or partly finished, manufactures of wood or of which wood is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem."

The importer protested, claiming that its importation came within the provisions of paragraph 575:

"Paintings in oil or water colors, original drawings and sketches, and artists' proofs of etchings and engravings, and statuary not otherwise provided for in this act, but the term 'statuary' as herein used, shall be understood to include only professional productions, whether round or in relief, in marble, stone, alabaster, wood or metal, of a statuary or sculptor," etc.

The extremely meager record in this cause, read in connection with the decisions of the supreme court, seems to make but one conclusion possible. Uncontradicted testimony shows that, in order to make these statues from the design shown in the full-sized drawings which were sent over, a clay model has first to be made; then the clay model is transferred into plaster, so that it will be permanent; and then, from the plaster, the actual finished work in wood is carried on. We know of no reason for holding that the embodying of a conception in the clay model is not the "professional production" of a statuary or sculptor. Certainly there is no testimony warranting such holding. And it is undisputed that the completed statue remains the artist's production, although nearly all the work of removing the superfluous material of the original block be done by others under his direction. It might be contended that a completed statue could fairly be regarded as the professional product of the statuary or sculptor only when the design which it embodied was his own conception. We should be inclined to that conclusion were it not for the fact that the supreme court in *Tutton v. Viti*, 108 U. S. 312, 2 Sup. Ct. 687, 27 L. Ed. 737, held that there was nothing in the acts of congress to limit the professional productions of a statuary or sculptor to those executed by him from models of his own creation, and that it is sufficient if the original is the work of another artist. *Merritt v. Tiffany*, 132 U. S. 167, 10 Sup. Ct. 52, 33 L. Ed. 299. The declaration of the sculptor annexed to the invoice and sworn to before the consular agent states that the articles in controversy were executed by him, and were "professional productions" of his, and that he is "a sculptor or statuary by profession"; but, in addition to this declaration, which by itself would, perhaps, be entitled to little weight, there is the evidence of a witness examined before the board who testified that L. Marquis, the statuary in question, is a "well-known man in France, * * * a most prominent sculptor"; that "he exhibits at the various exhibitions, and in the spring of 1897 was represented at the Paris Salon." This is uncontradicted. The same witness, who conceived the original design, and represented it in the full-sized drawing which was sent to Marquis, testified that he himself was an architect, and sculptor, and painter, having been engaged in those professions for seventeen years; that he has been president of the Art Students' League for two years, vice president of the Architectural League for three years, and, at the time he testified, second vice presi-

dent of the Sculptors' Society. In the absence of anything to contradict this testimony, we cannot disregard it, and see no reason for rejecting the conclusion that the conception or design was the work of one "statuary or sculptor," and the embodying of that conception or design in the clay, plaster, and wood the work of another, and so within the decisions cited above. The board of general appraisers found that these articles "are not the professional production of a statuary or sculptor who conceived the designs." That is so, but, under the decisions above cited, the circumstance that he did not "conceive the design" is immaterial. The board further finds that they "are mechanical productions executed by artisans and by mechanical means." We have searched the record in vain for a scintilla of evidence to sustain this finding. There is some general testimony introduced from another proceeding where certain busts, single figures, and groups in marble, alabaster, and bronze representing familiar subjects already embodied in marble, such as the Venus of Milo and the Cupid and Psyche of Canova, were under consideration; but that testimony does not meet this case, where one "statuary or sculptor" conceives the design and represents it on paper, and another "statuary or sculptor" embodies such conception in the clay model, and eventually in wood. The process may in fact be mechanical, but we cannot find it so without some proof. The decision of the circuit court is affirmed.

McCARTY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1900.)

No. 1,280.

1. CRIMINAL LAW—REVIEW ON APPEAL.

When the evidence and instructions are not brought into the record by a proper bill of exceptions on appeal in a criminal case, the presumption is that the evidence supported the charge, and warranted the verdict, and that the charge of the court was correct.

2. INDICTMENT—AVERMENT OF INTENT.

In an indictment for violation of the law against counterfeiting, a general averment that the defendant did the acts charged "with intent to defraud" is sufficient, the pleader in a case where intent is the essence of the crime not being required to set out the facts going to prove such intent, or the particular means by which the intent was to be effected.

In Error to the District Court of the United States for the District of Nebraska.

John McCarty, the plaintiff in error, was indicted jointly with one John Brown, for passing counterfeit silver half dollars and dollars, and for having in his possession, with intent to pass, counterfeit silver dollars and nickels, and for having in his possession molds for coining counterfeit silver dollars. He was tried, and found guilty on six counts, and sentenced to pay a fine of \$100, and to be imprisoned in the penitentiary for five years, and thereupon sued out this writ of error.

John O. Yeiser and C. L. Hover, for plaintiff in error.

W. S. Summers and S. R. Rush, for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There is no bill of exceptions in this case. The evidence and instructions are, therefore, not before us for consideration. When the evidence and instructions are not brought before us by a proper bill of exceptions, the presumption is that the evidence supported the charge and warranted the verdict, and that the court charged the law. The assignments of error on which chief reliance is placed, and which are most discussed in the brief, are founded on what it is alleged the evidence either did or did not prove; but upon this record the only question we are at liberty to consider is the sufficiency of the indictment. We have examined very carefully the several counts of the indictment on which the defendant was convicted, and find they conform to the requirements of the statutes on which they are based (Act Jan. 16, 1877 [19 Stat. 223, c. 24] § 1, and Act Feb. 10, 1891 [26 Stat. 742, c. 127] § 1), and to the standard forms found in the approved precedents for such indictments, and which have long been used and approved by all the courts. The objections to the sufficiency of the indictment upon its face are few, and not of a serious character. It is objected that the averment that the defendant did the acts complained of with "intent to defraud" is "too general for toleration, and only amounts to pleading a conclusion." The pleader is never required in this class of cases to set out the evidence or facts going to prove the intent to defraud, or the particular means by which the party named in the indictment was to be defrauded. It is never done, and in most cases would be impractical. In the case of *U. S. v. Ulrici*, 3 Dill. 532, 535, Fed. Cas. No. 16,594, this same objection was made to the indictment which charged the act was done "with intent to defraud the United States," and Mr. Justice Miller, in answering the objection, said:

"It is contended that there should be some statement of the evidence of this intent,—that some one or more of the facts which manifest this intent should be set out in the indictment; but I suggested to counsel at the time that, if he could show where it was necessary to describe more than what the party intended to do, in a case where intent was the essence of the crime, then this might not be considered a sufficient charge, but I apprehend that no such instance can be produced. * * * But it is said that you must show how he was going to do it. Now, an intent is often very hard to prove, but when you show that it is essential to a civil or criminal proceeding you can demonstrate it in a thousand ways. All human actions are the external evidence of intent. The conduct of a man, in its thousand various forms, goes to discover his inner thoughts; and to say that the indictment should allege these with particularity would be very difficult for the pleader. Are we to set all the facts out? If not, where is the limit to be fixed? The objections, therefore, to this count are overruled, and it is held to be good."

Dr. Wharton, in his valuable work on Criminal Law, says:

"The means of effecting the criminal intent, or the circumstances evincive of the design with which the act was done are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." 1 Whart. Cr. Law, § 292.

Certain of the counts on which the defendant was convicted charged that he did the acts complained of with intent to defraud a named person "and divers other persons to the grand jurors un-

known." It is said there was no evidence to support this allegation, and that it is, besides, bad for uncertainty; but, as we have before said, the presumption upon the state of this record is that there was evidence to support the averment; and, where it is necessary to allege an intent to defraud some one, it is sufficient, when the fact is so, to allege an intent to defraud "divers persons to the grand jurors unknown."

The contention is made, but probably not very seriously, that the count charging the defendant with having in his possession molds for coining counterfeit silver dollars is bad because it spells "mold" "mould," when the statute creating the offense spells it "mold." It is the same word, and has the same meaning, whether spelled "mold" or "mould." In the Century Dictionary it is said:

"The proper spelling is 'mold,' like 'gold' (which is exactly parallel phonetically), but 'mould' has long been in use, and is still commonly preferred in Great Britain."

The judgment of the district court is affirmed.

In re SEE HO HOW.

(District Court, N. D. California. April 12, 1900.)

No. 12,050.

PROCEEDING FOR DEPORTATION OF CHINAMAN—POWERS OF COMMISSIONER—
CANCELLATION OF CERTIFICATE.

In a proceeding for the deportation of a Chinese person arrested as being unlawfully in the United States, the commissioner has no jurisdiction to cancel a certificate of residence issued to the defendant under the provisions of Act Nov. 3, 1893 (28 Stat. 7), and regular on its face, on the ground that it was procured by fraud; and, having found that defendant is possessed of such certificate, an order by the commissioner for his deportation is void, unless it is further found that defendant has, since the issuance of such certificate, forfeited his right to remain in the United States by departing therefrom without procuring from the collector a certificate entitling him to re-entry.

This was a proceeding by writ of habeas corpus by See Ho How, a Chinese laborer detained under an order of a commissioner for his deportation.

Bert Schlesinger, for petitioner.

Marshall B. Woodworth, Asst. U. S. Atty.

DE HAVEN, District Judge. See Ho How, a Chinese laborer, is before the court upon a writ of habeas corpus. It appears from the return to the writ that he is now in the custody of the United States marshal for this district, for the purpose of deportation to China, in execution of an order or judgment of a United States commissioner. The judgment first recites that See Ho How was arrested and brought before the commissioner upon a verified complaint, in which he was charged with having been found unlawfully in the United States, and then proceeds with the following recitals, showing the facts found by the commissioner, and his judgment thereon:

"Whereas, an examination was thereafter had by me of said See Ho How, alias Hoy Tim, upon the said charge, from which examination, and from the evidence adduced before me, it appears to me that the said See Ho How, alias Hoy Tim, is, by race, color, language, and dress, a Chinese person, and a laborer by occupation; and, whereas, the said See Ho How, alias Hoy Tim, has offered in defense to said charge a certificate of residence issued by O. M. Welburn, collector of internal revenue, First district of California, per F. C. Josselyn, deputy, on April 17, 1894, under amendatory act of November 3, 1893, to See Ho How, and numbered 86,376; and whereas, from the said evidence adduced before me, it appears to me that said certificate of residence was procured to be issued by fraud and misrepresentations, and by false testimony; and whereas, said See Ho How, alias Hoy Tim, has failed to establish by affirmative proof, to my satisfaction, his lawful right to remain in the United States; and whereas, said See Ho How, alias Hoy Tim, has not made it appear to me that he is a subject or citizen of any other country than China; and whereas, from the foregoing facts, I find and adjudge said certificate of residence to be invalid and void and of no effect, and said See Ho How to be unlawfully within the United States; Now, therefore, I order that said certificate of residence aforesaid be canceled, and that See Ho How, alias Hoy Tim, be removed from the United States to China."

It is apparent from these recitals that the commissioner found as a fact that the petitioner is in possession of a certificate of residence issued to him by the proper officer, and the judgment of deportation is based solely upon the finding that such certificate was "procured to be issued by fraud and misrepresentation and by false testimony." In my opinion, the commissioner was without jurisdiction to find or adjudge that the issuance of the certificate referred to was procured by fraud. Section 1 of the amendatory act of November 3, 1893, relating to the exclusion of Chinese (28 Stat. 7), made it the duty of all Chinese laborers who were residents of the United States on May 5, 1892, and then entitled to remain in the United States, to apply within six months after the passage of that act to the collector of internal revenue of their respective districts for a certificate of residence; and it was further provided that any Chinese laborer found in the United States without such certificate of residence after the expiration of said six months should be deemed and adjudged to be unlawfully in the United States, and deported therefrom, unless, when arrested and taken before a United States judge, he should establish clearly to the satisfaction of such judge that he was unable to procure such certificate by reason of accident, sickness, or other unavoidable cause, and further show by at least one credible witness, other than Chinese, that he was a resident of the United States on May 5, 1892; and it was provided in section 2 that the certificate of residence required by that act "shall contain the photograph of the applicant, together with his name, local residence, and occupation, and a copy of such certificate, with a duplicate of such photograph attached, shall be filed in the office of the United States collector of internal revenue of the district in which such Chinaman makes application." It is very clear that under this statute each collector of internal revenue was charged with the duty of ascertaining and determining whether the Chinese person applying to him for the certificate of residence provided for was entitled thereto, and I am entirely satisfied that, in any collateral inquiry concerning the right of its holder to remain in the United States, such certificate is con-

clusive evidence of the facts recited therein. The issuance of such a certificate is the solemn act of the government, of which a permanent record is made, and is intended to furnish evidence of the right of the holder to remain in the United States. The right which the certificate confers is a valuable one, of which the holder can only be deprived by the judgment of a court of equity, in a direct action brought by the United States for the purpose of annulling it, or in a proceeding for deportation, by proof that since its issuance the holder has forfeited his right to remain in the United States by departing therefrom without procuring from the collector of customs of the district from which he departed a certificate entitling him to re-enter the United States, as provided in article 2 of the treaty of March 17, 1894, between the United States and China, and the regulations adopted by the treasury department for the purpose of carrying out the provisions of that article. As the commissioner did not have jurisdiction to adjudge that petitioner's certificate was procured by fraud, his finding in relation to such fraud, and so much of the judgment as directs the cancellation of the certificate, must be entirely disregarded. The question then arises whether, in view of the other facts found, the judgment of deportation is valid, or whether it is in excess of the jurisdiction of the commissioner, and for that reason void. In the case of *In re Bennett* (D. C.) 84 Fed. 327, it is said:

"In any case where it appears from the record that the court had no authority to render judgment against a defendant, such judgment is void; and where the record shows a second prosecution, trial, and conviction of an offense of which the defendant has once been acquitted or convicted, such judgment is void."

And upon precisely the same principle the judgment of deportation in this case must be held void, in the extreme sense, because it appears upon the face of the judgment that the petitioner is in possession of an uncanceled certificate of residence, which, in the absence of a finding that he subsequently departed from the country, and thereby forfeited the right conferred by such certificate, entitles him to remain in the United States. The commissioner having found facts which, under the law, show that petitioner has the right to remain in the United States, the judgment that he be deported is absolutely void,—as much so as would be a judgment of conviction upon a verdict of not guilty. The petitioner is discharged.

NATIONAL STARCH MFG. CO. v. DURYEA et al.

(Circuit Court of Appeals, Second Circuit. February 28, 1900.)

No. 83.

TRADE-NAMES—UNFAIR COMPETITION.

One Duryea was for many years the president and a stockholder in the Glen Cove Manufacturing Company, which made and sold starch in packages having thereon the name "Duryea's Starch" in prominent letters, and also a picture of the manufacturing buildings, and the name of the company. After the starch had been sold for many years, and had become identified with the company, the latter sold its business, trade-marks, and good will to another corporation, which continued the use

of the package containing the name and picture, with its own name as manufacturer; Duryea agreeing not to go into the starch business for five years. At the expiration of this time he furnished capital to his sons, who formed a partnership with others, and procured other starch to be made for them, and sold it as "Starch Prepared by Duryea & Co.," but used strikingly different labels and packages. Their starch was in fact prepared in accordance with directions given by them or Duryea, Sr., who subsequently purchased the assets of the firm, and continued the business. *Held*, that this was a proper use by Duryea and his sons of their own name, and could not be enjoined.¹

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This is a case of "unfair competition" and was before this court upon an appeal from an order of the circuit court which denied a motion for an injunction pendente lite. The case proceeded to final hearing upon full proofs, and the bill was dismissed. From the decree of dismissal this appeal was taken.

Francis Forbes, for appellant.

H. Galbraith Ward, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The counsel for the respective parties united in the request that this appeal should be heard by the court as now constituted, although the different judges had passed upon the motion for an injunction pendente lite. The facts, as they appeared upon the motion papers, were stated in 25 C. C. A. 139, 79 Fed. 651, and it is therefore not necessary to repeat them. The complainant is of the opinion that additional facts now appear in the record which will compel a decree in its favor. There is now evidence that the defendant's starch was vigorously pushed upon retail grocers by salesmen whom the purchasers formerly knew as salesmen of the complainant's product, and that grocers made representations, either by acts or orally, to their customers, in regard to the origin of the new product, which indicated either careless ignorance or a willful disregard of the truth. Testimony is given by retail purchasers from the grocers that they were misled by the use of the name Duryea & Co. It appears that the written contract with the Sioux City Starch Company was one of purchase and sale, and was silent in regard to the rights of the defendant to supervise or to direct the manufacture of the product. Hiram Duryea, during the progress of the suit, bought the partnership assets, and is now carrying on the business under the name of Duryea & Co., and these facts are now, by consent, made part of the record. It will be observed, by reference to the statement of the facts in 25 C. C. A. 139, 79 Fed. 651, that Hiram Duryea had charge of the general management of the sale of the Glen Cove Company's starch from about 1857 to 1890, when its entire property was sold to the complainant, of which he became the first president, having entered into an agreement with the new company that during the term of

¹As to unfair competition in trade, see note to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper*, 30 C. C. A. 376.

five years from April 12, 1890, he would not permit or suffer his name to be used or employed in carrying on the starch business in specified states of this country; and that on November 1, 1895, four of the defendants, including two sons of Hiram Duryea, entered into the business of selling starch under the name of Duryea & Co., with capital furnished by Hiram Duryea, and that the labels of the firm were strikingly different from those of the Glen Cove starch. The right of Hiram Duryea to enter directly or indirectly into the starch business in November, 1895, and his right to permit his name to be used in the new enterprise, are admitted. That an incidental interference with and injury to the business of the complainant, which had the exclusive right to the use of the well-known name or title "Duryea's Starch," would occur,—an injury which would be enhanced by the earnestness of competition in the field which the complainant and its predecessors had labored to occupy,—and that an injury from honest competition is not remediable by a court of equity, are also manifest. The point which is urged by the complainant is that the defendants use the name of Duryea, and have pressed the article which they sell upon the public by the use of that name, "unaccompanied with any precaution or indication" that the article was not the manufacture of the complainant, and thus that their silence is an artifice which misleads (*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118); and that neither the original members of the firm nor Hiram Duryea have taken pains to differentiate their goods from those of the complainant. The complainant uses the familiar label, which contained a picture of the factory buildings at Glen Cove, with its name as the manufacturer of the starch in lieu of the name of its predecessor, and with the words "Duryea's Starch." The defendants' label is entirely dissimilar, but it contains the words, "Prepared by Duryea & Co." That they gladly welcomed the pecuniary advantage from the right to use the name Duryea is true, but that they presented it to the public as the Glen Cove starch is not true, and, while their label does not say as much as it might have said without detriment to themselves, and with the same injury to the complainant, yet we think that their starch is shown by the label not to be the manufacture of the complainant, as the successor of the Glen Cove Company, and not to be identified with the former Glen Cove factories as the source of its manufacture. The statement that the starch is prepared by Duryea & Co., whereas it is manufactured by the Sioux City Starch Company, is the most significant indication of an attempt to deceive; but the evidence in this case, from letters which passed after the date of the contract with that company between the parties to it, contains stronger and more convincing proof than was presented on the motion for preliminary injunction that the starch was actually being perfected by the improvements suggested or directed by the defendants, and that the manufacture was actually under their supervision. Upon the whole case, we are of opinion that the decree of the circuit court should be affirmed, with costs.

CUTTER ELECTRICAL & MANUFACTURING CO. v. ANCHOR ELECTRIC CO. et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 146.

PATENTS—INVENTIONS—ELECTRICAL SWITCHES.

The Cutter patent, No. 437,667, for improvements in electrical switches, as to claims 4 and 5, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the circuit court, Southern district of New York, dismissing the bill. 97 Fed. 804.

John P. Croasdale, for appellant.

E. P. Payson, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The suit is for infringement of United States letters patent No. 437,667, September 30, 1890, to Henry B. Cutter, as joint inventor with and assignee of Lucius T. Stanley, for "improvements in electrical switches." The specification states that the "main purpose has been to produce a neat and ornamental switch mechanism, which may be applied and used in any house or room without disfigurement, and which at the same time shall be complete and effective as a device for making and breaking a heavy current; and our further object has been to improve the construction and mechanical details of the switch mechanism itself." It will not be necessary to quote from nor discuss such portions of the specification and drawings as describe the alleged improvements in the details of the switch mechanism and the particular arrangement of mechanical parts which makes the device effective when the current is heavy. Such portions of the patent might be quite material in connection with the prior history of the art, if the first three claims were under discussion. But at the very outset of the case, while taking its prima facie testimony, the complainant, by its counsel, expressly stated that "it relies on the fourth and fifth claims * * * as the claims infringed by the defendants," and those two claims only have been relied upon in argument in this court. These claims are as follows:

"(4) In an electric switch, the combination with a rocking lever constituting a part of the operative parts of a switch mechanism, of a face-plate for enclosing said switch mechanism in a suitable receptacle, and push-buttons passing through said face-plate, and connected with opposite ends of said rocking lever, as set forth. (5) A spring-actuated electric switch, adapted to be inserted in a recess in a wall, and a pivoted lever for operating the same, in combination with a face-plate for covering said recess and inclosing said switch, and push-buttons passing through said face-plate and connected with the lever of the switch mechanism, whereby the switch may be set in action or operation to make or break circuit by pushing one or the other of said buttons."

Electric switches spring-actuated and with rocking or pivoted levers had theretofore been inserted in suitable receptacles, such as

a recess in a wall, and had been covered over with face-plates, or their equivalents, and operated from without the recess by a turning button or thumbpiece. Absolutely the only element of novelty in these claims is the substitution for such turn-buttons of two push-buttons passing through the face-plate. The application of such a well-known device, which had long been employed in the common door lock, hardly called even for the skill of the particular art. The most ordinary mechanical experience was sufficient to substitute it for the turn-button as the means to rock the lever one way or the other. When confined within the limits of these two claims, the "improvement" of the patent is of the most trivial character, and wholly devoid of patentable invention. The decree is sustained, with costs.

THOMSON-HOUSTON ELECTRIC CO. v. JEFFREY MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. March 15, 1900.)

No. 710.

PATENTS—PRIOR PATENT FOR SAME INVENTION—TROLLEY RAILWAYS.

The Van Depoele patent, No. 495,443, for a traveling contact for electric railways, is rendered invalid by patent No. 424,695, previously issued to the same inventor for precisely the same devices, the only difference being that the earlier patent states an additional function to be performed by one of the elements.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Frederic H. Betts, for appellant.

John R. Bennett and H. H. Bliss, for appellee.

Before TAFT, LURTON, and DAY, Circuit Judges.

TAFT, Circuit Judge. This is an appeal from a decree dismissing a bill to enjoin the infringement of claims 2, 4, 8, 12, and 16 of patent No. 495,443, issued to Charles J. Van Depoele for improvements in suspended switches and traveling contacts for electric railways. The sole question in the case is whether the patent sued on is rendered invalid by patent No. 424,695, issued to the same inventor, for improvements in the same art. The question was stated by this court in *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 26 C. C. A. 107, 80 Fed. 712, but was not decided. We there said:

"We come now to the question whether patent No. 495,443 is rendered void by the prior issue of patent No. 424,695. This presents much more difficulty than the question just disposed of. In this case, the drawings and specifications of the two patents are substantially alike, and show a car, a track, a post on top of the car, a swinging and hinged arm pivoted in the post with a contact wheel at its outer end. A spring is secured to the lower end of the swinging arm, and to the spring is attached a weight, which works in suitable vertical grooves down through the roof to the front platform within reach of the driver. The spring and weight maintain the contact of the outer end of the swinging arm with the overhead conductor. Switches in the overhead conductor are maintained immediately over the point in the track where track

switches occur. The trolley post and arm are in such positions and of such size that the point of contact of the outer end of the arm and the overhead conductor is back of the front wheels of the car. This is for the purpose of imparting to the trolley wheel as it enters the switch in the overhead conductor the direction already taken by the front wheels of the car in entering the switches upon the track. The spring and weight working in vertical grooves are intended to keep the trolley arm in the vertical plane of the longitudinal center of the car, and thus to make its contact wheel more certain to follow in the overhead switch the direction of the car as it turns into a track switch. It is shown by the evidence that the inventor first used in his combination a spring attached to the top of the car to secure contact, and then a spring attached to the foot of the trolley post, and finally the spring and weight arrangement shown in the drawings of the patents. The claims of the second patent in question are for the broad claims of a combination, in an electric railway, of a car, a track, and overhead conductor, a post and swinging hinged arm on the car, and a tension spring for maintaining contact between the arm and the conductor; and the language of the specifications shows that it was the intention of the inventor to make this cover the generic invention. The claims of the first patent that embrace the whole combination include the weight as part of the means for maintaining upward pressure of the arm against the conductor. There are five claims of the first patent that cover the whole combination, and include a spring or weight to perform the function of keeping the trolley arm in the center line of the car. Now, this same spring and weight in the drawings discharge the function of maintaining the upward pressure of the swinging arm. The contention of the counsel for the complainant is that the first patent was a patent for the special and improved form of the invention including the spring and weight, with their upward pressure and centralizing tendency, and that the second patent, though using the same drawings and specifications, shows by the language of the latter and its claims that it was intended to cover, and did cover, a combination with a spring without a weight in such a position that it need only discharge the function of maintaining the upward pressure of the arm without the centralizing tendency, and that the modification of the drawings and specifications to show such a tension spring is only the work of a skilled mechanic. To the objection that the last five claims of the earlier patent are exactly the same as the broad claims of the later patent, with the mere statement of a necessary centralizing function of the same spring always present in it, it is answered that the second patent was intended to cover springs that had no centralizing tendency, and that the use of the function in describing the spring, therefore, is a limitation of the claim showing it to be a special form of spring. It is argued, therefore, that as the claims of the first patent do not cover any of the broad claims of the second patent, based on a simpler combination of parts than that shown in the drawings, the second patent may be held to be a separate generic invention, while the earlier patent is merely for improved forms of the same invention entitled to a separate patent. We think the case on these two patents much nearer *Miller v. Manufacturing Co.*, 14 Sup. Ct. 310, 38 L. Ed. 121, than the case on the two patents already considered, but we are unwilling, upon an appeal from a preliminary injunction heard upon affidavits, and without a full review of the art, and without a fuller argument, and closer consideration of the claim and specifications, to decide the question mooted. The questions are whether, in determining the separability of the inventions, we may consult evidence dehors the record, and whether, in considering the gist of the second patent, we may supply such variations in the form of the combination shown in the drawings and specifications suggested by mere mechanical skill as would make it one not covered by the first patent, but a simpler and more generic form, and whether the claims of the second patent are limited to the devices actually shown by the words 'substantially as described.'

These questions are now presented on the merits and on pleadings and proof. It seems clear to us, after careful consideration, that the principles announced in *Miller v. Manufacturing Co.* require us to hold that the patent here in suit is void. The devices

shown in the earlier and later patents are exactly the same. The specifications are in every material respect the same. The combination claimed in the eighth claim in suit is generic (so called). It consists of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car and provided at its outer end with a contact engaging the underside of the suspended conductor, and a tension spring at or near the inner end of the arm for maintaining said upward pressure contact, substantially as described. The combination claimed in the thirty-third claim of the earlier patent is of an overhead conductor and a vehicle, an intermediate contact device, consisting of an upwardly pressed trailing arm having a ground contact wheel at its outer end, by which it is guided by the conductor, the said arm being free to swing laterally relatively to the vehicle, but tending to remain in its normal central position by means of a spring or weight. His two claims refer to exactly the same device. They describe the same elements. The second differs from the first only in describing a function of the device not referred to in the first. It is true that one might, perhaps, modify the device so that the normal centralizing tendency of the spring or weight would be absent, but no such change is suggested in the specifications. The arrangement of the spring and weight in the device in such a way as to produce the normal centralizing effect is not shown as an improvement on a simpler form. It is present in the only patented device as disclosed by the specifications in both patents. The device patented in the first patent is the same as that in the second. The same elements are claimed in combination in the first as the second. A difference in statement of their functions cannot and does not make them different claims or different combinations. The court of appeals of the Second circuit has reached the same conclusion in the case of Thomson-Houston Electric Co. v. Hoosick Ry. Co., 27 C. C. A. 419, 82 Fed. 461. The decree of the circuit court is affirmed.

CAMPBELL et al. v. STRATTON et al.

SAME v. HOUTAIN.

(Circuit Court, E. D. New York. April 13, 1900.)

PATENTS—INFRINGEMENT—CIGAR-TIP CUTTERS.

The Campbell patent, No. 533,207, for a cigar-tip cutter, discloses invention, and is valid. Claim 4 also *held* infringed by a cutter made under the Brunhoff and Lehmann patent, No. 567,277.

In Equity. Suits for infringement of patents. On final hearing.

Clifton V. Edwards, Esq., for complainants.

C. W. Miles and Seymour, Seymour & Harmon, for defendants.

THOMAS, District Judge. The above actions involve the validity and infringement of claims 1, 4, and 5 of letters patent No. 533,207, and claims 1 to 5, inclusive, of letters patent No. 533,208, issued to

William H. Campbell, January 29, 1895, and now owned by the complainants. Letters patent No. 533,207 relate to "automatic cigar-tip cutters of the class in which a releaser is operated by the insertion of a cigar in a tip hole to disengage stops and free a spring-driven rotary blade." The specification states:

"A cutter of this class is shown in my application for letters patent filed June 16, 1894, serial No. 514,729, in which cutter a depressible frame has a cutting blade, a releaser fixed to the frame opposite to the tip hole, and a stop fixed to the frame, engaging a fixed stop carried by the casing, and disengaged when the frame is moved inwardly by pressure of a cigar on the releaser. My present invention aims to provide an improved cutter of the class having a rotating cutter frame, to the end that such cutters may be rendered more effective in operation and convenient of construction. To this end I construct the rotary cutter frame with a nose or stop carried by the frame, and engaging a stop carried by the casing, and with a releaser bar carried by and movable relatively to the rotary frame for disengaging said stops; and I provide certain detail improvements which will be hereinafter fully set forth."

Serial No. 514,729 refers to letters patent No. 533,208. In the device covered by that patent the stop on the side of the revolving frame engages a stop on the inner side of the casing while the machine awaits use. When a cigar is pressed through the tip hole in the casing, the whole frame is pressed downward, thus disengaging the stop, and the frame revolves, carrying the cutter with sufficient force, derived from a spring, to cut the end of the cigar. It is not necessary to determine the validity of this patent (No. 533,208), inasmuch as the machine used by the defendants is essentially different in the combination of parts and in their operation, and does not infringe. Therefore attention may be devoted entirely to letters patent No. 533,207, from which the quotation above was taken. The claims alleged to be infringed are as follows:

"(1) In a cigar-tip cutter, a casing having a tip hole, a rotary cutter in said casing moving past said hole, a rotary frame carrying said rotary cutter, means for driving said frame, a fixed stop carried by said casing, a stop engaging said fixed stop carried by and movable relatively to said rotating frame, and a bar carried by and movable relatively to said rotating frame, opposite said tip hole, connected to said movable stop, and moved by the insertion of a cigar in said hole, and, when moved, moving said movable stop free from said fixed stop, all combined and arranged substantially as and for the purpose set forth."

"(4) In a cigar-tip cutter, a casing having a tip hole, a rotary cutter moving past said hole, and means for rotating the rotary cutter, in combination with a stationary stop on said casing, and a movable latch carried by said cutter, moving substantially radially thereof, engaging said stop to prevent rotation of the rotary cutter, and moved out of engagement with said stop when a cigar is inserted in said hole, whereby the cutter is then permitted to rotate, and cut the cigar."

"(5) In a cigar-tip cutter, a rotary frame, F, a cutter blade carried thereby, a latch bar, M, carried by said frame, and projecting exteriorly thereof, said frame having a slot, O, through which said latch bar projects, a stop, N, fixed to the casing and engaged by the projecting end of said latch, and a spring pressing said latch into position for engagement with said stop."

These claims are for a combination of parts, each in itself old, but differing from every previously known device for cutting cigar tips at least in this: that the stop, which engages a fixed stop on the casing, is carried by and is movable relatively to a rotary frame. Such movable stop is at the end of "a bar carried by and movable

relatively to said rotating frame." The end of the cigar is passed through a hole in the casing, and is pressed upon a bar, which is carried across a rotating frame, so as to depress the same and disengage it from the fixed stop on the casing. In no previous device for cutting the tips of cigars is this depressible latch found carried on a movable wheel or frame, and the evidence shows that the improvement in the art in this respect is attributable to Campbell. The defendants employ a machine which is claimed to be constructed under and in accordance with letters patent No. 567,277, granted to Charles Lehmann and Edward Brunhoff, September 8, 1896. This machine, like that of the complainants, has a casing with tip hole, a rotary frame carrying a rotary cutter, a spring power for driving the machinery, two stops on the casing, instead of one, as described in the complainants' machine, and two stops on the rotary frame or wheel movable relatively thereto. Mr. Brunhoff, one of the patentees of the defendants' machine, gave the following evidence on his direct examination:

"Q. 24. Please compare the Campbell cutter as disclosed in patent No. 533,207, and 'complainants' exhibits, model of complainants' patent, with the defendant's cutter, as embodied in complainants' model, defendants' cigar cutter, and patent No. 567,277, granted to Brunhoff & Lehmann, September 8, '96? A. They are similar in having the conventional spring and spring shaft, gearing, cutters, and means for operating the same. On the Campbell manufacture patent, 533,207, I find the knives fastened on two disks forming a spool, and on one side in one of the disks a long latch bar is hinged on a pivot and carried clear across the spool, or you might call it rotating cutter frame, and engaging upon the other side in a recess. This recess is there to allow this latch to be depressed. There is a projection to this latch, called a 'nose,' which engaged a fixed stop rigidly to the outer casing of the machine, substantially as specified in the description of their patent. In our cutter and patent—for one conforms to the other—we have a knife block instead of such a spool, which is entirely solid, excepting for a hole being drilled radially through this knife block; and in this hole we set a boss resting upon a spring. This boss has ears or lugs projecting from it, and through the sides of our knife block, so as to engage on either side with rigid stops fastening on the cover plate, through which the cigar is inserted. This knife block and knife acting like a dog in cutting off the cigar with its boss for releasing are substantially the features of our cigar cutter, which we have manufactured right along, and patented,—No. 567,277."

So that it seems that in one case the cigar presses upon a bar carried by a revolving frame, thus disengaging the latch, and allowing the frame to revolve, and so carrying the knife as to perform the desired office, while in the other case the cigar rests upon a boss or stud, which is sunk into the solid power wheel, and thereby the boss is disengaged from a stop on the casing, and the solid wheel revolves. Notwithstanding the differences in the mechanisms as above described by Brunhoff, the defendants have involved in their machine the essential elements of the complainants' combination. The function performed by each part is the same, and the result of the combined parts is the same, and, if the complainants' device shows invention, there is apparent infringement. The defendants lay stress upon the ears or lugs projecting from the boss as differentiating their combination, but it is understood that such lugs are simply to reinforce and strengthen the stops.

It is urged that the complainants' machine is not patentable; because it is without utility, so far as the movable latch is concerned, in that it simply changes the latch from the casing to the frame. But the location of the latch on the wheel appeared so important and useful to the defendants as to cause them to change from their first device, where the latch was on the casing, to the machine now used by them, where the latch is carried on the wheel, as described. Unless there was some utility and decided advantage in such change, either in decreased expense, compactness, or facility of operation, why did the defendants make it? This change of itself shows utility in the estimation of the defendants, and the court may adopt their judgment. While the complainants' rights under their letters are narrow, yet the defendants' machine, changed in form, contains its essential elements, with nothing added which materially changes the mode or method of operation, and at least infringes claim 4 of letters patent No. 533,207. The complainants' device shows sufficient improvement in the art to amount to invention, and they should have a decree for an injunction and accounting, with costs.

WALES v. WATERBURY MFG. CO.

(Circuit Court of Appeals, Second Circuit. February 28, 1900.)

No. 11.

1. PATENTS—VALIDITY—LEVER BUCKLES.

The Wales patent, No. 172,527, for an improvement in lever buckles, was not anticipated, and is valid as to claims 1, 2, and 3.

2. SAME—INFRINGEMENT—PROFITS RECOVERABLE.

An infringer is liable for the entire profits made by the manufacture and sale of an article containing the patented device, where it appears that, but for the patented feature, the article would not have been salable.

Cross Appeals from the Circuit Court of the United States for the District of Connecticut.

Roger Foster and Roger S. Baldwin, for complainant.

John K. Beach, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. We agree with the conclusions of the learned judge who decided the cause in the court below as to the validity of claims 1, 2, and 3 of the patent in suit, and deem it unnecessary to add anything to his very satisfactory opinion. 87 Fed. 920. We are unable, however, to agree with his conclusions in respect to the amount of profits which the complainant was entitled to recover.

The patent is for an improved lever buckle, adapted for use upon various articles of men's and women's wearing apparel. The buckle of claim 3, as appears from the demand which it eventually supplied in the trade, is especially adapted to be the fastening device of a pencil holder, a metal case or frame shaped to receive a lead pencil, and pivoted upon the base of the buckle, and forming, with the buckle, a

pencil carrier to be worn on the edge of the watch or side pocket of the vest. The pencil holder was devised by Mr. Wales, one of the patentees and the inventor of the buckle, who conceived that when it was attached to the buckle the integral device would be attractive and convenient, and would especially command the favor of the stationers' trade. He introduced the buckle and pencil holder to the notice of the defendant, and made arrangements with the defendant to become the sole manufacturer. Probably because the pencil holder alone was useless, and derived its whole value by being attached to the buckle, and the integral device could not be made or sold without infringing the buckle patent, Mr. Wales did not patent the combination. The patent having been in the meantime assigned to the complainant, the wife of the inventor, in 1880 she made a license agreement with the defendant, by the terms of which she granted to the defendant the exclusive right of making and selling the buckle, and the defendant agreed to pay a royalty varying from 10 to 25 cents a gross for the buckle alone (depending upon the sizes), and when sold with the pencil holder to pay a graded royalty amounting to \$2.03½ per gross when the sale price should be \$5.08. In the following year the complainant revoked this license, alleging non-compliance by the defendant with the license; but the defendant, notwithstanding, continued to make and sell the buckles and pencil holders, and between that time and the date of the expiration of the patent sold 9,361 gross of the combined article, realizing therefrom as net profits admittedly the sum of \$22,887, and, accepting as correct the findings of the master upon the accounting, a considerably larger sum. Upon the basis of the license the royalties upon these sales would amount to over \$19,000. The court below awarded the complainant \$4,483 for these profits, arriving at the amount by charging the defendant only with the difference between the cost of the buckles and the price they would have brought if they had been sold separately from the pencil holders. It is manifest that the defendant would not have sold the 9,361 gross of pencil holders if it had not attached them to the patented buckle, or to some other buckle which would have satisfactorily supplied its place as an adjunct of the holder. The proofs indicate that other buckles, which were open to public use, could have been attached to the holders, but the organized device would have been a clumsy and unattractive one, while the patented buckle was peculiarly adapted for the purpose, and was the part which commended the organized device to purchasers. The master found that the patented buckle was "the best and only known buckle that could have sold pencil holders, and no part of the profits would have been made except for it." It is reasonable to suppose that the defendant's managers would not have exposed it to liability as an infringer if they had believed that some other buckle, which they were at liberty to use, would have answered the purpose of the patented buckle as an adjunct of the holders; and, notwithstanding some evidence to show that it would, and that the spring buckle plate, an unpatented feature added to the buckle, contributed to its popularity, we are satisfied upon the proofs that the master was correct in his finding, and that there would have been no appreciable demand for

the holders if they had not been attached to the patented buckle. The license in fixing such a large royalty upon the buckle when sold with the holders points also to this conclusion. In his opinion disposing of the master's report, the learned judge in the court below did not discuss the finding of fact that, but for the use of the buckle, the buckle and holder would not have been a marketable device; but in his opinion rendered upon granting the interlocutory decree it is stated that the patented buckle was "apparently the only practicable solution of the problem presented," which was to devise a lever buckle having characteristics, among others adapting it to be used for carrying a pencil holder. In disallowing the profits upon the combined buckle and lever, he did so apparently in deference to the rule that, where the articles which have been made and sold by the infringer contain not the patented invention alone, but other inventions or improvements, the profits for which he is to account are not the total profits, but those only which are attributable to the presence of the patented invention. This has always been the rule, and it is manifestly a just one upon principle; but it is often difficult of practical application, and the courts have sometimes applied it so that it has not produced an equitable result. In many cases, where it is obvious that the patented invention has contributed a great part of the profits realized from selling the infringing article or apparatus embodying unpatented features, it is practically impossible for the complainant to establish affirmatively the proportionate part. The present case is an illustration. None of the patented buckles like those attached to the pencil holders, those of the third claim of the patent, were ever sold to an extent and under circumstances to establish satisfactorily their market price. No pencil holders detached from the buckles were ever sold, and no competent and reliable evidence can be produced to show what part of the profits the defendant derived from the buckles and what part from the holders separately. According to the estimate of the complainant's principal witness, which the master finds to be an "intelligent estimate of a man of large experience in the cost of all such details," the cost of the buckle was about \$1.02, and of the buckle and pencil holder \$1.71 per gross; and it is undisputed that the combined article was sold at the price of \$5.08 per gross. The master thought this estimate of cost too liberal for the defendant, and he found the total cost of the buckle and pencil holder to be \$1.62½, and upon this basis the profits of the defendant would be \$32,342. Upon either estimate the cost of the buckle was more than two-thirds of the cost of the whole article. It was certainly the dominant feature of the whole article, and no one can doubt that it contributed much more to the entire profits than did the holder. Yet there is no way by which the complainant can establish the proportion. As the rule has been applied in some of the adjudged cases, there could be no recovery against the infringer. In such a case it would seem to be reasonable to require the infringer to account for the whole profits, even though it could not be proved that the commercial value of the article was wholly due to the patented feature. An infringer is a trustee ex maleficio for the owner of the exclusive rights protected by the patent; and a trustee who has

confused the profits made by the use of the trust property with those made from his own property, and commingled them so that they cannot be segregated, must account for the whole. *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. 108; *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693. On the other hand, such a rule would work unjustly in many cases,—as where the patented feature is of an insignificant part of the machine or article; and it is probably because of its manifest inequity in such cases that the courts have placed upon the complainant the burden of proof. Thus, in *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, where the patent was for an improvement in a mop head, and the defendant sold mops which contained the patented improvement, but otherwise were the common unpatented article, it would have been unreasonable to permit the complainant to recover the profits on the entire mops; and, because he had not given evidence to apportion the profits between the patented features and the other features of the mop, the court decided that he had not established any basis for the recovery of profits. The court in that case quoted with approval the proposition stated in the following terms:

“The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible, and not conjectural and speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature.”

The present is a case where the defendant would not, and, as we think, could not, have made any profits from manufacturing the holders if it had not used the patented buckle to command a sale for them; and upon the facts is within the second branch of the rule stated in *Garretson v. Clark*, and within other authorities sanctioning a recovery of the total profits derived from the sale of an infringing article embodying unpatented features, when, but for the patented features, it would not have been a marketable article.

In *Manufacturing Co. v. Cowing*, 105 U. S. 255, 26 L. Ed. 987, the court, after adverting to the rule that the profits for which an infringer is liable are to be determined by the advantage which he has derived from using the patented invention beyond those he might have derived in using other instrumentalities open to the public, and adequate to enable him to obtain an equally beneficial result, said:

“It does not necessarily follow from this that, where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. * * * If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public to supply the demand for that use, then it is clear that the infringer has, by his infringement, secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. * * * Through their infringement they won the advantage of selling pumps which had upon them the patented improvements. Without it, no such sales would have been effected. The fruits of the advan-

tage they gained by their infringement were, therefore, necessarily the profits they made upon the entire sale."

In *Hurlbut v. Schillinger*, 130 U. S. 456-472, 9 Sup. Ct. 584, 32 L. Ed. 101, the court held the infringer liable for the entire profits made by the laying by him of concrete flagging. It is self-evident that concrete flagging would be of more or less value if it were not laid according to the method of the patent which was infringed; but the court said that if it had not been laid that way it would not have been laid at all, and that its entire value as a marketable article was properly and legally attributable to the invention.

In *Crosby Steam Gauge & Valve Co. v. Consolidated Safety-Valve Co.*, 141 U. S. 441-453, 12 Sup. Ct. 49, 35 L. Ed. 309, the court held the infringer liable for the entire profit made from making and selling safety valves containing the patented improvement, for the reason that the entire value of the valve, as a marketable article, was properly and legally attributable to the patented feature.

The rule that the complainant is entitled to the whole profits when it appears that, but for the patented feature, the machine or article made and sold by the infringer would not have been a marketable commodity, was recognized in *Mosher v. Joyce*, 2 C. C. A. 322, 51 Fed. 441, and in *Holmes v. Truman*, 29 U. S. App. 572, 14 C. C. A. 517, 67 Fed. 542.

It is doubtless true that, except for the pencil-holder attachment, the buckles would not have been sold; but that circumstance is quite immaterial. The buckles were sold, and therefore the defendant must account for whatever profits were attributable to their sale. It is also immaterial that a spring bearing plate was superadded to the patented features of the buckle of the defendant, as we are satisfied the organized device did not derive its commercial value to any appreciable extent from that addition, and would have sold as readily without it. We are of the opinion that the master gave too much weight to the circumstance of the destruction by the defendant of some of its books of account, and, because of its failure to "prove conclusively" all the items of the cost of the manufacture, was led to adopt a lower estimate of cost than he otherwise would. The proofs do not warrant the inference that the books were destroyed for any illegitimate purpose. The estimate of the cost made by the complainant's principal witness, in view of his apparent candor and intelligence, commends itself to us as more reliable. In his estimate, however, he places the cost of the brass used at 34 cents, the cost of mounting the articles upon the cards for sale at 10 cents, and omits the cost of forming the blank for the pencil holder. In respect to these items we regard the estimate of the witnesses of the defendant as more accurate, according to which the cost per gross of the brass was 43½ cents, the cost of mounting 14 cents, and the cost of forming the pencil holder 3 cents. Making these corrections, the cost of the pencil holder and buckle per gross was \$1.91½. Profits should therefore have been allowed to the complainant in the sum of \$29,627.

We think the defendant's fifth assignment of error is well taken.

This relates to the profits allowed upon certain buckles other than those of the sizes and combination sold with the pencil holders. They were sold chiefly to the garter and suspender trade, and had a short lever attached to the upper end to fasten the buckle to the strap. This was an unpatented feature. It was also open to the defendant to substitute another base plate for that of the patented combination, and thus make a buckle which would probably have been as useful and as salable. In the buckles of this class the profit resulting from the sales was only such as is measured by the difference in value between the patented combination and others open to use by the defendant. That profit was not satisfactorily established by the evidence.

There should be a decree for the complainant for \$29,627, with interest from the date of the master's report, and to that extent the decree is reversed, with costs to the complainant, and the cause is remitted to the court below, with instructions to modify the decree in conformity with this opinion.

WELSBACH LIGHT CO. v. UNION INCANDESCENT LIGHT CO.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 136.

1. PATENTS—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The owner of a process patent is not entitled to a preliminary injunction, in a suit for infringement, restraining the defendant from vending articles made in infringement of the patented process.

2. SAME—PROCESS—INCANDESCENT MANTLES.

The Rawson patent, No. 407,963, for the production of incandescent mantles, is for a process, and not for a product.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Louis Hicks, for appellant.

John R. Bennett, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. That part of the order appealed from restraining the defendant, during the pendency of the action, from selling any incandescent mantles "except such as shall be shown to have been coated by others," can only be justified upon the theory that the patent for infringing which the suit was brought was a patent for a product or manufacture, and not one for a process. If it was a patent for a process, it would not be infringed by selling the product, and no conditions should have been annexed to the exercise of the vendor's rights. The broad proposition that the vendor of a product which has been made in infringement of a patented process is an infringer, or liable to any extent to the patentee, is untenable and does not require discussion. The patentee's remedy is against the manufacturer. *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235.

The patent in suit (No. 407,963) was granted July 30, 1889, to Frederick Lawrence Rawson and William Stepney Rawson for "production of incandescent mantles." We entertain no doubt that it is one for a process, and not for a product. It describes a method of producing the Welsbach mantle, and treating it after ignition so as to render it sufficiently hard and resistant to allow of transportation without danger of breakage. The method described consists in stretching the mantle upon a mandrel and igniting it, then shaping it against the mandrel by a blowpipe flame, and then coating it with paraffin, or other similar material. The patent contains two claims, which are as follows:

"(1) The herein-described improvement in strengthening incandescent mantles, consisting in coating the completed mantle with paraffin, or other suitable material, substantially as set forth. (2) In the manufacture of incandescent mantles, the method of forming said mantles, which consists of first stretching the impregnated knitted mantle upon a mandrel, then burning the mantle, then shaping the mantle against the mandrel by means of a blowpipe flame, and finally coating the mantle with paraffin, or other similar material, substantially as set forth."

The first claim covers merely the final part of the process, and the second covers the entire process. It is unfortunate that an invention of such great merit and value is not adequately protected by the claims of the patent; but so it is, and any person is at liberty to vend or use the invention without accountability to the patentee, except he also be the manufacturer or a contributory infringer. The order must, as to the part referred to, have been inadvertently made, and should be modified by eliminating that part.

THE VILLA Y HERMAN.

(District Court, S. D. Alabama. March 20, 1900.)

SEAMEN—SUIT FOR WAGES—GROUNDS JUSTIFYING DISCHARGE.

Libelants were duly signed as seamen before a proper officer by an authorized agent of the master of a schooner, and on the next day were taken on board by the agent, and were recognized by the mate as members of the crew, but, with the remainder of the crew, were ordered ashore and discharged by the master a few minutes later, and before the voyage was commenced. *Held*, that on such facts the burden rested upon the vessel, in order to defeat the claim of libelants to a month's wages under the statute, to justify their discharge, which could only be done by showing that they were disqualified for seamen, or an act of disobedience of an aggravated character.

In Admiralty. Suit by discharged seamen to recover wages.

Smith & Gaynor, for libelants.

M. D. Wickersham, for claimant.

TOULMIN, District Judge. The undisputed facts in this case are: That the master of the schooner employed and directed Charles Nelson, a boarding-house master, to get him a crew. That Nelson procured at least two of the libelants, Charles Peters and Peter

Aster, as a part of that crew. That he duly shipped them before the proper officer, where they signed the articles. That on the next day he brought them aboard the vessel,—whether this was at 8 or 9 o'clock, or later, it makes no difference. They went aboard with Nelson, the agent of the master, whose duty it was to report and identify them to the master. Later the crew generally, whoever may have constituted it, was ordered by the mate to single out the lines, and to prepare to pass the towline to the tug. That the lines were singled out, but the towline was not fastened. That the master subsequently ordered the crew generally to leave the vessel, and go ashore, saying that he would not have them, and that they went ashore, and did not return. There are, then, on the evidence in the case, three prominent and substantive facts conceded; facts as to which there is no dispute. They are that Peters and Aster were duly shipped; that they went aboard, and were recognized as a part of the crew of the vessel by the mate; that the master gave orders to the crew, both in person and through the mate; that the libelants were discharged as a part of the crew before the voyage was commenced, and that they were discharged without their consent. The evidence does not satisfy me that the other libelants were ever shipped. Their names do not appear on the articles, and they do not come within the operation of the statute. Section 4527, Rev. St. They, no doubt, came aboard to ship, but I do not find that they made a contract of shipment; so I consider them out of the case, and the libel as to them is dismissed. The only question, then, to be considered as to Peters' and Aster's right to recover is whether they were discharged without fault on their part justifying their discharge. The shipping articles made a binding contract between them and the ship. The master is not ordinarily justified in dissolving the contract with a seaman and discharging him for a single fault, unless it is of a highly aggravated character. 2 Pritch. Adm. Dig. p. 2150; *Smith v. Treat*, 2 Ware (Dav. 266) 270, Fed. Cas. No. 13,117; *Hutchinson v. Combs*, 1 Ware, 65, Fed. Cas. No. 6,955. The causes for which a seaman may be discharged are ordinarily such as amount to a disqualification, and show him to be an unsafe or an unfit man to have on board the vessel. Authorities *supra*. So far as the evidence for the libelants is concerned, it shows no fault on their part, and that their discharge was not justified. The evidence on the part of claimant is in many respects vague, indefinite, and uncertain. The master's testimony is not only so, but it is inconsistent with itself. That the mate was drunk seems to be conceded by the evidence. Whether the master was under the influence of liquor is disputed. The evidence is conflicting on the point. Suffice it to say there seems to be some confusion as to what the order really was disobedience to which is claimed by the master as the cause for the discharge of the crew; also as to whose duty it was to give such order, and who really received it, and to whom it was given. Whether the particular order was given to the libelants, Peters and Aster, or was heard or received by them, and was disobeyed by them individually, is certainly in great doubt. They say it was not. The master says in one place that he gave the mate orders

to have the towline run to the towboat, and the sailors refused to do it. He further says, "The mate reported on board as a drunken man; could not stand; had to go around on his all fours." He further says that he (the master) went on deck of the vessel, and ordered the sailors in the forecastle to run the towline to the towboat, and they did not obey the order. He repeated the order two or three times, and they did not run the line; refused to do so, but said nothing. He says he saw two men standing in the forecastle door. He did not know them. Indeed, he says he did not know any of the crew. He did not know whether the libelants were even among the men on board. None of them reported to him for duty, yet he says he had the sailors on board to single out the lines. The master's representative, Nelson, brought them on board as a part of the crew of the vessel, and yet the master enters them on the articles as not reporting,—that they failed to report for duty. It was clearly his duty to take notice of the seamen shipped on his articles, and to have identified them, or had them identified, when they came aboard. If he did not do so, how could he give them orders, at least in person? He says he gave the orders in person, having been informed that they would not obey the mate. He speaks especially of two men that he saw when he gave the order, and says that two men could have easily carried the towrope out to the tug. (He does not identify the two men as the libelants.) While he says he gave the order first to the mate to have the towline carried out to the tug, and he was informed that the sailors would not obey the order, and hence gave the order himself, he says the mate was not strictly sober, and does not think he was sober enough to give intelligent orders. This is a remarkable statement. The master of a vessel gives orders to his mate to have certain things done by the sailors, and yet says that the mate was not sober enough to give intelligent orders. It is hardly more remarkable, however, than the fact, as shown by the evidence on his part, that he gave an order to the crew generally—shown by the evidence to have consisted at the time of four men—to execute an order which two could have done, and at the time he gave the order he saw but two men, and yet he did not compel obedience, and cannot identify them, or even know that they were members of his crew. He says he was not drunk, but had taken something to drink. He did not know the libelants as his crew, but he told them he would not have them on the vessel, and told them to "go to hell ashore," or words to that effect. The master is corroborated to the effect that he gave general orders or cried out on deck several times for the towline to be made fast; that there were several men on deck, supposed to be the crew, but none identified by the witnesses as the libelants. It appears from some of the testimony that there was a good deal of noise and hallooing on deck. It further appears from some of it that it was the duty and custom of the pilot in charge to give the order about the towline, and also that the towline was not to be carried or run out to the towboat, but that it was in fact thrown aboard of the vessel, and should there have been handled and made fast. I mention this to show that there is not a very clear or consistent account of what

did take place on the occasion, or should have taken place. The libelants having shown the contract of shipping, their discharge having not only been shown, but admitted, and libelants having, for their part, shown that their discharge was without their fault, and against their consent, the burden is cast on the claimant to show that they were in fault, and were discharged for good cause. The claimant has, in my opinion, failed to successfully meet this burden. There is a singular fact in this case in that Charles Nelson, the man who represented the master in shipping the libelants and carrying them aboard, and who was in court, was not called to tell what he knew about the transaction; especially in view of the fact that the master, in his testimony, says that he had some men on board the vessel, but they were not his crew. The work actually done by libelants admittedly did not occupy over 10 or 15 minutes. For this I award no wages. "*De minimis non curat lex.*" But under the statute I award one month's wages to each of the libelants Charles Peters and Peter Aster, to wit, \$20 each. It is so ordered.

THE ALEXANDER M. LAWRENCE.

(District Court, S. D. Alabama. March 3, 1900.)

No. 874.

SEAMEN—SUIT FOR WAGES—CREDIT FOR PROHIBITED PAYMENTS.

The statute of the United States relating to the merchant marine having prohibited, under penalty, the payment of seamen's wages in advance (30 Stat. 763), and also provided, under penalty, that seamen discharged shall be so discharged and paid off in the presence of an authorized shipping commissioner, and that no payment, receipt, settlement, or discharge otherwise made shall operate as evidence of the release or satisfaction of any claim (Rev. St. §§ 4529, 4552), a payment made to a seaman of wages not then earned, or one made on the termination of a voyage, but not in the presence of a commissioner, cannot be shown in defense to a libel by the seaman to recover wages shown to have been earned.

In Admiralty. Suit by seaman to recover wages.

W. D. McKinstry, for libellant.

Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. The statutes of the United States forbid the payment of a seaman's wages in advance, and provide that in no case, except as therein provided, shall such payment absolve the vessel, or the master or owner thereof, from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel for the recovery of such wages. 30 Stat. 763. The statutes also provide that all seamen discharged from merchant vessels, etc., shall be discharged and receive their wages in the presence of a duly-authorized shipping commissioner, except where some court otherwise directs; and any master or owner of any such vessel, who discharges any such seamen belonging thereto, or pays their wages within the United States in any other manner, shall be

liable to a penalty of not more than \$50 (Rev. St. § 4549); and further provides that, in all cases in which discharge and settlement before a shipping commissioner are required, no payment, receipt, settlement, or discharge, otherwise made, shall operate as evidence of the release or satisfaction of any claim (Id. § 4552). It is an elementary principle of law that one who has himself participated in a violation of the law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. *Manufacturing Co. v. Brucker*, 111 U. S. 597, 4 Sup. Ct. 572, 28 L. Ed. 534; *Swann v. Swann* (C. C.) 21 Fed. 306. The authorities, both state and federal, hold that no rights can spring from or be rested upon an act in the performance of which a criminal penalty is incurred. The penalty implies a prohibition, and the act relating to it is void,—as absolutely void as if the law had declared that it should be so. Authorities *supra*; *Moog v. Hannon's Adm'r*, 93 Ala. 503, 9 South. 596; *Youngblood v. Savings Co.*, 95 Ala. 526, 12 South. 579. Hence I am bound to hold that the advance of \$10 made by the master to the libelant on his wages not then earned can be no defense to this libel for the recovery of wages, the proof showing that wages were earned; and, in view of the fact that the payment of the \$12.36 to the libelant at Mobile on the termination of the voyage was in violation of section 4549, Rev. St., and of the law as declared in the authorities cited, however unjust it may appear, or however harsh such ruling might sometimes be, I am constrained to hold that the claimant cannot be permitted to assert his right to have such payment deducted from or charged against any wages actually earned by the libelant. The claimant can rest no right upon the act of payment, it being done subject to a penalty. Furthermore, the statute expressly says that no such payment shall operate as evidence of the release or satisfaction of the libelant's claim. If the payment cannot operate as evidence, is it admissible as evidence? My opinion is that the libelant is entitled to no wages from the time he was imprisoned down to the time he reshipped on the voyage to Mobile, as I find he was himself the cause of the imprisonment. A decree will be entered for the libelant for \$22.36, with a division of the costs.

THE MENOMINEE.

(District Court, S. D. New York. March 28, 1900.)

SHIPPING—LIABILITY OF SHIP FOR INJURY TO STEVEDORE—NEGLIGENCE.

A ship cannot be held liable for an injury to a stevedore resulting from the breaking of a rope constituting part of the tackle furnished by the ship for the use of the stevedores, where the tackle and rope were in good condition when furnished, and the breaking of the rope was caused by a piece of ratline becoming wound around it, and preventing its passing through a fall, and the evidence fails to show, either directly or presumptively, that this occurred through any negligence or fault of the ship.

In Admiralty. Suit in rem for personal injuries to a stevedore.

Avery F. Cushman, for libelant.
Convers & Kirlin, for respondent.

BROWN, District Judge. The libelant was one of the stevedore's gang preparing to discharge the steamship Menominee. While clearing the end of one derrick boom, the end of another derrick boom very near, which had been raised a number of feet by other men in the same employment, fell upon him and caused him considerable suffering and injury. That boom fell in consequence of the parting of the Manilla rope by which it was being hoisted. The parting of the rope was at a block about 55 feet above the deck through which the boom was being raised by a line running through other falls, making in all five parts, and thence attached to the winch by which the boom was raised. The evidence leaves no doubt that the rope was cut in the upper fall in consequence of becoming jammed by a piece of ratline some 5, 10 or 15 feet long, which had in some way become wound around the Manilla rope and carried up with it into the fall, so that the rope could not pass through, but broke off a part of the block and crowded the Manilla rope upon the edge of the sheave and the iron lining of the block, where it was cut by the strain from the winch. The libelant charges that the ship should be held responsible for the attachment of the ratline to the Manilla rope, as constituting an imperfect equipment and deficient appliance supplied to the stevedore.

I cannot sustain the libelant's contention upon the facts as they appear in evidence. The rope, falls and blocks were all in good order and condition. How the ratline got around the Manilla rope is wholly unexplained. It was not part of the appliance itself, but wholly independent of it. Ratlines are sometimes tied to the ropes for some temporary purpose. But this ratline was not tied to the rope, but swung around it enough to carry it up with the rope as it ascended. From this fact it would seem more probable that it resulted from some careless throwing of the ratline than from any intentional attachment; or it might have been picked up from the deck by the Manilla rope in passing through the lower falls.

The mate testifies that an hour or two before this work commenced he examined the tackle falls and that they were in perfect condition. The foreman of the stevedore's gang, who handled these falls, also testified that he examined them immediately before using and saw nothing out of order. From the length and size of this ratline, however, it could not fail to be seen, upon any real examination, that it was no part of the tackle. The testimony further shows that the ratline was smaller in size and of less strands than any ratline that belonged to the ship or was in use by the seamen; and that the stevedores occasionally used such ratlines, although several of them testified that none such was used that morning.

In this state of the evidence I do not see how fault can be charged upon the ship. The only rational inference is that the ratline became accidentally attached to the rope by some inadvertence unknown, that it was not probably attached to the rope when the offi-

cer examined the falls two hours before, and possibly not even when the stevedore's man examined it immediately before commencing to hoist, but possibly by some inadvertence during the hoisting. The burden of proof to show negligence or fault of the ship is upon the libelant. This has not been shown. There is no presumption that the ratline got around the Manilla rope through the ship's agency rather than through the agency of the stevedores themselves; while the character of the rope itself would indicate that it came much more probably from the latter than from the former.

The libel is dismissed without costs.

THE HIRAM.

(District Court, S. D. Alabama. April 21, 1900.)

No. 854.

1. SHIPPING—DAMAGE TO CARGO—DELAY IN PREPARING VESSEL FOR LOADING.

A contract of affreightment becomes effective, so as to render the carrier liable for its breach, only from the time the goods are delivered for shipment; and the owner of a cargo has no lien upon a vessel for injury to such cargo resulting from delay in preparing the vessel for loading which occurred before the cargo was received by the owners or their agents.

2. SAME—CONTRACT OF AFFREIGHTMENT WITH CHARTERER—LIABILITY OF VESSEL FOR BREACH.

Neither a vessel nor her owner is liable for a breach of a contract for the carriage of a cargo, between the charterer and a shipper, occurring before any part of the cargo had been put on board.

3. SAME.

A ship is answerable for any negligence that causes damage to a cargo after it has been placed on board under a contract of affreightment between the shipper and a charterer, and a suit to enforce such liability may be maintained by the shipper directly against the vessel; but she cannot be held liable for damage resulting from delay due to the condition of the weather, and not to any negligence in her navigation.

4. SAME—CONSTRUCTION OF CHARTER.

A vessel was described in a charter as a water-ballast ship, and was so accepted without objection by the charterer, who contracted to carry in her a cargo of cattle. The shipper desired to load a number of the cattle on the deck, which was refused by the master on the ground that it would be unsafe, with the ballast the ship carried. *Held*, that he could not be required to provide additional ballast, nor could the ship be held liable for his refusal to load the cattle as required by the shipper; it being shown that his objections were well founded, and there being no provision of the charter specifically requiring the vessel to take a deck cargo, or to carry any specific number of cattle.

In Admiralty. Suit to recover damages for injury to cargo.

Gregory L. & H. T. Smith, for libelant.

Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. There is no claim in this case that the vessel was unseaworthy at the time she sailed with the cargo

on board, or that the damage complained of was caused from the unseaworthiness of the vessel during the voyage; and it appears that she was not unseaworthy when taking the cargo aboard, but that she was discovered to be so while being prepared to receive the cargo. On the discovery of a leak in the water tank, she was considered unseaworthy, and the master stopped the work of preparation for cargo, and proceeded at once to repair the tank. The contention of libellant is that by reason of certain delays in taking the cargo aboard, and in proceeding on the voyage after it was laden, the damage complained of arose. The delays specified, and that, it is urged, mainly caused said damage, were by reason of the negligence of the master of the vessel in not repairing the tank sooner, and of his further negligence in not having his winches in proper order. These delays were during the time the cargo was not in the possession of the vessel, nor had it been delivered to it or to its owners or agents. No law relating to the liability of common carriers justifies a rule that they are liable for injury to goods not in their possession, arising from delay in conveying them, and not delivered to them during such delay. *The George Dumois* (D. C.) 88 Fed. 542. "The owner of a cargo has no lien upon the vessel for the breach of a contract of affreightment until the cargo, or some portion, has been laden on board or delivered to the master." *Scott v. The Ira Chaffee* (D. C.) 2 Fed. 401, and authorities therein cited. The liability of a common carrier usually begins when the goods are delivered to him at the place appointed or provided for their reception, in a proper condition, and ready for immediate transportation. Independently of any special agreement, he is accountable for any damage or loss that may happen to the cargo in its conveyance, unless arising from inevitable accident,—in other words, the act of God or the public enemy. *New Jersey Steam-Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465. I do not find from the evidence that the master was negligent in either particular referred to. These delays are not shown to have been caused by his negligence, nor are they shown to have been voluntary, in the sense that they were unjustifiable. The evidence shows that the tank had been thoroughly overhauled and repaired but a few months before, which, in view of the expert testimony as to custom and necessity for more frequent inspection and repair, and as to the condition of the tank at the time of the aforesaid repairs, satisfies me that the master was guilty of no negligence in the premises. As soon as he discovered the leak in the tank, he proceeded at once to repair it, as it was his duty to do, to render the vessel seaworthy for the voyage on which she was about to enter. The evidence also shows that the winches were in good order, but that there was no steam up, ready to operate them; that the master had not been positively notified that they would be needed. As soon as he was so notified, steam was promptly raised, and the winches were at work. However, the delay on this account was inconsiderable, and it appeared that it did not materially interfere with the loading of the cargo.

There is a case in 17 Fed. (the case of *The J. C. Stevenson* [D. C.]

17 Fed. 540) where a libel was filed to recover damages for the loss of cattle shipped by libelant on said steamship, and for damages resulting from the delay of the steamship entering upon the voyage. The contract for the shipment of the cattle was made by the agent of the steamship, and provided for her to sail with the cattle on the 12th of October, or thereabouts. She did not sail until about the 14th of November, owing to her nonarrival at the port of departure until the 4th of November. There was a delay of about a month. Damages were claimed for this delay. The court, in its opinion, says the damages on this ground cannot be extended beyond such as had occurred up to the time the cattle were put on board; that as the ship, when she did arrive, was accepted by the libelant, and did in part perform the contract, by her taking the cattle with his consent, he can recover the cost of keeping the cattle during the delay, and this is all he can recover; adding that it is a question not free from doubt whether for these items for damages the libelant has a lien on the ship. The court cites but one authority to sustain its decision, and that case was in personam. The case of *Hoadley v. The Lizzie* (C. C.) 39 Fed. 45, cited by libelant on the point of delay in loading and prosecuting the voyage, was a libel for damages for breach of a charter party, brought by the charterers. The court held that a careful examination of the pleadings and evidence in the case showed that the delays on the part of the vessel in the execution of the contract were wanton and wholly inexcusable, and, wholly unexplained as they were, fully justified the suit and the recovery of resulting damages. The charter party in the case stipulated that the vessel should be at the port of loading by a day named, "excepting the acts of God in weather * * * preventing," and also stipulated that there should be "quick dispatch in loading as fast as the vessel could receive." The delays complained of were in loading, and in prosecuting the voyage after she was loaded. I find the preponderance of authorities to be that "any duty that may be violated by the owner or master before the cargo is put aboard the vessel is not a duty of the vessel, or one for the breach of which a lien on the vessel is created or can be enforced." *Scott v. The Ira Chaffee*, supra, and numerous authorities therein cited. The case of *The Lizzie*, supra, is unlike the present one in its facts. In this case the libelant had no direct agreement with the owners or master of the vessel for the carriage of the cargo, and there was no assignment of the charter to him, but the agreement was a contract of affreightment made with the original charterer, who undertook to transport the cargo. My opinion is that for a breach of this contract there can be no liability on the vessel or its owners. The ship, however, would be answerable for any negligence that caused damage to the cargo after its shipment on board; that is to say, it would be answerable to the shipper upon the implied contract to transport safely, and that there should be no unreasonable delay in commencing and prosecuting the voyage after the cargo had been received by the vessel. 1 Pritch. Adm. Dig. p. 492, § 223; *The T. A. Goddard* (D. C.) 12 Fed. 174; *The Euripides* (D. C.) 52 Fed. 161. And

"a person whose goods are transported by contract with a charterer, in a chartered vessel, navigated by her owners, is not limited, in case of loss or injury to his goods, to his remedy against the charterer on the express contract with him, but may directly pursue the vessel or her owners, who have caused the loss." The *T. A. Goddard*, supra; *New Jersey Steam-Nav. Co. v. Merchants' Bank*, supra. But I am clearly of the opinion that the vessel is not liable for any loss or damage that was caused by the delays complained of as occurring prior to the delivery of the cargo to the vessel. The libelant, however, alleges that the master was negligent in not proceeding to sea promptly when the cargo was laden, and by which he claims he was damaged by the loss of some of his cattle, and the deterioration in value of the remainder of them, due to their long confinement on board of the vessel. There was delay in proceeding on the voyage after the cargo was on board, and also after the vessel broke ground. But the evidence tends to show that these delays were not unreasonable, in view of the existing circumstances and conditions; that on the day the loading of the cattle was completed, and at the time it was completed, a heavy fog had arisen, which prevented the vessel from sailing; that the master made efforts to get a bar pilot to take the vessel down the channel to the bay, but failed to get one, owing to the condition of the weather, and the hazards of navigating the channel in it. The evidence tends to show that navigation of the lower river and channel was prevented or at least suspended for two or three days; that after the vessel had sailed, and while going down the channel, she had to stop and cast anchor, owing to the fog; that further down the channel she got aground; that this was due mainly to the obstruction of the channel by a vessel lying therein, but that her delay there was due to fog which rendered navigation of the channel at that point impracticable. In short, the effect of the evidence was, in my opinion, that the several delays in prosecuting the voyage after the cargo was laden were due, not to the negligence of the master, as alleged, but to the condition of the weather and consequent interruption of navigation. For these delays the vessel is not answerable.

Another cause of damage alleged in the libel is the master's refusal to allow 70 head of cattle to be shipped on the deck of the vessel, which the libelant desired and offered to so ship. The master stated that the reason for his refusal to take the cattle on deck was that the vessel was "quite crank and tender," and already lurched and rolled considerably, and that, in his judgment, he could not reasonably or safely carry such deck load with the ballast that he had; that to have done so would have rendered the vessel unseaworthy and unfit for the contemplated voyage. And such was substantially the expert evidence on the subject. It is, however, urged on the part of the libelant that if the vessel, with the ballast she had, was unseaworthy and unfit for the voyage with the proposed deck load of cattle, it was the master's duty to have provided additional and sufficient ballast. I do not think this contention sound. The vessel was a water-ballast ship. She was so described in the charter,

and hence known as such to the charterer, and accepted by him without any provision for extra ballast, and presumably so known to the libellant,—at all events, was delivered to the libellant as a water-ballast ship. The charterer presumably considered that the vessel had sufficient ballast for the service and purpose for which he had chartered her. He required no additional ballast. His contract with libellant did not provide specifically for a deck cargo, or for a specific number of cattle to be transported. I think, under the circumstances, that it was the duty of the libellant or the charterer to have furnished the extra ballast, if it was necessary to enable the vessel to carry the deck cargo desired.

The case of *The Alvah* (D. C.) 59 Fed. 630, cited by the libellant, was an action against the ship to recover damages for a violation of a contract of affreightment. The contract, made by the ship's brokers, and confirmed by those who had authority to bind the ship, stipulated for the transportation of 374 head of cattle. Only 332 head of the cattle were shipped, and the court held that the shipper was entitled to recover for the failure of the ship to transport the additional 42 head called for by the contract. The ship's brokers stated that the 374 head of cattle, if carried in the space allotted by the ship for their transportation, could be insured. It turned out that insurance could not be effected upon so many cattle placed in the space allotted for them, without additional ventilation, which the master refused to provide; and the shipper thereupon refused to ship more than 332 head of his cattle, and sued to recover damages for the nonshipment of the 42 head. The court held, in substance, that, in a contract for transportation of cattle, it is implied that the space allotted to the cattle for the voyage shall be sufficiently ventilated, and the ship's brokers having reported that the ship would insure, and it turned out that insurance could not be effected on the number of cattle contracted to be transported, without additional ventilation, and the master refusing to provide sufficient ventilation for the space allotted to the cattle, the shipper was justified in refusing to ship more cattle than could be safely transported in the space allotted without further ventilation, and that the ship was liable for the damages sustained by the shipper by reason of the nonshipment of the excess. The damages were not found, and the rule on which they were to be ascertained was not stated in the opinion. It seems to me that the principle involved in this decision is that of liability of a vessel for improper stowage of cargo, or refusal to properly stow. A specified cargo, in character and quantity, was contracted for. A part of it was received aboard the vessel. The performance of the contract was actually entered upon by the vessel, and after the performance of the contract had begun, and the ship became bound to its full performance, it, in effect, refused to fully perform it, and thereby rendered itself liable for a violation of the contract. This case was reversed, on appeal, by the circuit court of appeals. It was, however, reversed on the ground that there was not satisfactory proof of a breach of the contract. *The Alvah*, 23 C. C. A. 181, 77 Fed. 315. The case of

The Alvah does not seem to me to be a parallel case to the one at bar. In that case there was a contract with the ship for the transportation of a specified number of cattle, a part of which was shipped; the remainder not shipped, as was claimed, by a fault of the master, and which the court held, if true, was a violation of the ship's contract, and for which the ship would be liable.

The libelant was unfortunate in his adventure, and, no doubt, sustained loss in it; but, as I understand the law and the pleadings and evidence in this case, the vessel is not responsible for such loss. The libel is therefore dismissed.

THE CHICAGO.

(District Court, S. D. New York. April 5, 1900.)

COLLISION—FERRYBOAT AND TUG—EVIDENCE CONSIDERED.

Evidence held to place the fault for a collision between a ferryboat passing out of her slip in North river and the tow of a tug passing down the river upon the tug, for coming down so near the piers that the vessels could not see each other until immediately before the collision, on account of the obstruction of the view by a shed on one of the piers.

In Admiralty. Libel for collision.

James J. Macklin, for libelant.

H. Galbraith Ward, for respondent.

BROWN, District Judge. About 7 o'clock in the morning of December 4, 1897, the ferryboat Chicago, as she emerged from her slip at Cortlandt street, North river, bound for Jersey City, came in contact with and damaged a car float on the port side of Central tug No. 20, going down river near the piers against the flood tide. The principal point in controversy is the distance of the float from the New York piers at the time of collision.

Starin's pier (No. 13), about 600 feet long and some 50 or 75 feet above the ferry slip, is covered by a shed, except at the very end, which obstructs the view of vessels coming down from above near the shore. The witnesses on both sides agree that neither of the vessels was seen by the other until the ferryboat was coming out from under Starin's pier, when the float was nearly abreast of it, except that the pilot on No. 20 saw the smokestack of the ferryboat over the shed moving outward some little time before the hull became visible. The pilot of No. 20 testifies that as soon as the ferryboat stopped blowing her slip whistle and before she was visible, except her smokestack, he gave her a signal of one whistle, being then off the upper part of Starin's pier; that he heard a signal of one whistle, which he took to be a reply from the Chicago, and, therefore, continued on, expecting the Chicago to go under his stern; but that the ferryboat, coming out without stopping, came into collision, as above stated, at a distance of about 300 feet outside of

the end of Starin's pier. The witnesses from the ferryboat testify that no whistle was given on No. 20 until she became visible, as the Chicago got nearly at the end of Starin's pier. The pilot of the sister ferryboat Washington coming in, who had stopped 600 or 800 feet outside of the slip, says this signal was not given until just before the collision, and that the collision was about 50 feet outside of Starin's pier, and about 30 feet below it. One witness for the defendant, above Starin's pier, says that at the time of collision he could see clear water between Starin's pier and the ferryboat, which, if true, would indicate that she was more than 200 feet outside of that pier. The weight of evidence, however, is I think that No. 20 was coming down considerably nearer the pier than this last testimony would indicate. Had she been 300 or 400 feet outside of that pier, as the defendant contends, No. 20 and the ferryboat must have been visible to each other when the ferryboat was considerably inside of Starin's pier and when No. 20 must have been considerably to the northward of that pier, as a map of the locality very manifestly shows. As both sides agree that the vessels were not visible to each other in that situation, nor until they were very much nearer each other, it follows of necessity that No. 20 must have been much nearer the pier than her witnesses admit.

That was really the cause of the accident, and for this No. 20 is alone to blame. I do not doubt that No. 20 heard the signal of one whistle, which she took to be an answer to one given by herself; but the evidence is also clear that the Washington, which had stopped outside and a little below, first gave the signal of one whistle to the Chicago as the latter was coming out of the slip; and that the Chicago gave one whistle as an answer to the Washington's signal, but gave no single whistle to No. 20. The confirmation of the Chicago's account of the whistles between the Washington and the Chicago is so strong, that I cannot reject it; and it follows that the supposition by No. 20 that the Chicago gave her an answer of one whistle was a mistake. This mistake in the understanding of the whistles arose from the fault of No. 20 in coming down out of sight so near the piers, and was at her risk. The Chicago is in no way to blame for not answering a signal of one whistle, given, as alleged by No. 20, before the Chicago had got out of the slip far enough to see No. 20, or to know by what vessel or from what situation or for what purpose such a signal might have been given, or in which direction the vessel giving it was moving.

Libel dismissed, with costs.

UNITED STATES MINERAL WOOL CO. V. MANVILLE COVERING CO.

(Circuit Court, E. D. Wisconsin. April 30, 1900.)

EQUITY PLEADING—MULTIFARIOUSNESS—BILL FOR INFRINGEMENT OF DIFFERENT PATENTS.

A bill is not demurra for multifariousness because it alleges infringement of two separate patents, both of which are for processes having a single object, and which differ only as to one ingredient employed, although they are not charged to have been used conjointly, where it is not apparent that any injustice will result from thus saving a multiplicity of suits.

In Equity. On demurrer to bill for multifariousness, in charging infringement of two separate patents, not alleged to be used conjointly.

Edward W. Frost, for complainant.

C. T. Benedict, for defendant.

SEAMAN, District Judge. The bill alleges the ownership by complainant of two patents for a process of manufacturing mineral wool,—No. 447,360, issued March 3, 1891, and No. 452,733, issued May 19, 1891,—and that both are infringed by the defendant for like manufacture. The process in each is "the remelting of hardened slag in a cupola," but the earlier patent contains two claims for such process,—one showing as an ingredient an admixture of lime or lime-bearing stone, and the other of lime and silica or lime and silica-bearing stone, while the later patent describes the ingredient used with the slag as silica or silica-bearing stone. The main feature in the process appears to rest in the use of hardened slag, which must be remelted to produce the mineral wool. If this is novel, as asserted, and the lime or silica, or both, are mere ingredients to facilitate the remelting, it may be questionable whether the various means should not have entered into the primary patent in some form; but the question urged here on behalf of the defendant, that the second patent is invalid for that reason, is not open on this demurrer, as the objection of multifariousness must rest, not only on the fact that the grounds of suit are different, but that each ground as stated is sufficient to sustain a bill. *Brown v. Trust Co.*, 128 U. S. 403, 412, 9 Sup. Ct. 127, 32 L. Ed. 468. The opinions cited in support of the demurrer undoubtedly state a test for charging infringement of several patents in one suit, which would defeat the joinder in this bill, if the rule applied in the cases referred to is inflexible,—that separate patents cannot be so united without an allegation of conjoint use of each patent. *Hayes v. Dayton* (C. C.) 8 Fed. 702; *Barney v. Peck* (C. C.) 16 Fed. 413; *Consolidated Electric Light Co. v. Brush-Swan Electric Light Co.* (C. C.) 20 Fed. 502; *Union Switch & Signal Co. v. Philadelphia & R. R. Co.* (C. C.) 68 Fed. 913; *Diamond Match Co. v. Ohio Match Co.* (C. C.) 80 Fed. 117; *Loudon Machinery Co. v. Montgomery, Ward & Co.* (C. C.) 96 Fed. 232. On the other hand, *Shields v. Thomas*, 18 How. 253, 259, 15 L. Ed. 371,—the leading authority on this subject,—adopts the view stated by Mr. Justice Story in his work on Equity Pleading, that

"the conclusion to which a close survey of all the authorities will conduct us seems to be that there is not any positive, inflexible rule as to what, in the sense of a court of equity, constitutes multifariousness, which is fatal to a suit on demurrer" (section 539); and the opinion further states that the rule is "almost as much an exception as a rule," and "that each case must be determined by its peculiar features." In *U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 352, 9 Sup. Ct. 90, 32 L. Ed. 450, in *Brown v. Trust Co.*, 128 U. S. 403, 410, 9 Sup. Ct. 127, 32 L. Ed. 468, and in *Harrison v. Perea*, 168 U. S. 311, 319, 18 Sup. Ct. 129, 42 L. Ed. 478, the view thus stated is reaffirmed and exemplified, and the principle of multifariousness is stated as "one very largely of convenience," and as not applicable to defeat a trial in one suit of several causes, where parties and subject-matter are intimately related, and no injustice is apparent from thus saving multiplicity of actions.

The case at bar is clearly distinguishable from each of those cited by counsel in which the objection of multifariousness was sustained. These patents are for a process with a single object,—the production of mineral wool,—differing only as to one ingredient employed in melting the slag. If the patents are valid, and the process is employed by the defendant, the use of either ingredient would constitute infringement. The inquiry of fact seems to be well defined, and it is not apparent that confusion or hardship can arise in presenting the issues in one suit. The demurrer is overruled, with leave to answer on or before the next rule day.

INTERSTATE COMMERCE COMMISSION v. LOUISVILLE & N. R. CO. et al.

(Circuit Court, S. D. Alabama. December 12, 1899.)

1. APPEAL—INJUNCTION—SUPERSEDEAS.

A decree granting an injunction is not superseded by an appeal from the decree, even though all the requisites for a supersedeas be complied with. *Hovey v. McDonald*, 3 Sup. Ct. 136, 109 U. S. 161, 27 L. Ed. 888; *Leonard v. Land Co.*, 6 Sup. Ct. 127, 115 U. S. 468, 29 L. Ed. 445; *Knox Co. v. Harshman*, 10 Sup. Ct. 8, 132 U. S. 14, 33 L. Ed. 249.

2. SAME.

A court rendering a decree granting an injunction has the power, if the purposes of justice require it, to order a continuance of the status quo until a decision shall be made by the appellate court, or until that court shall order the contrary, and the power should always be exercised when any irremediable injury may result from the effect of the decree as rendered. *Hovey v. McDonald*, 3 Sup. Ct. 136, 109 U. S. 161, 27 L. Ed. 888; *Leonard v. Land Co.*, 6 Sup. Ct. 127, 115 U. S. 468, 29 L. Ed. 445.

3. SAME.

So long as an appeal remains unperfected, and the cause has not passed into the jurisdiction of the appellate tribunal, it continues subject to the general power of the circuit court over its own judgments, decrees, and orders during the existence of the term at which they are made. *Smelting Co. v. Billings*, 14 Sup. Ct. 4, 150 U. S. 31, 37 L. Ed. 986; *Goddard v. Ordway*, 101 U. S. 752, 25 L. Ed. 1040.

4. JUDGMENT—VACATING.

During the term at which they are made, the judgments, orders, and decrees of courts are under their control, and may be set aside or modified,

as law or justice may require. *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872.

5. SAME—ACT TO REGULATE COMMERCE.

The sixteenth section of the act of February 4, 1887 (24 Stat. c. 104), to regulate commerce, as amended by the act of March 2, 1889 (25 Stat. c. 382), under which resort to the circuit court can be had for the enforcement of lawful orders or requirements of the interstate commerce commission, provides that, "when the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the supreme court of the United States, under the same regulations now provided by law in respect of security for such appeals; but such appeals shall not operate to stay or supersede the order of the court, or the execution of any writ or process thereon." *Railroad v. Behlmer*, 169 U. S. 645, 42 L. Ed. 889. Said provision of the act to regulate commerce relates only to the effect of an appeal, and it does not deprive the circuit courts of their right of control over their own decrees during the term at which they are rendered, and before an appeal is prayed.

In Equity. On petition by defendants for suspension of decree and supersedeas of injunction.

Fuller E. Calloway filed a petition before the interstate commerce commission against the Louisville & Nashville Railroad Company, the Western Railway of Alabama, and the Atlanta & West Point Railroad Company, alleging violations by said defendants of certain provisions of the act to regulate commerce; and such proceedings were had upon said petition that said commission ordered, in effect, that said defendants cease and desist from charging rates for the transportation of the several kinds or classes of freight from New Orleans, La., to La Grange, Ga., which are higher than defendants' rates from New Orleans to Atlanta, Ga. See *Calloway v. Railroad Co.*, 7 Interst. Commerce Com. R. p. 431. The defendants, conceiving that said order made by the commission was illegal, declined to obey it; and thereupon said commission filed a petition in the circuit court of the United States for the Southern district of Alabama against said defendants, to compel them to obey said order. Such proceedings were had in said court that on December 2, 1899, it was decreed by the court that a writ of injunction issue, as prayed for in said petition, restraining the defendants from further continuing disobedience of said order, and enjoining obedience to the same. On December 7, 1899, pursuant to said decree, an injunction was issued from said court enjoining said defendants, in effect, from charging rates for the transportation of the several kinds or classes of freight from New Orleans, La., to La Grange, Ga., which are higher than defendants' rates from New Orleans to Atlanta, Ga. During the same term at which said decree of December 2, 1899, was rendered, said defendants, on December 11, 1899, filed a petition in said court, in which they averred, among other things, that to reduce the rates from New Orleans to La Grange, so as to make them not higher than the rates from New Orleans to Atlanta, will necessitate a reduction in the La Grange rates on each and every class of freight, ranging from 9 cents per 100 pounds on class D, to 40 cents per 100 pounds on class 1; that, by combining said reduced rates from New Orleans to La Grange with local rates prevailing from La Grange, material reductions will have to be made in the rates from New Orleans to every local station on the Atlanta & West Point Railroad, from and including Newnan, Ga., to and including West Point, Ga.; that said reduced rates from New Orleans to La Grange will be materially lower than the rates from New Orleans to every local station on the Western Railway of Alabama, from and including Cusseta, Ala., to and including Seven Mile, Ala.; that, if defendants shall accept said reductions in rates from New Orleans to said local stations, the loss will be irremediable, because defendants will have no right of action to recover back the difference between such reduced rates and the present rates, and, if defendants have such right of action, they will be forced to bring a multiplicity of suits against the various shippers and consignees to enforce said right; and that if defendants shall fail or refuse to reduce the rates from New Orleans to said local stations on the Western Railway of Alabama, so as to make them

as low as the La Grange rates, defendants will be subjected to a multiplicity of suits by shippers and consignees at said local stations for violating the long and short haul clause and other provisions of the act to regulate commerce. Said petition averred that defendants contemplated praying an appeal from said decree of December 2, 1899, and defendants offered therein to keep an account of all shipments from New Orleans to La Grange, and to execute a bond to refund to shippers and consignees at La Grange all such amounts as may be collected by defendants, pending said appeal, as shall be in excess of said reduced rates to La Grange as ordered by the interstate commerce commission. Said petition prayed that the execution of said decree of December 2, 1899, be suspended, and that said injunction be suspended and superseded, pending said appeal. Said petition was submitted upon brief and oral argument by the solicitor for defendants, and the United States district attorney, on behalf of said commission, opposed the granting of the prayer.

L. A. Shaver and M. D. Wickersham, U. S. Dist. Atty., for complainant.

Ed. Baxter, for defendants.

TOULMIN, District Judge. This cause came on further to be heard on this, the 12th day of December, 1899, upon the previous proceedings, and the petition filed herein, on the 11th day of December, 1899, by said defendants, praying for a suspension of the decree rendered herein on December 2, 1899, and for a suspension and supersedeas of the injunction issued herein on December 7, 1899, pending the appeal, which said defendants desire to pray from said decree. And, it appearing to the court that said defendants may be subjected to irreparable injury and to a multiplicity of suits if said decree and injunction should be enforced pending said appeal, it is ordered, adjudged, and decreed by the court that, pending said appeal, said defendants keep an accurate account of each and every shipment of freight made from New Orleans, La., to La Grange, Ga., over their line, showing the dates of shipment, names of consignors and consignees, the class and weight of freight carried, and the rate of freight charged, and make reports thereof to this court once every three months, pending said appeal; and that said defendants execute bond, with sufficient surety, to be approved by the court, payable to the United States of America, for the benefit of whom it may concern, in the penalty of \$5,000, conditioned that, if said defendants fail to prosecute said appeal to effect, they will promptly pay to such person or persons as may be entitled thereto such amounts as said defendants may collect from such person or persons, for the transportation of freight from New Orleans to La Grange, pending said appeal, over and above the reduced rates from New Orleans to La Grange, as ordered by said commission and decreed by this court. And thereupon said defendants executed said bond, and the same was approved by the court, and it was ordered, adjudged, and decreed by the court that said decree be suspended, and that said injunction be suspended and superseded pending said appeal.

NEWTON et al. v. EAGLE & PHENIX MFG. CO. (JOHNSON et al.,
Interveners).

(Circuit Court, W. D. Georgia, N. D. February 9, 1897.)

1. BANKS AND BANKING—LIENS—PLEDGE OF PERSONALTY—SECURITY OF DEPOSITORS.

Act Ga. Feb. 17, 1873, authorizing a corporation to establish a savings department, requiring such company to pledge its entire capital stock and property for the payment of the depositors, and providing that deposits might be received after such pledge, did not, of itself, create a lien on such capital stock and property, since it authorized and required the company so to do, and contemplated the security of depositors before the receipt of deposits.

2. SAME—MORTGAGE.

A resolution of the stockholders authorizing the directors to put into operation a savings department, and action by the directors thereunder, declaring the entire property of the company pledged for the payment of depositors, was not a full compliance with the authority and requirements of Act Ga. Feb. 17, 1873, authorizing and requiring a corporation to pledge its entire capital stock and property for the payment of depositors in its savings department, since such statute contemplated a mortgage on such stock and property.

3. SAME—EQUITABLE LIEN.

Act Ga. Feb. 17, 1873, authorized and required the Eagle & Phenix Manufacturing Company to pledge its entire capital stock and property for the payment of depositors in a savings department authorized to be established. The directors under authority of a stockholders' resolution, declared the entire property of the company pledged for the payment of such depositors. *Held*, that such action of the stockholders and directors constituted an equitable lien upon such property in favor of depositors, or those who became depositors, in such savings department, though no particular person was named, enforceable against the company and others with notice.

4. SAME—NOTICE—CONTENTS OF DEED.

A deed of trust conveyed the real and personal property of a corporation to secure payment of bonds issued to pay depositors in its savings department. Such deed recited Act Ga. Feb. 17, 1873, authorizing and requiring such corporation to pledge its capital stock and property for the payment of such depositors; that large deposits had been received; that such company had not made any pledge of its capital stock or property for payment of depositors, nor created any lien or mortgage of any kind on its property. *Held*, that notice of an equitable lien existing on the capital stock and property of such corporation by reason of a pledge of such property declared by the directors under authority of a stockholders' resolution, and in pursuance of such act, cannot be implied from knowledge of the contents of such deed and bonds.

In Equity. Bill by J. A. Newton, administrator, and others, against the Eagle & Phenix Manufacturing Company. On demurrer to the intervention of J. W. Johnson and others. Overruled.

Ellis & Gray, for complainant.

Abbott & Cox, for defendant.

L. F. Garrard and W. A. Blount, for trustee.

McNeil & Levey, for interveners.

Glenn, Slaton & Phillips, for receivers.

Goetchius & Chappell, for creditors.

NEWMAN, District Judge. In 1873 the Eagle & Phenix Manufacturing Company was engaged in the manufacturing business at Columbus, Ga. On February 17, 1873, an act of the legislature of Georgia in reference to said company became a law by the approval of the governor. That act, which authorized the establishment of a savings department, and which gives rise to the controversy now before the court, is as follows:

"Section 1. Be it enacted by the general assembly of the state of Georgia, that the Eagle and Phenix Manufacturing Company, of Columbus, Georgia, be and is hereby authorized to establish a savings department in connection with the business of said company, and to receive money on deposit from the employees of said company and others, and pay such rate of interest, not exceeding ten per cent, upon the same as the directors of said company may determine.

"Sec. 2. That the said company is authorized and is hereby required, to pledge the entire capital stock and property of said company for the payment of depositors and those holding certificates of deposits in said savings department, and each stockholder in said company shall be individually liable for the ultimate payment of depositors, and those holding certificates of deposits in said savings department, in proportion to the amount of his stock.

"Sec. 3. That after the said capital stock and property shall have been pledged, the said company may issue certificates of deposit to the amount equal to the amount actually deposited, in sums of five, two and one dollars, which may be payable to the holder of the same, and may be circulated by delivery as currency.

"Sec. 4. That the directors of said company are further authorized to make such by-laws and regulations as may be necessary for the proper management of said savings department."

Following this act, on March 20, 1873, at a stockholders' meeting of said company, as appears by the minutes, the following action was taken:

"John Peabody offered the following resolution, based upon the charter granted by the general assembly to this company authorizing a savings department, and the issue of certificates of deposit to be circulated as currency: 'Resolved, that the directors be authorized to put into operation the savings department according to the charter, and to proceed to the erection of an additional mill,' etc.

Subsequently, as appears by the minutes, at a meeting of the directors of the company, the following action was had:

"Columbus, Ga., March 20th, 1873. At a subsequent meeting of the directors the following motion was made and unanimously passed: 'That by the authority delegated by the stockholders and authorized by the charter of the savings department, that the entire property of the company and of the stockholders individually in proportion to their shares is hereby pledged for the payment of depositors and those holding certificates of deposit in said savings department.'"

The marginal note to this action of the directors was as follows:

"Pledge of the total assets of the Co. and the property of shareholders to depositors."

Subsequently the interveners and others made deposits with the company, balances of which still remain in their favor unpaid. While the fact does not appear in the intervention which is now being heard on demurrer, it is conceded that no question is involved as to certificates of deposit, a large number of which were issued to be used as currency; they having all been redeemed, and none

of them being in question here. The indebtedness of this intervener and others, who have been heard by counsel in argument, and probably all that is now outstanding, is evidenced by pass books issued by the savings department, and held by depositors showing deposits and balances. Another fact alluded to in the argument, and not controverted, and which was evidenced by one of these pass books, may be mentioned, and that is that inside of each of these pass books was pasted a printed slip, stating the action of the company with reference to securing depositors in the savings department, as has been set out above. On the 18th day of February, 1891, the company, by action of its stockholders, ceased to receive deposits in its savings department, and by like action of its stockholders resolved to issue bonds to the amount of \$1,000,000, to be sold for the purpose of paying off the deposits; said bonds to be secured by a mortgage or deed of trust executed by the company to the American Trust & Banking Company as trustee. Something over \$900,000 in amount of said bonds have been issued and sold. The bonds so issued recited upon their face that they were "to be issued and used only to pay off deposits made in the savings department in said Eagle & Phenix Manufacturing Company, established under act of the general assembly of Georgia, Feb. 17, 1873." The recitals in the deed of trust made by the Eagle & Phenix Manufacturing Company to the American Trust & Banking Company as trustee, so far as material here, are as follows.

"Whereas, under an act of the general assembly of Georgia entitled 'An act to authorize the Eagle & Phenix Manufacturing Company, of Columbus, Georgia, to establish a savings department, and to provide for securing depositors' (which said act was approved February 17, 1873), the said manufacturing company did establish a savings department, and did receive money on deposit from the employes of said company and others, and continued to receive such deposits up to the 14th day of February, 1891. Whereas, the said manufacturing company did not at any time, by any action of its stockholders or directors, make any pledge of its capital or property for the payment of depositors, or those holding certificates of deposit in said savings department, and has not created any lien or mortgage of any kind upon the property of said company. Whereas, on the 14th day of February, 1891, the board of directors of said manufacturing company, at a meeting held at the office of said company on that day, passed the following resolution, to wit: 'Resolved, that the savings department of the Eagle & Phenix Manufacturing Company shall be wound up at as early a day as practicable; that no more deposits shall be received after this day in the savings department, and any money sent for that purpose shall be held subject to the order of the owner.' Whereas, afterwards, to wit, on the 18th day of February, 1891, at the annual meeting of the stockholders of said manufacturing company, the aforesaid action of the directors in discontinuing the said savings department was, by the said stockholders, ratified and confirmed, and the board of directors were authorized and directed to issue bonds payable in gold, bearing interest at a rate not exceeding six per cent. per annum, to an amount not exceeding the total amount due said depositors, which bonds and the proceeds thereof shall be used only in paying off said depositors; and said board of directors were further authorized and directed to cause a mortgage or deed of trust to be made upon the real and personal property of said manufacturing company, to secure the payment of such bonds, which mortgage or deed of trust shall be signed by the president and the secretary and treasurer of said company, and to be made to such person as trustee as the said board may designate, and for the benefit of the holders of such bonds; and to be further secured by keeping the said property so conveyed insured against fire for the benefit of

the bondholders. Whereas, instead of using and employing the money so deposited in said savings department in banking, or in banking loans, or investing in stock, bonds, or other securities, the board of directors of said manufacturing company employed the same to the extent of over one million of dollars in erecting additional mills and other proper and necessary buildings, and in the purchase of additional machinery, and in erecting a stone dam across the Chattahoochee river in order the more effectively and permanently to control the water power of said company; and have, in this way, added to and increased the value of the property of said company to an amount over one million dollars, all of which now belongs to said company, and forms a part of its capital and property; and for this cause it becomes necessary to issue bonds of said manufacturing company in order to pay off said deposits. Whereas, in order to pay off said deposits, and in pursuance of the authority duly conferred on them by said resolution, and by the charter of said manufacturing company and amendatory acts, the said board of directors, by resolutions duly adopted, determined to issue one thousand bonds of one thousand dollars each, aggregating in amount (\$1,000,000) one million dollars, which amount does not exceed the amount of such deposits, and is sufficient to enable the said manufacturing company to fully pay off such deposits."

All of the property of the Eagle & Phenix Manufacturing Company was, on the 13th day of June, 1896, placed in the hands of receivers by order of this court. At that time there were still outstanding and due a considerable sum to depositors in the savings department; the amount due to each being evidenced, as stated, by the pass books of the several depositors.

The question now presented to the court is as to the relative priority of the two classes of creditors of the Eagle & Phenix Manufacturing Company, namely, the depositors in the savings department of the company, and the holders of the bonds secured by the trust deed referred to. In determining this question, the first matter for consideration is a construction of the act of the legislature of February, 1873. Did this act of itself create a lien on the property of the Eagle & Phenix Company,—did it create a present and effective lien, without further action on the part of the company? The second section of the act provides that "said company is authorized and hereby required to pledge the entire capital stock and property of said company," etc. The term "pledge" is evidently not here used in a technical sense, and could not have been. The term "pledge" strictly and technically refers to personal property, and involves a delivery of the property pledged. The intention clearly was that depositors in the savings department should have, as security for their deposits, the entire capital stock and property of the company; proper action of the company being authorized to this end. It is equally clear that this act did not, of itself, establish or create a lien, but it authorized the company to do so. The company, by the second section, is "authorized and required to pledge," etc. The language is not that the "property is pledged," but that "said company is authorized and required to pledge," etc. If there could be any doubt about this being the proper construction of this act, the doubt is removed by the language of the third section of the act, which is, "After said capital stock and property shall have been so pledged, the company may issue," etc. It seems too clear for discussion that the act contemplated that the company should take steps, before receiving any deposits, to give to depositors the security which the act authorized and required. Equally

clear is it that there was not a full compliance with the statutory authority and requirement. A mortgage was the only proper means by which the security contemplated by the statute could have been given. Inasmuch as depositors would change from time to time, a mortgage to each would have been impracticable, and perhaps the most effective, and, indeed, the proper, way to accomplish the result, would have been by a trust deed made to a trustee, who should hold for the benefit of all who, from time to time, might become depositors in the savings department of the company. That such a course as this, and proper record, was necessary to a compliance with the statute such as would give those who might become depositors in the savings department a right to stand upon the statute, and to claim constructive notice as against subsequent incumbrancers or purchasers, is manifest.

Passing from this, the next question for consideration is the contention of the interveners that, if they have not a statutory lien, strictly considered, they have, under all the facts, an equitable lien as against the company and those charged with notice. The claim is that, taking the act of the legislature, together with the subsequent action of the stockholders and of the directors, showing an evident intention to secure the depositors in the savings department with all the property of the company, that under the recognized principles applicable to the subject a court of equity will come to their aid, and enforce the transaction as an equitable mortgage. In *1 Jones, Mortg.* § 162, the doctrine as to equitable mortgages is stated in this way:

"It has been noticed that a conveyance, accompanied by a condition contained either in the deed itself or in a separate instrument executed at the same time, constitutes a legal mortgage, or a mortgage at common law. In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts which are wanting in one or both of these characteristics of a common-law mortgage are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intention. Mortgages of this kind are, therefore, called equitable mortgages." "There are many kinds of equitable mortgages,—as many as there are variety of ways in which parties may contract for security by pledging some interest in lands. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage. It is not even necessary that the contract should be, in express terms, a security; for equity will often imply this from the nature of the transaction between the parties. For instance, a contract for security is, in England, and in some states of America, implied from a deposit of title deeds."

And again, in section 165:

"Upon this principle, the entry of an agreement by a corporation upon its records that a certain bond for title should be pledged to certain of its members as security for liabilities which they were about to incur for the company was held to be an equitable mortgage; and, although a deed of trust was afterwards made in conformity with the resolution, yet these members, having acted upon the faith of it before the deed of trust was made, were held to be entitled to the security as from that time, and the deed of trust was regarded only as a confirmation of the agreement, and as having relation to the resolution."

Also from section 166 is taken the following:

"An instrument whereby a corporation 'pledges the real and personal estate of said company' for the fulfillment of a contract may be enforced as a mortgage against the company and all persons claiming under it with notice; and is not rendered invalid for the reason that the property of the company is pledged without specification, or that the amount secured is not stated, or the time of redemption fixed."

A case on which much reliance is placed for the interveners is that of *Ketchum v. Railroad Co.*, 3 Cent. Law J. 704, Fed. Cas. No. 7,739, first decided by Circuit Judge Dillon. The rule, as applicable to the facts in that case, is stated by the court in this way:

"But the accepted doctrine of courts of equity in respect to equitable liens or charges will be found, we think, to support the conclusion we have reached. The cases clearly establish this legal proposition. If a debtor, by a concluded agreement with a creditor, sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties and upon all persons with notice who subsequently claim an interest in the fund under the debtor."

This case was subsequently in the supreme court (*Ketchum v. City of St. Louis*, 101 U. S. 306, 25 L. Ed. 999), and the decision of Judge Dillon was affirmed, two judges dissenting.

In *Gest v. Packwood* (C. C.) 39 Fed. 525, the case decided by Judge Deady, the rule is stated in this way:

"A written agreement for security on certain property for the payment of a debt is, in equity, a mortgage, and will be enforced as such against all parties to the agreement and those who have notice of it."

Applying the doctrine thus enunciated to the facts in this case, there seems to be no doubt that an equitable lien exists in favor of these interveners against the company and as against others with notice of the facts creating such equitable lien. It is said by the bondholders resisting this claim that an equitable mortgage was not created by the action of the stockholders and directors, because no mortgagee was named. It is true that no particular person was named as mortgagee, but a class of persons were named for whose benefit the pledge was made, and a class of persons easily capable of identification, and who must be identified before any rights can be declared in their favor. It is said, also, that this pledge of the property of the company was not made for the benefit of those who should become depositors in the future. This cannot be the case, because it is clear from the date of the act authorizing the savings department (February 17, 1873), and the date of the action of the stockholders and directors, March 20th thereafter, that, if the resolution of the stockholders and directors was not taken before any deposits were received (which is most probable), only a very small amount could have been received. The unmistakable intention of the action of both the stockholders and directors is that it should apply to all the depositors thereafter in the savings department of the company. I have no difficulty, therefore, in holding that in view of this act of the legislature, and the action taken by the stockholders and directors, and the evident purpose and intention of that action, together with what must have been understood and relied

upon by the depositors, an equitable mortgage exists in their favor, which will be enforced as such against the company and others with notice.

On the question of notice, in view of the last amendment filed by the interveners, there is great difficulty in making any satisfactory ruling at this time. The amendment alleged that \$500,000, or some such large amount, of the bonds secured by the trust deed to the American Banking & Trust Company were purchased by stockholders and directors of the Eagle & Phenix Manufacturing Company, who had, at the time they took the bonds, full and actual knowledge of all the facts relied upon by the interveners to establish their priority here. So much of the question as relates to the effect of what appears on the face of the trust deed and the bonds themselves as notice to purchasers of the bonds may be now, however; properly determined. While it is true that the trust deed shows on its face the passage of the act authorizing the savings department, and while it is true that other recitals show that the deposits to a large amount were received, still there is nothing whatever on the face of either the trust deed or the bonds to show that any action such as that contained on the minutes of the company had been taken by either the stockholders or directors. The recital in the trust deed is that "the said manufacturing company did not at any time, by any action of its stockholders or directors, make any pledge of its capital or property for the payment of depositors or those holding certificates of deposit in said savings department, and has not created any lien or mortgage of any kind upon the property of said company." It cannot be that a statement that action of a certain kind has not been taken is notice that such action has been taken, in the absence of facts and circumstances calculated to arouse inquiry, or to suggest the untruthfulness of the statement. Nothing is seen upon the face of these papers to suggest to a purchaser otherwise innocent, and purchasing bonds in the due course of business, any doubt as to the truth of the statement made therein. More must be shown, therefore, than appears upon the face of the trust deed and bonds to charge a purchaser with notice of the equitable lien which is held to exist as against the company and those taking the bonds with notice.

With this expression of opinion, the matter as to how far each bondholder or set of bondholders are charged with notice of the depositors' equitable lien must be referred to the special master to be determined upon the facts and circumstances surrounding the several bondholders. An order may be taken, therefore, referring the whole matter as to the relative priority of the bondholders and depositors to the special master to hear evidence, determine and report upon the same.

FISCHER et al. v. CAMPBELL et al.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1900.)

No. 887.

1. FRAUDULENT CONVEYANCES—PREFERENCES BY DEBTOR.

In the absence of any law rendering preferences illegal, the organization by a debtor, with others, of a corporation, and his transfer of property to such corporation in consideration of stock therein issued to him, which he transfers to certain of his creditors, does not constitute a fraudulent conveyance of the property which can be set aside at suit of other general creditors.

2. CREDITORS' SUIT—AMENDMENT OF BILL.

Complainants filed a creditors' bill to set aside a conveyance of property by their debtor to a corporation, which was made a defendant, on the ground that such conveyance was colorable only, without consideration, and made to defraud creditors. The evidence showed that the debtor received for the property stock in the corporation, the most of which he had transferred to others, claimed to be creditors; but there was also evidence tending to show that much of such stock was disposed of in such a way that he still remained the real owner, and in control of the same for his own benefit. *Held*, that equity required that complainants should be permitted to amend their bill so as to raise the issue as to the bona fides and character of such transfers, and to reach such stock if so transferred as to work an illegal prejudice to complainants as creditors.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

Statement of the pleadings as given by appellants: Henry B. Fischer, Bernardo F. Fischer, Adolpho H. Fischer, and T. Tasso Fischer, partners doing business under the firm name of J. & C. Fischer, filed their bill in the United States circuit court for the Southern district of Florida against A. B. Campbell and the A. B. Campbell Land & Loan Company, a corporation under the laws of Florida, alleging that on December 14, 1895, Charles S. Fischer held four notes, aggregating \$16,116, against the A. B. Campbell Company, the payment of which notes stood guarantied by the defendant Alexander B. Campbell under and by a certain contract of guaranty executed by said A. B. Campbell to said Charles S. Fischer, dated April 3, 1895; that said notes and contract of guaranty were sold and assigned by said Charles S. Fischer to complainants, who sued the defendant Alexander B. Campbell thereon, and recovered judgment against him for \$18,980.98 and costs; that execution was issued on said judgment, and returned nulla bona; that on said December 14, 1895, the defendant Alexander B. Campbell owned the property described in the bill (a number of lots in the city of Jacksonville, Fla.), and that on said date (December 14, 1895) said defendant Alexander B. Campbell made a pretended deed of conveyance of said property to the defendant the A. B. Campbell Land & Loan Company, a corporation organized under the laws of Florida, October 21, 1895 (the incorporators being the defendant Alexander B. Campbell, and his wife, Mary E., and two brothers, A. L. and P. Campbell); that at the time of the organization of said corporation the said Alexander B. Campbell was largely involved in debt to Charles S. Fischer and other creditors; that said Mary E., A. L., and P. Campbell never invested any capital in said corporation, nor had any real interest therein; and that the organization of said corporation was but a part of a fraudulent scheme of said defendant A. B. Campbell to hinder, delay, and defraud said Charles S. Fischer and other creditors; that said A. B. Campbell, in pursuance of his scheme to hinder and defraud his creditors, made and caused to be recorded sundry other conveyances about December 14, 1895, by which he covered up all of his property. The bill alleges that the deed from A. B. Campbell to the A. B. Campbell Land & Loan Company is fraudulent and void as against creditors, and prays that the same may be set aside, and the property subjected to the payment of complainants' judgment.

The bill prays that defendants be required to answer, but expressly waives answer under oath. There is also a prayer for general relief. The defendants filed separate answers. The answer of the defendant land and loan company denies that said deed to it was a fraud and a sham, and alleges that said deed was made in good faith, for a full and valuable consideration, to wit, \$5,000 in cash, and 200 shares of the capital stock of said company, issued and delivered to A. B. Campbell. The answer denies that the incorporation of said company was fraudulent, but alleges that said company was organized for the purpose of doing a legitimate business. The answer also sets up that a number of said lots have been sold on contracts to other parties. The defendant A. B. Campbell answers to the same effect, and further alleges that, of the 200 shares of stock issued to him, 193 shares were assigned to various persons who had advanced him money. Replications to these answers were filed, and testimony taken. Upon final hearing the court made its decree denying the prayer of the bill and dismissing the bill. This appeal is brought to reverse this decree, and appellants insist that the decree is erroneous and should be reversed.

D. U. Fletcher and H. B. Phillips, for appellants.
W. B. Owen, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The judge a quo decided in favor of the defendants, and filed the following reasons, to wit:

"Findings by the Court.

"J. & C. Fischer v. A. B. Campbell et al.

"The substance of the allegations of this bill, omitting all introductory and admitted portions, is that Alexander B. Campbell and his wife made a pretended deed of conveyance to the A. B. Campbell Land & Loan Company, for a pretended consideration; that the organization was but a part of a fraudulent scheme to hinder and delay and defraud the creditors out of their just demands; that the said conveyance was not real, but a mere sham, and made with the intention of hindering and defrauding the said Fischers and other creditors out of their just demands; that no consideration was paid by the A. B. Campbell Land & Loan Company to said A. B. Campbell for said conveyance, and that said property is now held in trust for said A. B. Campbell, and for his use and benefit, and for the purpose of preventing a levy and sale under a writ of *fi. fa.* Stripped of all surplus language, the charge is that said conveyance complained of was but a pretended conveyance, and not a real one; that it was but a mere sham, and no consideration passed, but the property is held in trust for the benefit of said A. B. Campbell. The answers of A. B. Campbell, as defendant, and the land and loan company, by A. B. Campbell, president, deny the charges so made, directly and positively,—alleging that the organization of the corporation was arranged and contemplated before defendant was a debtor of complainants; that the conveyance was made in good faith, for a good and valuable consideration, without any intent to defraud his creditors; and that the stockholders of said corporation are bona fide holders, for full consideration paid. The questions are very narrow and direct, and must be determined by the testimony, in the light of all the surrounding circumstances. The principles of fraudulent conveyances are well established by numerous decisions, and it is only necessary to apply them to the facts of this case. If the allegations of the bill are true, the complainants are entitled to a decree; but if, as contended by the defendant Campbell, the conveyance was made in good faith, for the purpose of enabling him to pay certain indebtedness which he had incurred in borrowing money to assist in clearing up the affairs of the A. B. Campbell Company, they are not so entitled. It is not every conveyance that may be set aside, although the result may be to hinder and prevent certain creditors from enforcing a collection of their debts. A simple debt, until reduced to judgment, does not act as a lien,

and prevent all conveyances and commercial transactions, although subsequent events may show that the debtor was, at the time of making such conveyances, insolvent. There is no question of assignment of bankruptcy in this case, by which preferences in payments of debts are prohibited; and the whole case turns upon the fraudulent intention of the defendant, and his design to make a colorable conveyance only, and to retain for his own use the property so conveyed. The testimony is positive that the conveyances, both of the property to the land and loan company, and of the shares taken in said company by the defendant to other creditors, were bona fide, and without any claim or right being withheld by the defendant.

"In the case of *Bank v. Trebein* (Ohio Sup.) 52 N. E. 834, so earnestly relied upon by complainants in this case, the defendant, after taking a certain number of shares in the new corporation in payment of the property, hypothecated them to secure loans, still holding the title in himself. This was unquestionably the crucial test of the case, which led to the reversal of the court below, as the appellate court says: 'His identity as owner of the property was no more changed by the conveyance than it would have been by taking off one coat and putting on another. He was as much the substantial owner of the property after the conveyance as before, and had substantially the same use of it as if the conveyance had not been made.' In this case the promise of an organization of the corporation, and a transfer of shares in payment of loans, based upon such promise, is distinctly testified to as having been made before the complainants' assignors became creditors, and that the conveyance was but a fulfillment of such arrangement and promise. The value of the property conveyed was estimated at about \$25,000, upon which were prior mortgage liens of between \$10,000 and \$11,000. The compensation received was \$5,000 cash, and the stock reserved, transferred in payment of debts, to the amount of about \$11,000. The discrepancy between the amount received and the actual value of the property is not so great as to awaken any suspicion of bad faith, and the supervision of the property since the conveyances seems to be but that of an employé for a fixed compensation, and not of an owner or trustee. The defendant had a legal right to make a conveyance of this property to such of his creditors as he considered most justly entitled; and if he made such conveyance for the purpose of repaying money borrowed to assist in settling up the indebtedness of the A. B. Campbell Company, rather than reserve it to respond to any deficiencies that might arise under his guaranty for any deficiencies which might appear after an exhaustion of the assignment of assets to the assignor of the complainants herein, it is not considered that the facts that such loans were procured from relations and personal friends of the defendant, and the payments made to them, is sufficient to prove bad faith in him. Nor can the retention of one share in the corporation show the entire conveyance fraudulent. There was no law against preferences, and it was for him to determine from the circumstances of the indebtedness who were most justly entitled. If he could transfer his property directly to his creditors, there is nothing in organizing a corporation, and transferring the stock to them in good faith in payment of their loans, which would render it fraudulent. It would only be the retaining for his own benefit the property, after a pretended conveyance, which would demand that a court of equity declare such conveyance a fraud, and I do not consider the evidence establishes such a reversion. It is therefore considered that the deed of conveyance made herein was made in good faith, and was not a pretended or colorable conveyance, intended to hinder and defraud creditors, but, rather, made in accordance with promises of the defendant made before his indebtedness to the complainant, and should not be set aside as fraudulent, and the decree will follow for the defendant accordingly.

"October 30, A. D. 1899.

James W. Locke, Judge."

We agree to the correctness of these findings, if the case should be finally disposed of on the present record, but we are of opinion that such disposition will not meet the real equities between the parties. If we concede, as shown by the evidence in the record, that the A. B. Campbell Land & Loan Company was incorporated

in good faith, that part of its stock was subscribed and paid for by third parties also in good faith, and that the lands conveyed by A. B. Campbell to the said company were conveyed for a valuable consideration, and not in fraud of the creditors of the said A. B. Campbell, still the case very strongly suggests that a large block of the stock of that company, received by said Campbell in payment for said lands, has been disposed of in such a way that he remains the real owner and in full control of the same for his own benefit, whereby his creditors are hindered, delayed, and defrauded. It is unnecessary to recapitulate the facts proved which so strongly suggest this equity. The record teems with them. As the complainants' bill is framed, it requires amendment to properly reach any of the stock of the A. B. Campbell Land & Loan Company, if any such there be, that A. B. Campbell has disposed of to hinder, delay, and defraud his creditors; and it would be an improvement to the bill, and better state complainants' case, if it should be amended so as to clearly charge that the A. B. Campbell Company was insolvent, and that A. B. Campbell had become and was personally indebted to the complainants at and before the time the A. B. Campbell Land & Loan Company was incorporated, and its stock was issued and disposed of. On a further hearing the defendant A. B. Campbell may supplement his own evidence, and more clearly show, if so the case be, that he has fairly used the stock issued by him to pay his just debts, without legal prejudice to his creditors. To allow amendments to the bill and take further evidence, the decree appealed from is reversed, and the case is remanded for further proceedings. See *Insurance Co. v. Phillips* (recently decided in this court) 102 Fed. 19, and the cases there cited. The costs of this appeal, including the cost of transcript, will be divided equally.

RACHAL et al v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1900.)

No. 873.

1. SUBROGATION TO RIGHTS OF MORTGAGEE—PAYMENT AND SATISFACTION OF MORTGAGE.

One who loans money to a mortgagor for the express purpose of paying the mortgage debt, and who himself makes such payment, is not a volunteer; and although he has the mortgage satisfied of record, taking a new one on the same property, he is entitled to be subrogated to the lien of the prior mortgage, as against one who acquired an interest in the property before its release, and subject thereto, of which fact the second mortgagee had neither actual nor constructive notice.

2. JUDGMENTS—CONCLUSIVENESS—RELIEF AGAINST IN EQUITY.

A defendant in an action at law to recover possession of land, who claimed under a legal title accompanied by possession, both antedating the title under which the plaintiff claimed, is concluded as to his claim by a judgment for the plaintiff, which necessarily determines the invalidity of his title; and he cannot make such title the basis of a subsequent suit in equity to restrain the enforcement of such judgment.

Appeal from the Circuit Court of the United States for the Western District of Texas.

On December 19, 1898, Lula M. Rachal, joined by her husband, E. R. Rachal, J. W. Baylor and his wife, Emma F. Baylor, and J. D. Willis, filed their ancillary bill against the appellees, Francis Smith and S. G. Borden, praying for an injunction to restrain the appellee Smith from executing a judgment at law for lands rendered on December 7, 1898, in the case of Francis Smith against E. R. Rachal et al. On January 28, 1899, the plaintiffs, by leave of the court, filed an amended bill in the cause. The plaintiffs obtained from the court on December 21, 1898, a temporary restraining order pending the application for an injunction. On February 13, 1899, the plaintiffs obtained another order, continuing in force the former order until the final determination of the application for the writ of injunction. The subject of the controversy is a tract of land. Francis Smith obtained a judgment at law for the land, and this suit in equity is to obtain relief against the judgment at law. Darius C. Rachal owned in fee simple 16,000 acres of land in San Patricio county, Tex. He owed Shattuck & Hoffman, as trustees of the British & American Mortgage Company, Limited, \$20,000, borrowed money, evidenced by a note and secured by a mortgage on the land. The mortgage bore date March 27, 1885. He also owed John Redmond a note for \$10,000, borrowed money, secured likewise by a mortgage on the land. On April 12, 1888, Darius C. Rachal sold and conveyed to P. A. Hunter, his son-in-law, and F. S. Rachal, his son, the 16,000 acres, except about 200 acres. The consideration recited in the deed was \$48,865.20. The grantees assumed, as a part of the consideration, the payment of the two mortgages on the land. The plaintiffs claimed and alleged in their bill that in the summer or fall of the year 1888 the plaintiff E. R. Rachal, acting for and on behalf of his wife, the plaintiff Lula M. Rachal, made from Darius C. Rachal, F. S. Rachal, and P. A. Hunter a parol purchase for his wife of 1,626 acres (described in the bill) of the aforesaid 16,000-acre tract of land; that this tract was sold to Lula M. Rachal as her separate property and estate, and to her sole and separate use and benefit, and with the distinct understanding that the deed to her should so recite and be made; that the consideration for the 1,626-acre tract was \$4 an acre, which was actually paid at the time. A deed was not made at the time, because a prior survey was necessary, and there was no surveyor in the county, and the survey was not made until in the spring of 1889. In 1888 Lula M. Rachal took possession of the 1,626 acres so purchased by her, and began to improve them. She built a house on the land. In 1889 she put a wire fence around the land, excepting about 126 acres, which she sold to Baylor.

The original and amended bills contain the following averments: "That the plaintiff Baylor and wife purchased in January, 1889, from Lula M. Rachal 126 acres of the 1,626-acre tract, and immediately took possession of them and inclosed them with a wire fence, and made other improvements; and on April 9, 1895, the defendant S. G. Borden purchased of Lula M. Rachal and her husband, by warranty deed, 350 acres of the 1,626-acre tract, for a consideration of \$1,800, which was paid in full; and the plaintiff J. D. Willis purchased from D. C. Rachal in the fall of 1888 50 acres of his 16,000-acre tract at \$14 an acre, which he paid for, improved, and occupied with his family, but did not obtain his deed until March 26, 1890. That at the time of Lula M. Rachal's purchase it was distinctly understood that her grantors should remove all liens and incumbrances from the tract by the payment of the consideration which P. A. Hunter and F. S. Rachal had agreed to pay for the 16,000-acre tract, and the same agreement was made with J. D. Willis at the time of his purchase, and that the whole of the consideration was fully paid off and extinguished on January 15, 1890. That on January 15, 1890, F. S. Rachal, P. A. Hunter, and Darius C. Rachal and wife executed a deed of trust on the whole of the 16,000-acre tract of land to a trustee to secure the Alliance Trust Company in a loan of \$34,000; and on May 27, 1892, the same parties gave to a trustee a deed of trust on the 16,000-acre tract, except the tract owned by Lula M. Rachal, J. W. Baylor, and J. D. Willis, to secure the defendant Francis Smith in a loan of \$9,000. The deeds of trust contained powers of sale, and on October 15, 1897, the trustee sold the whole of the 16,000-acre tract under the

power in the deed of trust, when the defendant Smith purchased it for \$10,000, and received a deed from the trustee, and brought his action at law to recover possession and obtained judgment; and S. G. Borden obtained judgment upon his plea in reconvention against E. R. Rachal upon his warranty for \$1,800, and Borden refused to join in this bill. That defendant Francis Smith, while acting as agent for the Alliance Trust Company in negotiating the loan of \$34,000, and Thompson, the trustee in the deed of trust, did in the latter part of December, 1889, visit and inspect the 16,000-acre tract of land, with the view of making the loan, and, while on the premises inspecting them, saw Lula M. Rachal living on and in possession of her 1,500-acre tract, and saw all the improvements made on it by her, including the fence inclosing it, and was notified that she owned it as her separate property, and was a married woman and head of a family, and wife of E. R. Rachal, and in like manner saw the possession and improvements of Baylor and wife and Willis, and before the execution of the two deeds of trust had full notice of the rights of the plaintiffs. That the tracts of land owned by the plaintiffs and S. G. Borden were included in the deed of trust of January, 1890, by mistake; that it was agreed between Darius C. Rachal, acting for himself, F. S. Rachal, and P. A. Hunter, and defendant Smith, as agent of the Alliance Trust Company, that the lands claimed by the plaintiffs and the defendant Borden should not be included in the deed of trust of January 15, 1890, and that they have a complete equitable title thereto, superior to the title of Smith. That pursuant to the agreement of the parties the Shattuck & Hoffman and Redmond notes were, by the procurement of Smith, as the agent of the Alliance Trust Company, paid off, and marked 'Paid' on their face, and canceled and extinguished, and the deeds of trust by which they were secured were, at the request of Smith, released in the manner required by law. That there never was an assignment of the Shattuck & Hoffman and Redmond notes to the Alliance Trust Company or to Smith, or any foreclosure of the deeds of trust securing them or any rights asserted under them, or any claim that they were valid, subsisting debts, until since filing this suit, but that the Alliance Trust Company and Smith have treated the notes as extinguished. That the lands embraced in the deed of trust of January 15, 1890, excluding the tracts claimed by the plaintiffs and the defendant Borden, were then of the value of \$90,000; that the plaintiffs have, in good faith, with the understanding that all liens would be removed therefrom, made permanent and valuable improvements on the lands, and have built thereon their homes and reared their families; and Smith, with a knowledge of their rights, is seeking to wrongfully acquire both their lands and the improvements; and that, if the preliminary writ of injunction is not granted, they will be immediately turned out of possession, and the injury to them will be immediate, certain, great, and irreparable. That neither the plaintiffs nor the defendant Borden was a party to any of the deeds of trust on said land mentioned in the pleadings, nor did they, or either of them, derive any benefit from the loans; nor was either of them in any way connected with the sale under the powers of the deeds of trust at which Smith purchased, nor the deeds made thereunder to Smith, but they are a cloud upon their title."

The issues will be shown by the following condensed statement of the answer filed by defendants, Francis Smith and S. G. Borden. The answer alleges: "That on the 4th of December, 1889, the two mortgage debts—one for \$20,000, and the other for \$10,000—became due; and in order to get money at a cheaper rate of interest, and to extend the above loans, Darius C. Rachal, F. S. Rachal, and P. A. Hunter made an application in writing to Francis Smith & Co., agents of the Alliance Trust Company, to borrow \$34,000. In the application they stated that the money was wanted for the purpose of paying the above mortgages, and the Alliance Trust Company was authorized to pay them out of the proceeds of the new loan. In the application they represented that the 16,351 acres of land were owned by the applicants, and were rented to and occupied by various tenants. That on the 15th of January, 1890, the Alliance Trust Company, relying upon the representation of the applicants, believing it to be true, loaned them the sum of \$34,000, for the security of which they executed a deed of trust upon the whole property; and the deed of trust was duly recorded on the 15th of January, 1890. In making the mortgages it was agreed and understood that they were made for the purpose of

taking up and extending the two previous loans, whereby the Alliance Trust Company should be subrogated to the liens of the two previous deeds of trust. That after the deed of trust was recorded the Alliance Trust Company paid to the British & American Mortgage Company, Limited, and to John Redmond, the principal and interest due upon their several mortgages; and releases were delivered to the Alliance Trust Company, and they were placed on record by it. That on the 4th of September, 1897, Darius C. Rachal, F. S. Rachal, and P. A. Hunter having failed and refused to pay the note due to the Alliance Trust Company, the property was duly sold by the trustee, and purchased by Francis Smith, who holds it as trustee for the Alliance Trust Company. The defendant denies that the surrender and cancellation of the notes and deeds of trust mentioned above were intended by the parties to operate as a discharge of the liens thereon as against the Alliance Trust Company, but were made merely for the purpose of carrying into effect the subrogation, and not for the purpose of discharging the liens in favor of any of the plaintiffs. That the appellants at the date of their pretended parcel purchases had notice of the two liens aforesaid, and their purchases, if any, were made subject to the liens, and defendant denies that it was ever at any time agreed and understood that the land purchased by them should not be included in the deed of trust in favor of the Alliance Trust Company. The defendant Smith admitted that he inspected the land before making the loan of \$34,000, but denies that he had any notice that the property in controversy was either owned or claimed by the plaintiffs, or either of them, but it was represented to him by the borrowers that the title to all of the land was in them, and it was occupied only by their tenants. The defendants denied that the lands claimed by the plaintiffs were included in the deed of trust to the Alliance Trust Company by mutual mistake. On the contrary, the land claimed by the plaintiffs was pointed out as a part of the security, the whole 16,351 acres then being in a solid body; and, had the 1,500 acres claimed by the plaintiffs been excepted, he would not have made the loan. The defendant denied that when he inspected the land it was pointed out as belonging to the plaintiffs. On the contrary, he was told by Darius C. Rachal that the land was owned by F. S. Rachal and Peter A. Hunter, and occupied by their tenants; that he expected to make a deed to E. R. Rachal of two hundred acres when his debts were settled. The defendant thereupon refused to loan the money unless E. R. Rachal made a disclaimer, whereupon E. R. Rachal made a disclaimer in writing, to the effect that he was living upon a ranch owned by Rachal and Hunter, and that he had no right, title, or claim whatever in the land occupied by him. That at the time the disclaimer was made no title had ever passed out of Darius C. Rachal, F. S. Rachal, and P. A. Hunter into Lula M. Rachal or the other appellants. The defendant Smith admits that he had in his possession the two notes for \$20,000 and \$10,000, and they were marked 'Paid' upon their faces, and he has in his possession releases of the two mortgages of \$20,000 and \$10,000, which have been duly placed on record. The defendant also admits that at the time he loaned the money for the Alliance Trust Company the 16,351 acres were worth the amount of the loan. He denies that they are now worth anything like that sum. He admits that on the 27th day of May, 1892, he loaned Rachal and Hunter an additional \$9,000, because Rachal and Hunter gave him, as additional security, vendor-lien notes aggregating \$21,800."

Many depositions and affidavits and documents were used in evidence by the parties, tending to prove the averments of the bill and answer, respectively. Such parts of this evidence as are deemed pertinent to the questions discussed will be stated in the opinion. The application for a preliminary writ of injunction in the case was heard before Hon. T. S. MAXEY, United States district judge, and on August 23, 1899, he refused the writ, and dissolved the temporary restraining order that had been granted in the case. The plaintiffs Lula M. Rachal, E. R. Rachal, and J. D. Willis appealed to this court, and assign as error the action of the court in refusing the injunction and dissolving the restraining order.

C. L. Bates, for appellants.

Upson & Newton and W. W. King, for appellee Francis Smith.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Darius C. Rachal was the owner in fee simple of the real estate in controversy. The entire tract owned by him embraced 16,000 acres. On March 27, 1885, having borrowed \$20,000 of the British & American Mortgage Company, Limited, he executed a deed of trust on the land to secure the debt. On September 15, 1887, he also executed a second mortgage on the land to secure \$10,000 borrowed of John Redmond. Darius C. Rachal's wife joined him in the execution of these mortgages, and they were duly recorded. There is no dispute as to their validity. It is well to note that Darius C. Rachal was the owner of these lands at the beginning of the transactions out of which the litigation arises, and that it is unquestioned that they were then subject to the two mortgages for \$30,000, with accrued interest. On April 12, 1888, Darius C. Rachal conveyed, with warranty of title, all these lands, except 200 acres, to Frank S. Rachal, his son, and P. A. Hunter, his son-in-law. The grantees assumed to pay the two mortgages. The recited consideration out of which the mortgages were to be paid was \$48,865.20. This sale and conveyance made F. S. Rachal and P. A. Hunter the owners in fee simple of the land, but it remained subject to the two mortgages. With the title and ownership standing this way, the trade was made on which the plaintiff Lula M. Rachal bases her right to equitable relief. She made a parol purchase in the summer or fall of 1888 of 1,626 acres of the land at \$4 an acre. She received no conveyance at first, but took possession and fenced and improved the land. Finally, on March 26, 1890, she obtained a conveyance of the land, dated November 1, 1889, but not acknowledged until April 14, 1890, and it was recorded on March 21, 1891. This deed was executed by Darius C. Rachal and his grantees in the conveyance of April 12, 1888,—F. S. Rachal and P. A. Hunter. Lula M. Rachal made sales of small parts of the tract conveyed to her, but, in the view we take of the case, these transactions are not material. The two mortgages on all the land remained unpaid. On December 4, 1889, Darius C. Rachal, F. S. Rachal, and P. A. Hunter made written application to Francis Smith, one of the appellees who was engaged in negotiating loans, to borrow \$34,000, at 9 per cent. interest, to be used in paying off the two mortgages on the land. The written application for the loan asserted that the title to the lands was in F. S. Rachal and P. A. Hunter, and that the lands were in the possession of Darius C. Rachal and P. A. Hunter. The fact that the land had on it the two mortgages was stated, and the applicants authorized Francis Smith, if the loan was made, to pay the mortgages out of it. These mortgages were bearing 12 per cent. interest. After examining the real estate, Francis Smith agreed to make the loan applied for. In this he acted as the agent of the Alliance Trust Company. On the 15th of January, 1890, Francis Smith, as such agent, lent the \$34,000 to the applicants Darius C. Rachal, F. S. Rachal, and P. A. Hunter, who executed a deed of trust on the 16,000 acres of land to A. S. Thompson, as trustee, to secure the loan. After the deed of trust was

executed, Francis Smith paid out of the loan to the owner of the \$20,000 mortgage debt the amount thereof, with interest; and he also paid out of the loan to the owner of the \$10,000 mortgage the amount thereof, with interest. Both debts, with interest, amounted to \$32,440. Francis Smith did not have these debts transferred to him or to the Alliance Trust Company. He had the owners of the debts, who received the money on them, to execute releases, which were recorded. Francis Smith received into his possession the releases and the original \$20,000 mortgage and note, and the original \$10,000 mortgage and note, and he still holds them in his possession. Darius C. Rachal, F. S. Rachal, and P. A. Hunter having failed to pay the loan of \$34,000 when due, and the trustee failing to act, a substituted trustee sold the real estate on the 4th of September, 1897, under the power of sale in the deed of trust; and Francis Smith became the purchaser, and received a conveyance from the substituted trustee. Francis Smith then sued, in an action at law in the circuit court of the United States for the Western district of Texas, to recover the lands, and on the 7th day of December, 1898, had judgment entered in his favor for them. This suit in equity is to enjoin the enforcement of the judgment at law.

On the facts of this case, is the Alliance Trust Company subrogated to the rights of the original mortgagees? The contention of the learned counsel for the appellees is that Francis Smith, as the agent of the Alliance Trust Company, having furnished money to the Rachals and Hunter to pay off the two mortgages, and the same having been paid by him at the request of the borrowers, he is thereby subrogated to the previous liens, and equity keeps them alive for his use and benefit, to the exclusion of Lula M. Rachal, who bought subject to the mortgages, but before the lien of the Alliance Trust Company. If this contention is well founded, it is conclusive in equity against the appellants; for Lula M. Rachal has no equity superior to the mortgagees, who held recorded liens on the lands at the time of her parol purchase. She clearly took the land subject to the two mortgages on it. If Francis Smith, as the agent of the Alliance Trust Company, had not paid the mortgages, they would now be on the land, and would be superior to the equity asserted by Lula M. Rachal. If we hold that the Alliance Trust Company is the equitable owner of the two mortgages, by applying the doctrine of subrogation, Lula M. Rachal is in no worse position than she would have been if the mortgages had never been paid. She does not and cannot complain that the subrogation makes her position less favorable than it would have been if Francis Smith had not advanced the money to pay the mortgages. Her claim, in effect, is that she, and not the Alliance Trust Company, should have the benefit of the payment made by Francis Smith as its agent.

Since the equitable doctrine of subrogation was ingrafted on the English equity jurisprudence from the civil law, it has been steadily growing in importance, and widening in its sphere of application. It is a creation of equity, and is administered in the furtherance

of justice. It is applied to give the party who actually pays the debt the full benefit and advantage of such payment. It has been long settled, and it is not controverted, that the doctrine applies where a junior incumbrancer discharges the prior incumbrance, and where the surety pays the debt of his principal, and in cases of like character. A just limitation of the application of the doctrine is that it does not apply to payments made by a mere volunteer or stranger. "No one can be allowed to intrude himself upon another as his surety; and therefore if a man voluntarily pays the debt of another, without any agreement to that effect with the debtor, he cannot take the place of the creditor, or in any way recover the money so paid, of the debtor, because the law does not permit one man thus officiously and without solicitation to intermeddle with the affairs of another." *Winder v. Diffenderffer*, 2 Bland, 199; *Harris*, Subr. p. 558, § 810, note h. This objection is made in the present case. It is urged that Francis Smith, in advancing the money to pay the mortgages, was a mere volunteer, within the meaning of the authorities, and that the doctrine of subrogation, therefore, does not apply. It will be remembered that the money was lent and applied to the payment of the mortgages at the request of the debtors, the new mortgage being taken on the same lands covered by the older mortgages. "A person who has lent money to a debtor may be subrogated by the debtor to the creditor's rights; and if the party who has agreed to advance the money for the purpose employed it himself in paying the debt, and discharging the incumbrance on land given for its security, he is not to be regarded as a stranger. *Dix*. Subr. 165; *Payne v. Hathaway*, 3 Vt. 212. The real question in all such cases is whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of the creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is. If a person pays a debt at the instance, request, or solicitation of the debtor, he is neither a volunteer, stranger, or intermeddler; nor is the debt regarded as extinguished, if justice requires that it should be kept alive for the benefit of the one advancing the money, who thereby becomes the creditor. *Association v. Thompson*, 32 N. J. Eq. 133." *Harris*, Subr. p. 559, § 811, note 1.

Pomeroy, after stating the general rule as to subrogation or equitable assignment in cases of payments made by persons who have subsequent interest in the premises, adds:

"The doctrine is also justly extended by analogy to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party, and for his benefit. Such a person is in no true sense a mere stranger and volunteer." 3 Pom. Eq. Jur. (1883) § 1212.

If Francis Smith, instead of taking a release of the two mortgages, had taken an assignment of them, the questions here discussed would never have been raised. As he paid off the mortgages at the request of the debtors, they would unquestionably have been assigned to him without recourse, had he requested it. He was

entitled to an assignment. *Twombly v. Cassidy*, 82 N. Y. 155. In equity, whatever rights accrue from the payment arise from the fact of payment. If the one who makes the payment is entitled to the benefit of the doctrine of subrogation, he becomes the equitable assignee of the claim paid. For this reason Pomeroy prefers and uses the term "equitable assignment," instead of "subrogation." 3 Pom. Eq. Jur. (1883) § 1212, note 1. If it be correct that Francis Smith's position was not that of a volunteer or stranger, then it is immaterial that a release, instead of an assignment, was made. Where the rights of innocent third persons have not intervened, the release will not prevent the person making the payment from becoming the equitable assignee of the claim paid. *Barnes v. Mott*, 64 N. Y. 397, 401; *Cobb v. Dyer*, 69 Me. 494; *Dillon v. Kauffman*, 58 Tex. 696.

We decide that on the facts of the case, in the absence of any agreement on the subject, the Alliance Trust Company is subrogated to the rights of the mortgagees, whose claims it advanced the money to discharge. The following Texas cases are cited as tending to sustain our conclusion: *Whitselle v. Loan Agency* (Tex. Civ. App.) 27 S. W. 309; *Ploeger v. Johnson* (Tex. Civ. App.) 26 S. W. 432; *Bank v. Ackerman*, 70 Tex. 315, 320, 8 S. W. 45; *Mustain v. Stokes*, 90 Tex. 358, 38 S. W. 758; *Pridgen v. Warn*, 79 Tex. 588, 593, 15 S. W. 559; *Hicks v. Morris*, 57 Tex. 658; *Focke v. Weishuhu*, 55 Tex. 33; *Oury v. Saunders*, 77 Tex. 278, 13 S. W. 1030; *Cason v. Connor*, 83 Tex. 26, 18 S. W. 668.

This conclusion alone would lead to an affirmance of the decree refusing the injunction and dissolving the restraining order, but there is another view of the case that leads to the same result. If *Lula M. Rachal* has the superior claim to the lands in question, why could she not successfully assert it at law? The suit at law was not brought by Francis Smith until October 16, 1897. At that time her parol purchase, according to the averments of the bill, had been ratified by the execution of a deed. It is alleged that she obtained the conveyance in its corrected form in time to have it entered of record on March 1, 1891. For five or six years before the suit at law was brought on the averments of the bill, she was in possession of the land, and in possession of it by a written title. If her averments and contentions are true as to her purchase, possession, and deed, did she not have the superior title at law? It is true that at the time she made the purchase the mortgages were on the land, and then unpaid; but, if they stood in the way of her defense at law while they were unpaid, it appears from the bill that they were paid and releases executed on the 15th of January, 1890, long before the suit was brought. It seems to us that, in deciding the case at law in favor of the plaintiff Francis Smith, the court necessarily held that the deed conveying the lands to *Lula M. Rachal* was for some reason invalid. Both parties to the suit at law deraigned title from *Darius C. Rachal*. The title offered by *Lula M. Rachal* was prior in point of time to the titles relied on by Francis Smith, and, unless the evidence showed her title to be invalid for fraud or for other legal reasons, she could successfully defend on her prior title. No bill of exceptions or writ of error was taken in the suit at law, and

that case is not before this court. It is only relevant to this litigation in showing, if it does show, that the plaintiff here, Lula M. Rachal, asserts no title here that was not, or that could not, if valid, have been, successfully asserted in the case at law. Her title being the older one, and being a legal title by deed, if the court had held it to be valid she would have prevailed at law; and Francis Smith or the Alliance Trust Company would have been forced to apply to equity for relief, if he desired to avail himself of the doctrine of subrogation to enforce the two mortgages on the land which were older than the title of Lula M. Rachal. The decree refusing the injunction and dissolving the restraining order is affirmed.

KENDALL v. DE FOREST et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 130.

1. TRUSTEE—APPOINTMENT OF SUCCESSOR—ACCOUNTING—PARTIES.

While it is not necessary to make annuitants parties to an action by a trustee to have a new trustee appointed in his place, yet if in such action he procured an accounting, and a decree approving payments made by him to residuary legatees which depleted the annuity fund, it is not conclusive against them.

2. SAME—LIABILITY OF TRUSTEE.

Where, after the death of some of the annuitants, the trustee appropriates part of the annuity fund for the benefit of residuary legatees, he does so at his peril; and, although acting in good faith, if the balance is insufficient to pay the annuitants, he must be deemed, in equity, to hold the amount still in his hands as part of the fund, and is liable to the annuitants therefor.

3. SAME—PAYMENTS PURSUANT TO DECREE—LIABILITY TO ANNUITANTS NOT PARTIES TO ACTION.

Where a trustee pays from an annuity fund a sum allowed as commissions, costs, and counsel fees in an action brought by him for an accounting, to which annuitants were not made parties so as to be bound thereby, he will be deemed, in equity, to hold the amount still in his hands as part of the fund.

4. SUCCESSIVE TRUSTEES—LIABILITY—ESTOPPEL.

A decree permitting a trustee to resign and appointing his successor determined the proportion of the estate belonging to an annuity fund, and the proportion belonging to the residuary legatees' fund. The trustee, in turning over the estate to his successor, scheduled as belonging to the residuary legatees a larger proportion of the assets than that fixed by the decree, and the new trustee distributed the income on that basis. *Held* that, as between it and the old trustee, it could not escape liability to the annuitants on the principle of estoppel, as it was not justified in relying on the schedule, and, in a legal sense, could not have been misled thereby.

5. APPEAL—STIPULATION—RE-EXAMINATION OF TESTIMONY.

Where, on an appeal from a decree fixing the liability of successive trustees, a stipulation is made, dispensing with the proofs taken before the master, and assenting to the accuracy of his computations, the court will not re-examine them to ascertain whether an error was made in apportioning restitution between the two trustees.

6. DEPLETION OF ESTATE—ACTION AGAINST TRUSTEES—PARTIES.

Where trustees erroneously pay to residuary legatees a larger proportion of the estate than they are entitled to, thereby depleting an annuity fund,

such legatees are not necessary parties defendant to an action by the annuitants against the trustees, as the annuitants are not obliged to follow the funds wrongfully divested, and the trustees are not deprived, by reason of any decree in such action, of any remedy they may have against the residuary legatees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Action by Sarah J. Kendall against Robert N. De Forest, individually and as trustee, etc., and the New York Life Insurance & Trust Company, to enforce payment of an annuity. From a decree in favor of complainant, defendants appealed.

Wm. T. Emmett, for appellant New York Life Insurance & Trust Co.

Robert Thorne, for appellant De Forest.

Hamilton Wallis, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. By the will of Mrs. Andrews, who died in 1883, the executor was empowered to sell and convey the real estate of the testatrix, and became a trustee to receive the rents and income of the whole estate, and apply the same first to the payment of annuities aggregating \$3,490 given by the will to several legatees, and thereafter to the payment of various residuary legatees. In 1885 the executor applied to the surrogate's court for a judicial settlement of his account, and had an accounting, and to that proceeding every person interested in the estate was a party. By the decree of the surrogate the executor was authorized to retain in his hands certain specified real and personal estate, or the investments arising from the conversion thereof into other assets, as a fund for producing the annuities. The decree also provided that out of the residue of the estate then remaining in his hands the sum of \$65,376 be appropriated as the amount to be divided among the residuary legatees, and that the executor also pay to them annually the net income from the annuity fund in excess of the annuities. Until September, 1894, he administered the estate; collecting the income of the annuity fund, and discharging the annuities in full. In 1894 he commenced an action in the supreme court of the state of New York against the legatees named in the will, other than the annuitants, for a judicial settlement of his accounts as trustee. By the decree in that action his account was stated, he was permitted to resign his trust, the New York Life Insurance & Trust Company was appointed trustee in his place, and upon transferring to the new trustee the estate of the testatrix in his hands he was to be discharged from all liability arising from its management and his acts in relation thereto. In the accounting, as stated by the decree, it appeared that he had made payments to residuary legatees amounting to \$30,000 out of the annuity fund constituted by the decree of the surrogate, and that there remained in his hands of that fund \$122,211 invested in specified securities; and it also appeared that there remained in his hands of the residuary legatees'

fund \$33,000 invested in specified securities. The decree approved and allowed the payments made to the residuary legatees out of the annuity fund, and directed the payment to them, out of the residuary legatees' fund, of \$33,000. It also directed the payment of about \$10,000 out of the annuity fund for trustee's commissions, and the costs and counsel fees of the action. September 9, 1894, the executor turned over to the new trustee about \$3,600 in money, and securities of the face value of about \$142,600. Thereafter the annuities were paid only in part. The complainant—one of the annuitants—brought the present action against the two trustees to enforce payment of her annuity. The other annuitants were made parties defendant to the action. The court below adjudged the substituted trustee liable to the annuitants to the extent of the income which it received or ought to have collected from the annuity fund, and adjudged the original trustee liable for the balance of the annuities. Each of the trustees has appealed from the decree.

Unless the original trustee was discharged by the decree of the supreme court from further liability to the annuitants, it is plain that he still remains liable to them for any breaches of duty in his dealings with the annuity fund. He remained their trustee until his successor in the trust was appointed, and, if he diverted any part of the fund consisting of the assets assigned to it for their benefit by the surrogate's decree, he is responsible to them to the extent of their losses. As they were not parties to the action, the decree of the supreme court was ineffectual to foreclose or affect their rights to an accounting. If it had been a proceeding merely for the appointment of a new trustee, the presence of the annuitants as parties would not have been essential, and might have been dispensed with at the discretion of the court; the appointment being always open to review upon the application of any person interested. In *re Robinson*, 37 N. Y. 261; *Smith v. Trust Co.*, 154 N. Y. 333, 48 N. E. 550. But the action was one for an accounting, and those persons only were concluded by a decree purporting to adjudicate their rights that were afforded an opportunity to be heard. *Williams v. Gibbes*, 17 How. 239, 15 L. Ed. 135; In *re Howard*, 9 Wall. 175, 19 L. Ed. 634. It appears by the proofs that the assets of the annuity fund amounted to about \$154,000. The fund was apparently ample to produce the annuities, and the trustee doubtless acted in good faith, and from commendable motives, in appropriating from it \$30,000 for the benefit of the residuary legatees, as in the meantime some of the annuitants had died. But he acted at his peril in thus depleting the fund, and, as the decree of the supreme court does not protect him, he must be deemed, in equity, to hold the amount still in his hands, as part of the fund. The fund, while in his hands, was further depleted to the extent of the \$10,000 paid from it, under the decree of the supreme court, for commissions, and the costs and counsel fees of the action; and for the same reason he must be deemed to have that amount still in his hands, as part of the fund. His responsibility in respect to the future management of the fund ceased upon the appointment of the new trustee, and, if he turned over to his successor the whole fund then in his hands, he remained

responsible to the annuitants only to the extent found to be due upon an accounting in respect to his past transactions.

The new trustee became responsible to the annuitants only to the extent of the producing capacity of the fund which came to its hands, unless it neglected to procure the delivery of assets by the original trustee which by the decree of the supreme court should have been turned over to it; but to that extent it became liable to respond to them, and if, in consequence of its own breaches of duty, the fund has not produced the income which should have been realized, it is accountable to them.

In turning over the assets to the new trustee, the original trustee scheduled, as belonging to the annuity fund, cash and securities to the amount of \$80,798, and, as belonging to the residuary legatees' fund, cash and securities to the amount of \$65,430. Among the latter, however, were a mortgage of \$5,000, and others for \$27,750, which were enumerated in the decree of the supreme court as belonging to the annuity fund. Thus, the new trustee received assets amounting to about \$113,500 belonging to the annuity fund. It had notice what securities belonged to that fund, because the decree by which it was appointed trustee recited and described them. As the successor in the trust, it assumed the duty of protecting these assets, realizing the income, and paying the annuitants in full if the fund was sufficient, or pro rata if insufficient to produce enough to pay them in full. Instead of treating the \$113,500 of assets as belonging to that fund, it treated only those as belonging to it which were recited in the schedule of the original trustee. Doubtless, it acted inadvertently in doing so; but, if it had compared the decree with the schedule, it could not have failed to observe that the Baier mortgage and the Wilckens mortgages belonged to the annuity fund, instead of the residuary legatees' fund. In paying as it did the income derived from these securities to the residuary legatees, it diverted the trust moneys of the annuitants. If the decree had not specifically informed the new trustee that these securities were part of the annuity fund, it might be entitled to insist that as between it and the original trustee, upon the principle of estoppel, they should be treated as belonging to the residuary legatees' fund. Being thus informed, however, it was not justified in relying upon the schedule, and, in a legal sense, could not have been misled by the recital. As between the two trustees, if the original trustee failed to turn over to the new trustee any part of the annuity fund specified in the decree of the supreme court, he is primarily liable for the income arising from that part.

We conclude that the court below correctly decided that the new trustee was liable to account to the annuitants for the income produced by the securities of the annuity fund which came to its hands, and that the original trustee was liable to account to them for any deficiency of income resulting from the depletion of the original annuity fund. We are not advised in the record of any departure in principle between the interlocutory decree and the final decree of the court below, and the stipulation dispensing with the proofs taken before the master, and assenting to the accuracy of his com-

putations, precludes us from re-examining them to ascertain whether an error has been made in apportioning restitution between the two trustees.

It is insisted for both appellants that the residuary legatees who have received part of the annuity fund should have been made parties defendant to the action. There is no merit in this contention. The annuitants were entitled to look to their trustees, and were under no obligation to follow the funds wrongfully diverted by them into the hands of other parties. If the trustees have a remedy against the residuary legatees, they are not deprived of it by the decree in the present action.

The decree is affirmed, with interest and costs to the appellee.

MCDONALD V. STATE OF NEBRASKA.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1900.)

No. 1,336.

1. NATIONAL BANKS—INSOLVENCY—LIABILITY TO DEPOSITOR.

The fact that certificates of deposit issued by a national bank to a state treasurer in his official capacity, for money of the state deposited, were surrendered by his successor in office, who had the amount credited in his general account as treasurer, cannot affect the liability of the bank to the state for the money actually deposited, and which was never repaid, nor does it justify its receiver in contesting the claim of the state or its treasurer therefor, where there is no defense to such claim on its merits.

2. JURISDICTION OF FEDERAL COURTS—ACTION AGAINST RECEIVER OF NATIONAL BANK.

An action against a receiver of a national bank in his official capacity is one arising under the laws of the United States, of which a federal court has jurisdiction.¹

3. PLEADING—AMENDMENT—SUBSTITUTION OF PLAINTIFFS.

To a petition filed in the circuit court by the treasurer of the state of Nebraska in his official capacity against the receiver of an insolvent national bank to recover money of the state deposited in such bank, the defendant demurred on the ground that the plaintiff had no legal capacity to bring the action, which could alone be brought by the state. The court sustained the demurrer and permitted the petition to be amended by the substitution of the name of the state as plaintiff. *Held*, that the court had power, under Rev. St. § 954, as well as under the statutes of the state (Code Civ. Proc. Neb. §§ 144, 145), to permit the amendment.

4. LIMITATION—EFFECT OF AMENDMENT OF PETITION.

As such amendment made no change in the cause of action, or, in fact, in the real parties, it related back to the commencement of the action for the purposes of the statute of limitations.

5. NATIONAL BANKS—RECEIVERS—RIGHT TO PLEAD LIMITATION.

Whether the receiver of a national bank can plead the statute of limitations to an action on a claim against the bank which was not barred at the time of his appointment, *quære*.

6. PLEADING—AMENDMENT.

At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded.

¹As to jurisdiction of cases involving federal questions, see note to *Bailey v. Mosher*, 11 C. C. A. 308, and, supplementary thereto, note to *Montana Ore-Purchasing Co. v. Boston & N. C. C. & S. Min. Co.*, 35 C. C. A. 7.

In Error to the Circuit Court of the United States for the District of Nebraska.

The state of Nebraska, by and through her state treasurer, deposited in the Capital National Bank of Lincoln, Neb., in money which belonged to the state, the sum of \$285,351.85, and took from the bank certificates of deposit for the sum, payable to the state treasurer in his official capacity. The incumbent of the office of treasurer of state was changed from time to time. On the 16th day of January, 1893, the then state treasurer returned to the bank the certificates of deposit for the money of the state previously deposited by his predecessor in office, and the amount thereof was placed to the credit of the treasurer of state on the books of the bank. On the 20th of January, 1893, the bank failed. Prior to its failure, the sum of \$48,990.02 of the state money deposited in the bank had been checked out, leaving the sum of \$236,361.83 belonging to the state in the bank on the date of its failure. Soon after the failure of the bank, the comptroller of the currency, in pursuance of the powers conferred on him by the act of congress in that behalf, appointed a receiver for the bank. The treasurer of the state, in his official capacity and on behalf of the state, twice presented to the receiver of the bank for allowance the claim for the money of the state which the bank held at the date of its failure, namely, \$236,361.83. That officer refused to allow the claim. After the receiver refused to allow the same, the treasurer of state, in his official capacity, brought this suit against the receiver to recover this sum of money for the state. The term of office of the treasurer who brought the suit expired, and his successor in office, John B. Meserve, was substituted as plaintiff. Demurrers to the petition and amended petition were filed, one ground of which was that the treasurer of state had no legal capacity to sue for the money, but that the suit should be brought by and in the name of the state. This ground of demurrer was sustained by the court, and thereupon, by leave of the court, the name of the state of Nebraska was substituted as plaintiff in the action for that of her treasurer, and the petition was amended accordingly. A demurrer was filed to this amended petition, which was afterwards, by leave of the court, withdrawn, and the defendant filed a motion to strike the amended petition from the files for various reasons, which was overruled; and a demurrer was then filed to the amended petition substituting the state as the plaintiff in the action, which was also overruled. Afterwards the defendant filed an answer, and the case was tried to a jury, resulting in a verdict and judgment for the plaintiff for \$236,361.83, this being the balance of the state money deposited in the bank by the treasurer of the state, and remaining there at the date of the bank's failure; and thereupon the defendant sued out this writ of error.

G. M. Lambertson and A. E. Harvey (Frank M. Hall, on the brief), for plaintiff in error.

C. J. Smyth, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The indisputable facts having relation to the merits of this case are: That the state of Nebraska, by her treasurer, deposited in the Capital National Bank of Lincoln, Neb., money of the state amounting to the sum of \$285,351.85. There is no pretense that this deposit was not made, or that it was not the money of the state. There is no pretense that the bank ever paid this money back to the state, or to any officer of the state, or to any person whomsoever, except the sum of \$48,990.02; and there is no pretense that the bank was not indebted to the state, at the time of its failure, on account of the money of the state thus deposited in the bank, in the sum of \$236,-

361.83. In view of these indisputable facts, the attitude of the receiver in this case is not one which commends itself to the court. He is a public officer, charged with the duty of collecting the assets of the insolvent bank and disbursing the same pro rata among its honest creditors. Why a public officer charged with such a trust should refuse to allow the claim of the state of Nebraska for the actual money of the state deposited in the bank by her treasurer in his official capacity, and remaining therein at the date of the bank's failure, passes our comprehension. Why should the assets of the bank, already grossly inadequate to discharge its obligations, be further diminished by incurring costs and attorney's fees in resisting such a confessedly just and meritorious claim?

Something is said in the record and briefs about the certificates of deposit issued by the bank for the money of the state when it was deposited in the bank. Concerning these certificates, it is enough to say that they were returned to the bank by the treasurer of state, but the money they represented—and they represented an actual deposit of money—was not repaid to the state or her treasurer, but remained in the bank to the credit of the treasurer of state in his official capacity. Whatever bearing these certificates of deposit may have on the question of the liability of the different treasurers of state through whose hands they passed, or on the liability of the sureties on the bonds of these treasurers, or on the liability of the sureties of the bank on the bond given to the state to secure money deposited in the bank by the state, they cut no figure at all in the case against the bank or its receiver. With or without certificates of deposit, and without regard to what may be the liabilities of others to the state for this money, the bank and its receiver are unquestionably liable therefor. No defenses going to the actual merits of the cause of action are interposed. Certain technical defenses are set up, which will now be considered.

It is contended that the court had no jurisdiction of the action; that the receiver was not liable to be sued in the circuit court. But the action is one arising under the laws of the United States, and for that reason was properly brought in the federal court. A receiver of a national bank appointed by the comptroller of the currency in pursuance of the act of congress is charged by the laws of the United States with the execution of certain duties in the performance of which he acts as an agent and officer of the United States. His office is created and his duties defined by an act of congress. In contemplation of law every action brought by or against him in his official capacity arises under the laws of the United States. This action is brought against the receiver in his official capacity for an alleged breach of his official duty to the plaintiff imposed on him by the laws of the United States, and the circuit court had undoubted jurisdiction of the case. *Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370; *Price v. Abbott* (C. C.) 17 Fed. 506 (opinion by Mr. Justice Gray); *Platt v. Beach*, 2 Ben. 303, Fed. Cas. No. 11,215; *Stanton v. Wilkeson*, 8 Ben. 357, Fed. Cas. No. 13,299; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Bank v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554; *U. S. v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *Armstrong v.*

Ettlesohn (C. C.) 36 Fed. 209; Stephens v. Bernays (D. C.) 41 Fed. 401; Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314; Hot Springs Independent School Dist. v. First Nat. Bank (C. C.) 61 Fed. 417. If the action had been brought in the state court, it scarcely admits of a doubt that the receiver would promptly have removed it into the federal court. Costs and delay were saved by bringing it in that court in the first instance.

Other contentions of the plaintiff in error are that the substitution of the state of Nebraska as plaintiff in the action was a change of the cause of action, and was equivalent to the bringing of a new action, and that, as the statute of limitations had run against the plaintiff's claim before the substitution was made, the cause of action is barred. It is not now material to inquire whether the suit was not properly brought, in the first instance, in the name of the treasurer of the state. The receiver insisted that the treasurer of state, in his official capacity, was not, and the state was, the proper party to maintain the suit on the cause of action set out in the petition. Having assumed that position, and succeeded in maintaining it, he cannot now assume a contrary position.

The state of Nebraska early adopted the reformed system of pleadings, and there is probably no state in the Union whose courts have given to that system a more liberal and enlightened interpretation, or one more in harmony with its obvious, and, we may say, expressed, purpose and intent. The Code of that state abolishes all common-law forms of actions, and, in common with the Codes of many other states, contains these provisions:

"Sec. 144. The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting any mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform, in any respect to the provisions of this Code, the court may permit the same to be made conformable thereto, by amendment.

"Sec. 145. The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Beyond all question these provisions authorized the court to allow the amendment that was made in this case. Not only so, but when the court ruled that the action should be prosecuted in the name of the state of Nebraska it was its duty to allow the amendment substituting the state as the plaintiff in the action. Section 145 is mandatory. It declares the court "must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." Under the Code in Nebraska there is no such thing as a vested right in a technical error or defect in the pleadings or the parties to the action. No error or defect can be regarded which does not affect the substantial rights of the adverse party. Whether the judicial demand upon the bank and its receiver to repay to the state the money of the state which

the bank had received and retained should be made in the name of the state or in the name of the treasurer of the state in his official capacity was purely a technical legal question, which in no wise related to the merits of the cause of action. The cause of action was not changed in the slightest degree by substituting the state of Nebraska as plaintiff in place of the treasurer of state. The cause of action declared on was the same in the original and amended petitions. The petition of the treasurer of state sought to recover of the bank and its receiver, for the state, the money of the state which had been deposited in the bank, and which the bank had never returned to the state. When the name of the state was substituted for that of her treasurer, precisely the same cause of action was counted on, and the same relief asked. The amendment merely substituted the name of the state, who was the real party in interest, for that of her fiscal agent. In the receipt and disbursement of the public funds the state can only act by and through her officers and agents. The money, if any, recovered in this action, must be received and receipted for and deposited in the state treasury by the proper fiscal agent of the state, who is undoubtedly the state treasurer; and the receipt of the treasurer of state to the bank or its receiver for the money sued for in this action would be a good quietus for the same.

Outside of the usual and necessary formal parts of the petition, there were but two averments essential to constitute a statement of a good cause of action in this case: One, that the state, by and through her treasurer, had deposited in the bank the money of the state to the amount of \$236,361.83; and the other that the bank and its receiver retained the money, and refused to repay it; and, in substance, this is what is stated in the original and amended petition. The receiver's objection, which resulted in substituting the name of the state as the plaintiff in the action, was not that the state was the proper party to maintain a suit on some other cause of action than that declared on in the petition of the state treasurer, but it was that the state was the proper party plaintiff in that suit, and for the very cause of action declared on in the petition of the treasurer of state. It is obvious, therefore, that the substitution of the state as the plaintiff in the action worked no change whatever in the cause of action.

The views we have expressed are in harmony with the decisions of the supreme court of Nebraska. In an early case in that state (*Martin v. Coppock*, 4 Neb. 173) the supreme court held that the summons might be amended after service thereof on defendant by changing the plaintiff's name from Isaac Coppock to Isaiah Coppock. The court, speaking by Judge Maxwell, said: "The mistake in the name of Coppock could not have misled Martin, but when the amendment to the summons was made it related back to the time of service;" and the court characterized the defense in the case as "purely technical." In *Reed v. Beardsly*, 6 Neb. 493, the action was brought against three persons as partners, and, when the proof disclosed that the cause of action was against one of the defendants individually, and not against the firm, the court permitted the plain-

tiff to amend his petition by striking out the name of the firm and the other defendants, and the supreme court said, "This amendment was clearly within the discretion of the court, and was properly allowed," and, after quoting section 144 of the Code of Civil Procedure, the court declared, "A discretion of wider range could hardly be given to the court." In *Herron v. Cole*, 25 Neb. 692, 41 N. W. 765, the action was brought in the name of "Cole Brothers" as plaintiffs, and the court permitted the petition to be amended so as to make "Cole Brothers, a corporation duly organized and existing under the laws of the state of Iowa," the plaintiff in the action, thus changing the plaintiff from a natural to an artificial person. In *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614, an action of ejectment was, by amendment of the petition, changed into a bill to redeem. The court, speaking by Judge Maxwell, said:

"The Code abolished the distinction between actions at law and suits in equity. If, therefore, an action at law is brought to recover a tract of land, the court certainly has the power to permit the plaintiff to amend his petition, so that he may recover the same either at law or in equity. The right to be enforced is the same in either case,—the recovery of the land,—and, so long as the identity of the cause of action is preserved, the petition may be amended by stating such facts as the plaintiff may believe to exist in his favor to entitle him to the relief sought. The restriction in the section above quoted does not refer to the form of the remedy, but the identity of the transaction."

And in answer to the same contention that is made by the receiver in this case, namely, that the amendment must be treated as the beginning of a new suit, and that, so treating it, the cause of action was barred by the statute of limitations before the amendment was allowed, the court said:

"The appellee claims, however, that, even if it is conceded that the court had authority to authorize the amendment in question, still the statute of limitations would run against the cause of action until the amended petition was filed. In *Martin v. Coppock*, 4 Neb. 173, it was held that the amendment of a mistake in the name of the plaintiff related back to the date of the service, and this, we think, is the general rule. The cause of action is the same although the relief is sought in a different manner from that in the first petition. This, however, does not change the cause of action, and the statute of limitations ceased to run when the summons which was served on him was issued, or, if the service was constructive, at the date of the first publication of the notice."

But, independent of the Nebraska Code and the decisions of the supreme court of that state, we would have no difficulty in upholding the judgment of the lower court in this case both upon principle and authority. The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the judiciary act of 1789. That act was framed by the great statesmen and lawyers who had actively participated in the struggle to establish the political independence of their country. When this object had been achieved, and the constitution adopted, they framed an act for the organization and government of the national courts, which has remained for more than a century a monument to their great wisdom, foresight, and sense of justice. The thirty-second section of that act was designed to free the administration of justice in the federal courts from all subtle, artificial, and tech-

nical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the supreme court of the United States grasped the object and purpose of this enactment. In referring to this section of the judiciary act, the supreme court of the United States, speaking by Mr. Justice Story, said:

"The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the Judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.), and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of the soundest protective policy." *Matheson's Adm'r v. Grant's Adm'r*, 2 How. 263, 281, 11 L. Ed. 261.

And Mr. Justice Miller, speaking from the circuit bench, declared:

"This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the federal courts, than any of the modern codes. It is founded on common sense and justice, and ought to be regarded by the circuit courts as mandatory."

Under section 954 of the Revised Statutes the right of amendment extends to the "summons, writ, declaration, return, judgment, and other proceedings in civil causes in any court of the United States," and may be exercised at any stage of the case, even after trial and judgment. The extended and beneficent use made of the authority given by this section to make amendments is disclosed by a long line of decisions of the supreme court of the United States covering every step in a case from the summons to the verdict and judgment. *The Caroline v. U. S.*, 7 Cranch, 496, 3 L. Ed. 417; *Jackson v. Ashton*, 10 Pet. 480, 8 L. Ed. 898; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Stockton v. Bishop*, 4 How. 155, 11 L. Ed. 918; *Conrad v. Griffey*, 11 How. 480, 14 L. Ed. 835; *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883; *Tilton v. Cofield*, 93 U. S. 163, 23 L. Ed. 858; *Bamberger v. Terry*, 103 U. S. 40, 26 L. Ed. 317; *Dow v. Humbert*, 91 U. S. 294-297, 23 L. Ed. 368; *Construction Co. v. Seymour*, 91 U. S. 646-655, 23 L. Ed. 341; *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141; *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. Other United States courts have given their sanction to the most liberal exercise of this power. *Erstein v. Rothschild (C. C.)* 22 Fed. 61 (the opinion is by Mr. Justice Matthews); *Bowden v. Burnham*, 19 U. S. App. 448, 8 C. C. A. 248, 59 Fed. 752; *Smith v. Railway Co.*, 12 U. S. App. 426, 5 C. C. A. 557, 56 Fed. 458; *Carnegie, Phipps & Co. v. Hulbert*, 36 U. S. App. 81-97, 16 C. C. A. 498, 70 Fed. 209; *People's Saving Bank & Trust Co. v. Batchelder Egg-Case Co.*, 4 U. S. App. 603, 2 C. C. A. 126, 51 Fed. 130; *Tiernan v. Woodruff*, 5 McLean, 135, Fed. Cas. 101 F.—12

No. 14,027; *Swatzel v. Arnold*, 1 Woolw. 383, Fed. Cas. No. 13,682.

A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations. An action was brought in the name of one member of a firm upon a cause of action belonging to the firm, and it was held in *Dixon v. Dixon*, 19 Iowa, 512, that the court below erred in not permitting an amendment substituting the firm as plaintiffs in the action. The court said:

"The jury found that the defendant justly owed the money; but, in the opinion of the court below, the technical right to recover was not in the plaintiff, and thereupon the plaintiff, being interested, sought to amend, by adding the name of his partner, or firm name, and thus bring his right to recover within technical law as well as rest it upon broad justice. There is one fact of controlling influence in the determination of this case, and that is, it appears from the papers in the case that, unless the plaintiff is permitted to amend, and continue the prosecution of the claim in this suit, it will be barred by the statute of limitations. The jury found that the defendant justly owes the claim, and to permit the plaintiff to amend and recover such just claim will be more evidently in the furtherance of justice than to refuse the amendment and dismiss the action, as did the court below, and thereby defeat the recovery of a claim the justice of which has already been established."

This ruling was reaffirmed by the court in the case of *Hodges v. Kimball*, 49 Iowa, 577.

In *Insurance Co. v. Mueller*, 77 Ill. 22, it was held that where an administrator sued upon a policy of insurance the widow and heirs of the assured might be substituted as plaintiffs in the action.

In *Lake Erie & W. R. Co. v. Town of Boswell* (Ind. Sup.) 36 N. E. 1103, the court permitted the substitution of the town of Boswell as plaintiff in lieu of the trustees of the town.

In *Wood v. Circuit Judge*, 84 Mich. 521, 47 N. W. 1103, in a suit upon an insurance policy, the heirs of the deceased were substituted for the administrator of the assured.

In *McLewis v. Ferguson*, 59 Ga. 644, the action was erroneously brought and prosecuted to judgment in the name of the sheriff as plaintiff. The supreme court, Chief Justice Bleckley delivering the opinion, held the sheriff a mere nominal party, "a stranger in a strange land," and directed the name of the sheriff to be stricken

out as plaintiff, and that of the real party in interest substituted, and affirmed the judgment of the lower court. Other cases in that state are to the same effect. *Wilson v. Presbyterian Church*, 56 Ga. 554; *Childers v. Adams*, 42 Ga. 352.

In *Miller v. Pollock*, 99 Pa. St. 202, the action was brought by one having no interest in the cause of action, and the court allowed an amendment substituting the real party in interest as plaintiff. The court said:

"Our statutes of amendments have been liberally construed, and it has been repeatedly held that parties might be stricken out or added whenever, by so doing, the cause can be tried on its merits; and the right to so amend is not confined to a mere mistake of fact in the name of the party. As is said in *Com. v. Dillon*, *81 Pa. St. 44: 'An action may be commenced in the name of a wrong party by mistake of law, and the legislature meant the power of amendment to extend to that case.'"

In *Whitaker v. Pope*, 2 Woods, 463, Fed. Cas. No. 17,528, Mr. Justice Bradley, on the circuit, after judgment, and on a motion in arrest of judgment, ordered the name of the plaintiff, who had no legal or equitable interest in the cause of action, to be stricken out of the record, and the name of the real party in interest to be inserted.

Where an administrator sold a claim due to the estate, and afterwards brought suit thereon in his own name as administrator, the supreme judicial court of Massachusetts held that the purchaser of the claim might be substituted as the plaintiff in the action, although he was not the owner of the claim at the time the suit was instituted by the administrator. *Buckland v. Green*, 133 Mass. 421.

In *McCall v. Lee* (Ill. Sup.) 11 N. E. 522, the suit was originally brought in the name of Thomas McKee as administrator of a decedent's estate. In the progress of the case it was determined by the supreme court that Henry R. Lee, and not McKee as administrator, was the proper party to maintain the suit, and thereupon the lower court permitted the declaration to be amended by substituting the name of Lee as plaintiff for that of McKee as administrator. This action of the lower court was assigned as error. The supreme court, in disposing of the assignment, said:

"In *People v. Abbott*, *supra*, this court intimated that the real party in interest in the prosecution of the claim was Henry R. Lee, the appellee herein, and not Thomas McKee, administrator. Accordingly, after the cause was reinstated, the county court, upon application for that purpose, and after due notice, permitted an amendment to be made, substituting the name of appellee as plaintiff in the place of that of McKee, administrator. It is charged that this amendment was improper; that its allowance amounted to the filing of a new claim by a new party, after the two-years limit for the filing of claims had expired; and that, therefore, the circuit court erred in directing the judgment in appellee's favor to be paid out of the assets of the estate, in due course of administration, instead of directing it to be paid out of subsequently discovered or noninventoried assets. In this case the amendment did not make a new cause of action. * * * After the substitution of appellee's name, the claim was still for the same notes and property. April 11, 1881, the day on which it was filed, was within the two years. Where no new cause of action is introduced, courts will allow amendments liberally, for the purpose of avoiding the running of the statute. We think that the amendment was properly allowed on the authority of the

following cases: *McDowell v. Town*, 90 Ill. 359; *Insurance Co. v. Mueller*, 77 Ill. 22; *Coal Co. v. Taylor*, 81 Ill. 590; *Challenor v. Niles*, 78 Ill. 78."

In Massachusetts, a suit in equity was brought by a receiver of a corporation, who was not, under the rule which obtains in that state, authorized to maintain it, and the supreme judicial court of Massachusetts held that the bill might be amended by substituting for the name of the receiver the name of the corporation of which he was receiver, and cited the following cases: *Buckland v. Green*, 133 Mass. 421; *Costelo v. Crowell*, 134 Mass. 280; *Pierce v. Insurance Co.*, 138 Mass. 151; *Bank v. Stevenson*, 7 Allen, 489; *Byers v. Coal Co.*, 106 Mass. 131; *Wilson v. Welch* (Mass.) 31 N. E. 712. In *Morford v. Dittenbäcker*, 20 N. W. 600, the supreme court of Michigan, Chief Justice Cooley delivering the opinion of the court, said:

"Defendant contends that the court had no power to permit an amendment of the declaration which substituted one party plaintiff for another. This, it is said, made a new suit of it. * * * This contention is plausible, but, we think, not sound."

In *Lottman v. Barnet*, 62 Mo. 159, the supreme court said:

"Amendments are allowed expressly to save the cause from the statute of limitations, and courts have been liberal in allowing them when the cause of action is not totally different."

In *George v. Reed*, 101 Mass. 378, the supreme judicial court, speaking by Chief Justice Chapman, said:

"The same remark may be made as to the point that the amendment has the effect to repeal the statute of limitations. It is true that, if the amendment had been refused, and the plaintiffs had been compelled to become non-suit, and commence a new action, the statute of limitations might be a bar to it. But that fact furnishes no argument against the amendment. In *Davenport v. Holland*, 2 Cush. 1, an amendment to a petition for review was granted more than a year after final judgment, when a new petition would have been barred by the statute. The amendment was held to be proper. Shaw, C. J., said that it had often been held to be a good reason for granting amendments on terms, instead of nonsuiting a party, and compelling him to bring a new action, that such action would be barred by the statute of limitations. He also said that the provisions of law allowing amendments are highly remedial, and are construed most liberally to cancel error and mistake and to advance justice and right."

The doctrine of this case is reaffirmed by the same court in *Sanger v. Newton*, 134 Mass. 308, where it is said:

"The fact that the three years within which an original petition could have been filed have elapsed furnishes no ground for refusing the amendment, but rather a reason why it should be allowed, as otherwise substantial justice will be defeated."

In *Van Doren v. Railroad Co.*, 35 C. C. A. 282, 93 Fed. 260, 271, the suit was brought in the name of Laura L. Van Doren, as administratrix of her deceased husband, and subsequently, and after the statute of limitations had run against a suit in her name as widow, she applied to the court for leave to amend the declaration by declaring as widow, instead of administratrix, of her deceased husband. The lower court refused to allow the amendment, but this ruling was reversed by the circuit court of appeals, that court saying:

"Substantial justice requires that such an amendment should be allowed, as a second suit for damages for the death of Henry Van Doren would be barred by the one-year limitation in the Pennsylvania statute."

This court has twice decided that the amendment of a petition has relation to the commencement of the action, and leaves no interval for the statute of limitations to intervene. *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248, 19 U. S. App. 448; *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. 202, 16 C. C. A. 498, 36 U. S. App. 81.

Moreover, it is a grave question whether it is competent for the receiver to plead the statute of limitations in a suit upon a claim which was not barred when the comptroller appointed the receiver. The receiver is appointed to collect the assets and pay the debts of the insolvent bank. He is the trustee of the assets of the bank for this purpose. The analogy is very close, if not complete, between a receiver of a national bank appointed by the comptroller of the currency under the act of congress, and an assignee in bankruptcy, or an assignee of an insolvent debtor's estate; and it seems to be well settled that such assignees or trustees cannot plead the statute of limitations unless the debt was barred when the trust was created.

In *Ex parte Ross*, 2 Glyn & J. 330, the lord chancellor said:

"The effect of the commission is clearly to vest the property in the assignees for the benefit of the creditors, and therefore they are in fact trustees; and it is an admitted rule that, unless debts are already barred by the statute of limitations when the trust is created, it is not afterwards affected by lapse of time."

In *Wood, Lim. Act. § 202*, it is said:

"The same rule also applies to insolvent debtors who avail themselves of insolvency statutes, or who are forced into insolvency by their creditors, and the statute is suspended from the time when notice of the proceedings is given in the manner provided by law. So, too, this rule applies when an insolvent debtor makes an assignment under the statute for the benefit of creditors, and it is held in such cases that the statute ceases to run from the date of the assignment."

The case of *Richmond v. Irons*, 121 U. S. 27, 52, 7 Sup. Ct. 788, 30 L. Ed. 864, was a suit in equity by the creditors of an insolvent bank to enforce the personal liability of the stockholders. The defendants pleaded that the creditors' claims were barred by the statute of limitations. Upon that question the supreme court, among other things, said:

"In the case of *In re General Rolling-Stock Co.*, L. R. 7 Ch. App. 646, *Melish, L. J.*, stated that in a case where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or in insolvency, or under a trust for creditors, or under a decree of the court of chancery in an administration suit, 'the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the statute of limitations does not run against this claim, but as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend.'"

And see *Minot v. Thacner*, 7 Metc. (Mass.) 348; *In re Leiman*, 32 Md. 225, 3 Am. Rep. 132, and cases there cited; 46 Cent. Law J. 493, and cases cited. But, as this question was not discussed by counsel, and its determination is not necessary to the decision of the case, we forbear to express any opinion upon it.

There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial, and technical rules governing the statement of actions and defenses—for the entire system of special pleading was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the cause determines its decision, and not some technical error or mistake in the pleadings. In England today the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defendant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and what is meant by substantial right is a right going to the actual merits of the case. Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer avails to turn a suitor out of court, or to delay justice.

Other errors assigned have been carefully examined, and found to be entirely without merit. As they are of no general importance, a more particular reference to them is unnecessary. The judgment of the circuit court is affirmed.

SANBORN, Circuit Judge (concurring). This action was by the same party and for the same cause from its inception to its close. It was an action in behalf of the state to recover moneys of the state. The treasurer of the state instituted the suit, but he brought it in his representative capacity in behalf of the state, and not for himself. If he had recovered, the state would have received the benefit of the judgment he obtained. The action might have been maintained by the treasurer in his representative capacity (*McIntosh v. Johnson*, 51 Neb. 33, 70 N. W. 522), or by the state itself in its own name. In either case the real plaintiff would have been the

same. There was, therefore, no change of the real party plaintiff, and hence neither error nor prejudice by the substitution of the state for its representative, the treasurer, and for this reason the judgment should be affirmed.

MCDONALD v. THOMPSON.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1900.)

No. 1,335.

NATIONAL BANKS—ACTION BY RECEIVER TO RECOVER ASSESSMENT—LIMITATION.

A suit, either at law or in equity, brought in Nebraska by the receiver of a national bank to recover an assessment against a stockholder, unless commenced within four years after the time fixed by the comptroller for the payment of such assessment, is barred by Code Civ. Proc. Neb. tit. 2, § 11, which prescribes four years as the limitation for an action upon a contract not in writing, express or implied, and for an action upon a liability created by statute, other than a forfeiture or penalty.

Appeal from the Circuit Court of the United States for the District of Nebraska.

On the 23d day of January, 1893, the Capital National Bank of Lincoln, Neb., failed, and on the 6th day of February, 1893, the comptroller of the currency appointed a receiver for the same. On the 10th day of June, 1893, the comptroller ordered an assessment on the stockholders of the bank to the amount of the par value of the shares, payable July 10, 1893. This suit in equity was brought on the 20th day of May, 1898, by Kent K. Hayden, as receiver of the bank, the predecessor in office of the present receiver and appellant, against David E. Thompson, the appellee, as a shareholder in the bank, to recover the amount assessed upon his stock by the order of the comptroller of the currency. The bill alleged the defendant had, in anticipation of the failure of the bank, fraudulently transferred his shares to persons financially irresponsible, for the purpose of escaping his liability as a stockholder. The defendant demurred to the bill and to an amended bill upon the ground, among others, that the cause of action was barred by the statute of limitations of the state of Nebraska. The court sustained the demurrer, and dismissed the bill, and thereupon the receiver brought the case by appeal to this court.

Andrew C. Harvey (John H. Ames, on the brief), for appellant.
Halleck F. Rose, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The demurrer raises several questions, but it is unnecessary to pass on any other than that based on the plea of the statute of limitations. The provisions of the Nebraska statute of limitations applicable to the case read as follows:

"Sec. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued."

"Sec. 11. Within four years an action upon a contract not in writing express or implied; an action upon a liability created by statute other than a forfeiture or penalty."

Comp. St. Neb.

Whether the liability of a stockholder is treated as an express or implied contract not in writing, or as a liability created by statute,—and confessedly it is one or the other,—an action founded thereon, whether at law or in equity, is barred, under the Nebraska statute, in four years. *Carroll v. Green*, 92 U. S. 509, 23 L. Ed. 738; *Terry v. McLure*, 103 U. S. 442, 26 L. Ed. 403; *Campbell v. Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 240; *Thompson v. Insurance Co. (C. C.)* 76 Fed. 892; *Butler v. Poole (C. C.)* 44 Fed. 586; *Van Pelt v. Gardner*, 54 Neb. 701, 705, 75 N. W. 874; *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790. In this case the cause of action accrued on the 10th day of July, 1893, the day fixed by the comptroller of the currency for the payment of the assessment, and suit was not brought until the 20th day of May, 1898, more than four years after the cause of action accrued. The circuit court rightly decided that upon the face of the bill the cause of action was barred, and its decree dismissing the bill is affirmed.

BOYLE v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1900.)

No. 828.

PARTIES—PERSONS ENTITLED TO SUE—INTEREST IN CONTROVERSY.

The purchaser of railroad property at foreclosure sale, who acts, in making the purchase, for other parties, to whom he at once transfers the title, cannot thereafter maintain a petition to require the receiver of the property during the foreclosure proceedings to pay taxes assessed thereon during the receivership; having no interest, personal or fiduciary, in the question which he seeks to litigate.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

On the 6th day of April, 1889, the appellee the Farmers' Loan & Trust Company, trustee for the holders of the first mortgage bonds executed by the Houston & Texas Central Railroad Company, filed its bill in the circuit court against the railway company to foreclose the first mortgage executed by it June 16, 1873, on the Waco & Northwestern Division, and for the appointment of a receiver. Agreeably to the prayer of the bill, a receiver was appointed; and on March 16, 1892, a final decree was rendered, foreclosing the mortgage and ordering a sale of the property. The railway and other property described in the decree were sold, conformably to the order of the court, December 28, 1892, and upon confirmation of the sale by the court a deed was tendered to the purchaser. This deed the purchaser declined to accept, and a controversy resulted, which eventually culminated, March 5, 1895, in an amendatory final decree setting aside the sale, relieving the purchaser of his bid, and ordering a resale of the property. In pursuance of the decree as amended, the property was again offered for sale on September 3, 1895, when it was purchased by the appellant, and the sale was thereafter duly confirmed. Upon presenting a petition praying for further time to comply with his bid, the court, on October 22, 1895, made an order granting the extension "until such time as shall be fixed by further order of the court, or a judge thereof, after reasonable notice to such purchaser." The appellees Moran Bros. and McHarg on March 18, 1897, and the Farmers' Loan & Trust Company on August 19, 1897, filed petitions to require the appellant to pay the remainder due on his bid and take

the property. On the 7th day of June, 1897, the appellant filed a petition claiming the net earnings of the property accruing subsequent to the confirmation of the sale, to wit, on the 21st day of October, 1895. Issue was joined upon the matters contained in the several petitions, and upon the hearing of the appellant's petition the court denied his right to the earnings claimed. Upon the hearing of the petition filed by the appellees, and the master's report made thereon, an order was passed requiring the appellant to comply with his bid, by the payment of the purchase money due on the 13th day of December, 1897. Appeals were taken from these orders. This court affirmed the order of the circuit court denying the right of the appellant to the earnings of the railway property accruing subsequent to his purchase, and made an order requiring the appellant to comply with his bid on the 1st day of July, 1898. Boyle v. Trust Co., 32 C. C. A. 142, 88 Fed. 930. The receiver continued in charge of the property until the 30th day of June, 1898, when the appellant fully complied with his bid, by paying the remainder of the purchase money, and received from the master commissioner a deed conveying to him the property. Possession was immediately surrendered by the receiver to the appellant. While the former was in possession of the property, he rendered it for taxation, in obedience to the laws of Texas, for the year 1898. The taxes, state and municipal, due for that year, and which did not become payable until October 1st, amounted to more than \$4,000. The receiver, after surrendering possession of the property, refused to pay the taxes, although having in his charge funds amply sufficient for the purpose. The appellant thereupon, on the 10th day of November, 1898, filed a petition to require the receiver to pay the taxes so due and unpaid for the year 1898. This claim on the part of the appellant was resisted by the appellees, who, among other things in their defensive pleadings, denied the right of the appellant to maintain the suit, because of a want of interest in the subject-matter. The following stipulation of counsel was considered by the court upon the hearing of the matter at issue: "First. That Alfred Abeel, the receiver in said cause, had rendered all said property for taxation for the year 1898, as required by the laws of Texas, prior to the 1st day of June, 1898; that said receiver had not paid, and would not pay, unless directed so to do by the court, the said taxes, or any part thereof; and that the state, county, and municipal taxes on said property for said year exceeded four thousand dollars. Second. That after the payment by him of the balance of his bid, and the delivery to him of a deed conveying, all and singular, the said property to him, as shown by the report of Alfred Abeel filed in said cause on July 6, 1898, the said Wilbur F. Boyle conveyed the railroad and property appurtenant thereto so purchased by him to the Houston & Texas Central Railway Company, and conveying the lands purchased by him, and not appurtenant to said railroad, to Thomas H. Hubbard; the said conveyances being in pursuance of the arrangement under which he purchased said property; said purchase being for account of said transferees,—that is, the purchase was made for the Pacific Improvement Company, who was acting for said railway company in making the purchase."

Jas. A. Baker and R. S. Lovett, for appellant.

L. W. Campbell and M. F. Mott, for appellees.

Before SHELBY, Circuit Judge, and NEWMAN and MAXEY, District Judges.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

In the disposition of this appeal it has not been deemed necessary to consider the errors assigned by the appellant as it is apparent from an examination of the record that he has no possible interest in the merits of the controversy. To maintain a suit in a court of justice, the party plaintiff must have some interest in the

subject-matter of the litigation, either legal or equitable, absolute or contingent, personal or fiduciary; and, where the want of interest clearly appears, the suit, whether in a court of law or equity, should be dismissed, without considering questions in which some third party may be alone interested. In *House v. Mullen*, 22 Wall., at page 46, 22 L. Ed., at page 839, it is said by the supreme court:

"The authorities are very clear that such a misjoinder, or the bringing of a suit by a plaintiff who shows no interest of any kind in the suit, is fatal to the bill, if taken on demurrer or answer."

The vice chancellor, in *Baxter v. Baxter*, 43 N. J. Eq. 86, 10 Atl. 816, used the following language:

"The complainants, it would seem, therefore are, in respect to the action they ask the court to take concerning the lands, mere intermeddlers. They are seeking judicial aid in respect to a matter in which they have no interest, either personal or fiduciary. The rule, I think, must be regarded as fundamental, that no person can maintain an action respecting a subject-matter in respect to which he has no interest, right, or duty, either personal or fiduciary."

And in the case of *Attorney General v. United Kingdom Electric Tel. Co.*, 30 Beav. 291, the master of the rolls said:

"Nothing is more clear than this (I am keeping distinct the questions of injury to private property and the injury to the public): That one man cannot come into this court and complain of an injury affecting the property of another person. That other person, if his property is injuriously affected, must come into this court and bring forward his own case, and request the interposition of this court to protect him from having his property injured or injuriously affected by the acts of the defendant."

Dix v. Insurance Co., 22 Ill. 272; *Dicey, Parties*, marg. p. 500, c. 34; 15 Enc. Pl. & Prac. p. 468, notes.

That the appellant was a mere volunteer in this case, without interest entitling him to invoke the aid of the court, is plainly disclosed by the record. The purchase of the property was originally made by him for the Pacific Improvement Company, and the latter was acting for and in the interest of the Houston & Texas Central Railway Company. It is admitted by counsel for the appellant in their brief that upon the delivery of the master commissioner's deed, and surrender of the possession of the property to him, on June 30, 1898, the appellant, in pursuance of the agreement under which he purchased the property, conveyed the railway and property thereto appurtenant to the Houston & Texas Central Railway Company; and the lands purchased by him, and not appurtenant to the railway, he conveyed to Thomas H. Hubbard. The petition which he interposed, to require the receiver to pay the taxes, was filed on the 10th day of November, 1898,—more than four months after he had parted with the naked legal title, the only interest or claim which he seems ever to have had in the property. Whether, therefore, the receiver should be required to pay the taxes in question, involves an issue to which the appellant is in no sense a party. A sale of the railway to satisfy the taxes would not affect his property rights, and he may safely remit the protection and preservation of the property to the guardianship of those who own and control it. The railway company itself is not complaining, and,

until it puts in motion the machinery of the courts, its rights, if any it enjoys, will not be considered. The circuit court was right in dismissing the petition of the appellant, and its order to that effect is affirmed.

HERRICK et al. v. QUIGLEY.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 762.

1. RAILROADS—NEGLIGENCE—PERSONAL INJURY TO EMPLOYEE—PROXIMATE CAUSE—EVIDENCE—QUESTION FOR JURY.

Plaintiff's intestate, who was employed as switchman in defendant's yard, having occasion to couple two cars, on one of which the drawbar was higher than on the other, making it difficult to couple the same with a straight link, went in between the cars, and, having completed the coupling, attempted to step out from between the cars onto the planking in the highway crossing, but the planks were so uneven that his foot caught or slipped thereon, and he was thrown under the cars. As he slipped, decedent grasped the grab iron, and endeavored to jump out from under the car, and was about to accomplish this, when his foot slipped into a hole between the ends of two ties, and he was run over by the cars and killed. *Held*, that the court properly left it to the jury to determine whether the condition of the plank at the crossing was the proximate cause of the injury.

2. SAME—CONTRIBUTORY NEGLIGENCE—COUPLING MOVING CARS—INSTRUCTIONS.

There being evidence that the deceased had succeeded in making the coupling, and would have stepped out from the moving train but for the presence of the upturned plank, upon which he stumbled and partially fell, and there being no proof tending to show that deceased knew of, or had reason to anticipate, the defect in the crossing, the court properly left it to the jury to determine whether the intestate was guilty of negligence that contributed to the injury, under an instruction that, if deceased knew of the defect in the crossing, and that it was more dangerous to couple moving cars under such circumstances, and had power to cause the cars to come to a stop before making the coupling, and, notwithstanding such knowledge, made the coupling while the cars were moving, he was guilty of contributory negligence, and his representatives could not recover.

3. SAME—REPAIR OF CROSSING—NOTICE OF DEFECTS.

It appearing that the crossing where plaintiff's intestate slipped had been out of repair for some time prior to the accident, the court properly left the question of defendant's negligence in that regard to the jury, under an instruction that it was the duty of defendant to keep the crossing in a reasonably safe condition for the use of its employes, and that, if it had been out of repair for several days before the accident, and defendant's attention had been called to it, and it failed to repair it, the company would be guilty of negligence.

4. SAME—CITY ORDINANCE—DEFENSE.

Defendant having put in evidence a city ordinance prohibiting it from using the crossing where plaintiff's intestate was injured for the storage of cars, and from permitting loaded and unloaded cars to stand thereon, the court properly instructed the jury that defendant could not plead its obligation thereunder as a defense to an action for an injury to one of its employes, caused by its failure to keep the crossing in repair.

5. TRIAL—INSTRUCTION AS TO VERDICT

A charge to the jury that, if they find on the issues therein in favor of the plaintiff, the court would "accept a reasonable and fair verdict as a proper settlement of the controversy," while possibly prejudicial to the plaintiff, is not open to objection by defendant as taking from the jury

their power to pass upon the facts in the case under the instructions of the court.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

This action was prosecuted by Mary Quigley, administratrix of the estate of Thomas Quigley, deceased, against the receivers of the Wheeling & Lake Erie Railway Company, to recover for injuries resulting in the death of Quigley because of the alleged negligence of the defendants. Quigley had been in the employ of the railway company as a switchman or pony conductor for a number of years; his duties requiring him to switch the cars in and about the yards of the company at Toledo. The accident which resulted in his death occurred on the tracks of the company across Summit avenue in the city of Toledo. The use of this avenue had been granted upon certain conditions by the city of Toledo to the company of which the defendants were receivers. Summit avenue extends in a northerly and southerly direction, and is said to be about 92 feet wide. Along the westerly side thereof is a sidewalk about 6 feet wide. East of and near said sidewalk there is a ditch or trench. Across Summit avenue were located two tracks of the Wheeling & Lake Erie Railway Company, the northern track being connected with other tracks extending into and constituting what is known as the "Manhattan Yard." A crossing at Summit avenue had been constructed of plank, consisting of two planks laid parallel to the rails. The allegations of the petition, so far as it is necessary to recite the same, set forth that on the 29th day of January, 1898, the receivers were operating a yard containing a number of tracks, in which Quigley was employed as switchman, his duty requiring him to make up trains, coupling and uncoupling, and switching cars. It is alleged that the duty of the receivers required them to construct at the place where the tracks above mentioned intersect said Summit avenue a good and sufficient crossing, and to maintain the same in good condition; that the said defendants allowed one of the planks of said crossing to become loosened, so that one side thereof projected over and above the other planks of said crossing, rendering the same dangerous to the men who had to switch cars over the same; all of which was known, or should have been known, to defendants, but was not known to Quigley, who did not have equal means with defendants of knowing of such defective condition. It is further alleged that it was the duty of the defendants to fill the open space between the ties projecting outside of the rails in said yard, and thereby protect their employes, when switching, coupling, and uncoupling cars, from having their feet caught, and being thereby injured. At the Summit avenue crossing on the north side of the track the defendants had permitted the space between the ties to remain open; had further permitted a trench or hole of the depth of about two feet or more to remain at the end of said ties, rendering the employment of the switchmen dangerous; all of which was known, or should have been known, to said defendants, but was unknown to decedent, who did not have equal means with defendants of knowing of said defect. The petition further alleges that in coupling cars the employes are required to give their entire attention to what they are doing, and that, if one drawbar is higher than the other, the coupling is extremely dangerous, requiring care and skill. It is alleged that on the 29th of January, 1898, said Quigley was required, in the discharge of his duties, to couple a number of freight cars, to which an engine was attached, to another freight car, which was at the time standing on the side track at or near the crossing of said Summit avenue; that the drawbar in one of said cars was about four inches higher than that of the other, thereby rendering the act of coupling them exceedingly dangerous and difficult; that, as the cars came together, Quigley attempted to make the coupling, and after great difficulty succeeded in doing so while the cars were in motion, and then attempted to step out from between the cars, but, owing to the dangerous and defective condition of the crossing, Quigley slipped on the broken plank, and, in order to save his life, attempted to catch hold of the handholds on the side of the cars, but failed, and then attempted to throw himself out from between the cars, but by the time he had to a certain ex-

tent recovered himself, and was about to escape from the peril and danger in which he was placed, the cars, which were in motion, had reached the point on the track where the ends of the ties projected over the said hole or trench, where the open spaces between said ties were unfilled, and that in attempting to throw his foot out and step outside of the track he fell into the hole and space between the ends of the ties, and was killed by one of the cars. The defendants, in addition to pleading substantially the general issue, set up that the injury to decedent was the result of his own negligence. At the trial, the judge, in charging the jury, said: "The facts, as shown by the plaintiff's evidence, are: The decedent was the conductor in charge of said train, and that, having occasion to couple two gondola coal cars, on one of which the drawbar was higher than on the other, making it difficult to couple the same with a straight link, he went in between the cars, and with his left hand undertook to change the link so as to make the coupling easier, and, having about completed it, he attempted to step out from between the cars on the planking in the highway crossing, which planks were so uneven that the decedent's foot caught or slipped thereon, and he was thrown under the cars. As he slipped and was about to fall, he grasped the grab iron, and pulled or dragged himself along in an attempt to gather himself, and made a strong effort to jump out from under the car. As he was about to accomplish this, his foot slipped down into a ditch or hole across the defendants' tracks, between the ends of two ties, and he was then thrown or drawn underneath, and the car wheels ran over him, breaking his arm and crushing his skull. The claim on behalf of the plaintiff is that this would not have happened but for the negligent and defective condition of the planking at the highway, and more particularly if this hole or ditch across the track into which his foot slipped had not been allowed to exist. It is contended on behalf of the defendant that the decedent had been for some considerable time in the employ of that company, knew the location of these switches, side tracks, and street crossing, and, being the conductor of the train, had the right to choose his own time, place, and manner of making this coupling; that if he found it more hazardous, on account of the cold weather and slippery condition of the roadbed, it was his duty to protect himself, and to protect the company from loss growing out of injury, by having the engineer stop until he could rearrange the drawbars or the link, and make the coupling while the cars were standing still; and that it was negligence on his part in undertaking to walk between the moving cars while the coupling was going on. There is some conflict in the testimony as to how rapidly the cars were moving when he was in between, one witness stating the cars moved faster than he was walking."

Julian H. Tyler, for plaintiffs in error.

Harold W. Fraser, for defendant in error.

Before LURTON and DAY, Circuit Judges, and SEVERENS, District Judge.

DAY, Circuit Judge, after thus stating the case, delivered the opinion of the court.

One of the principal assignments of error is that the court erred in stating the facts as shown by plaintiff's evidence as above set forth. We have carefully examined the record, and are of opinion that the court did not unfairly put the case as developed in the testimony. Upon the facts established it is argued that the court should have sustained the motion to take the case from the jury by a peremptory instruction to return a verdict for the defendants. In order to reverse the case upon this ground, it must appear that the case was so palpably for the defendants as to require this instruction. The rule upon this subject was so recently restated in the case of *Insurance Co. v. Thornton*, 100 Fed. 582 (decided

by this court March 19, 1900), that it need not be repeated. In support of the contention that the court should have so instructed the jury it is urged that the condition of the plank in question was not the proximate cause of the injury, and that the injury, if chargeable to the defendants at all, resulted from the falling of the decedent into the ditch or trench, some distance from the crossing, where the ends of the ties were left uncovered. The court eliminated consideration of this open space between the ties as an independent ground of recovery in the case in its charge to the jury, and left them to determine whether the condition of the plank was the proximate cause of the injury. The following is the charge of the court upon this branch of the case:

"It is contended on behalf of defendants' counsel that, even conceding a faulty condition of the crossing over this highway, it was not the proximate cause of the injury, and therefore not such negligence as would make the defendants liable. The rule is well settled that the plaintiff cannot recover except for what is called the proximate or immediate cause of the injury, and that remote causes do not constitute such negligence as would make the defendants liable. In this case it is a question for you to determine, gentlemen, where the injury occurred, and whether, considering where it occurred, it was the proximate and direct cause of the negligence on the part of the railroad company. The whole unfortunate accident took place within a few seconds, as stated by most of the witnesses. The petition avers that the decedent, after he had perfected the coupling of the cars, had his foot caught on this defective planking, but that he had about recovered himself from stumbling on this defective planking, so far as that part of the accident is concerned, and would have probably righted himself, and been able to throw himself out from the cars, if it had not been for the hole between the ties, into which his foot finally went, and from which he was unable to extricate himself. The contention by the defendants is that this hole, being the last place where he was caught, was the proximate and direct cause of the injury, and that the slipping and falling on the crossing cannot be considered as the negligence which caused the injury. That is a question of fact for you, gentlemen of the jury, to determine under the instructions I have given you as to proximate cause, and under the facts as they have been stated to you; and it will be very important for you to consider closely the facts which bear on this part of the case, because it is the only negligence charged for which the defendants would be liable. Defendants' counsel also contend that the defendants were not guilty of negligence because of not having the side track at this point fully ballasted. That is true, gentlemen. The side tracks are not used for the same purpose as the main tracks. Trains do not move so fast upon them, and in every respect more caution is to be exercised when side tracks are used. It is only necessary that the company should have them safely ballasted, so they will meet the purposes for which they are generally used, and be in a reasonably safe condition."

The verdict establishes that under this charge the jury must have found that the upturned plank was the proximate cause of the injury, and we think the testimony was such that the court was warranted in submitting that question to the jury. There was testimony tending to show that the decedent had made the coupling, or had practically accomplished this purpose, when he came upon the upturned plank where his foot was caught, and he stumbled, and partly fell, and was in the effort of recovering himself, when he came upon and over the uncovered ends of the ties above the ditch, where, his efforts proving fruitless, he was precipitated beneath the cars. Assuming, without now deciding, that the court

correctly charged the jury that the company was not compelled to fill up the space between the ties at this point as a duty owing to the decedent, can it be said that this condition was the cause of the injury in such sense that the accident must be attributed thereto, and the previous stumbling and the defective crossing eliminated as producing causes of the injury? What constitutes proximate cause and the effect of intervening or independent causes between the negligent conduct of defendant and injury to plaintiff was the subject of consideration by the supreme court of the United States in *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, in which case the opinion is by Mr. Justice Strong. At page 474, 94 U. S., and page 259, 24 L. Ed., the learned justice says:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd*, 2 Black, 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * We do not even say that the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. * * * In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are severed by new and independent agencies; and this must be determined in view of the circumstances existing at the time."

McDonald v. Railway Co., 20 C. C. A. 322, 74 Fed. 104; *Zoppi v. Cable Co.*, 9 C. C. A. 308, 60 Fed. 987.

In the light of these authorities and the testimony in the present case, we do not think the court erred in submitting to the jury the question of proximate cause. We cannot review the weight of the testimony nor the correctness of the finding of the jury. It is sufficient, if there was evidence upon which the case ought properly to be submitted to the jury. The testimony tended to show that, after the stumbling upon the upturned plank in the defective crossing, the decedent never succeeded in recovering himself. He was making every effort to do so, but did not succeed. Perhaps the weight of

the testimony may be said to be that from the time of the first stumbling Quigley was exerting all of his strength and activity to recover himself. There is nothing in the case tending to show that the ditch or open space between the ties would have had any effect upon Quigley, independent of the slipping and stumbling upon the defective plank. From the situation in which he was placed because of that defect he never recovered, and was finally precipitated beneath the wheels. Under instructions which we think were sufficiently favorable to the defendants, the jury must have found that the defective plank was the real and substantial cause of the injury, and that there was no "intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." We find no error in the action of the court submitting this question to the jury under the instruction given.

It is further claimed in argument that the testimony showed that the court should have directed a verdict for the defendants because of the contributory negligence of the decedent. In the view we take of the case, we do not think it necessary to determine whether it would have been contributory negligence, as matter of law, to have undertaken to make the coupling while the cars were moving without signaling the engineer to stop, or taking other precautions for his safety on part of decedent. The court left this question to the jury in the following language:

"On this charge of contributory negligence the court says that it was the decedent's duty to have made that coupling in the way least hazardous. If he was aware that the tracks at that point were covered with ice and snow, and knew it was more dangerous to couple moving cars under such circumstances, he not only had the power and authority to move the train slower, but could have come to a full stop; and it was his absolute duty to do so in order to protect his own life, and thereby protect the defendants' company from loss. If you find he undertook to make that coupling while the cars were moving, and by so undertaking to make it, under the circumstances then existing, made the coupling more hazardous than ordinary, and that he could have controlled the movement of the train, and made the coupling at a point and in a manner that would have been absolutely safe; and if you further find that he knew of these dangerous places as to the planks on the highway and the ditch across the track,—then the court says to you he was guilty of contributory negligence, and cannot recover. Even though the defendant company was guilty of negligence, yet, if the injury would not have happened but for the decedent's own negligence, his representatives cannot recover in this action. It will be your duty to consider that this accident happened in broad daylight, on what is called a bright winter day, and at a place familiar to the decedent. The conductor of such a train has absolute control, not only of the movement of the train after it is made up, but he has control of the making up of the train in the yards; and under the conditions disclosed by this case the whole proceeding from beginning to end was absolutely under the control of decedent; and if you find he performed his duty there under such circumstances and in such a manner as made the injury probable, when by his own acts he might have made it almost impossible, the company has a right to plead such acts and such want of care on his part as contributory negligence, and the court charges you that it is contributory negligence,—that it is a defense which the defendants are entitled to make, and the court enforce."

We think this charge quite as favorable as the defendants could have asked. There was testimony in the case tending to show, as we have already stated, that Quigley had succeeded in making the coupling, and would have stepped out from the moving train but for

the presence of the upturned plank, upon which he stumbled and partially fell. There are cases holding that unnecessarily undertaking to couple moving cars, where another and safer method is open to the employé, is negligence per se. But in this case there was testimony to show the unlooked-for and independent agency of the upturned plank as the immediate cause of the injury. In the case of *Railway Co. v. Craig*, 19 C. C. A. 631, 73 Fed. 642, it was said:

"Where a switchman was injured by catching his foot in an unblocked frog while uncoupling moving cars, held, that the question whether the danger from the frog was so substantially different in character from the danger of slipping or of tripping upon the ties or cross rails as to prevent his original negligence in going between the cars from being the proximate cause of his injuries was a question for the jury."

In this case, in view of the testimony adduced, we think it was properly a question for the jury as to whether the contributory negligence of the decedent was the cause of his injury. In the case of *Gleason v. Railway Co.*, 19 C. C. A. 636, 73 Fed. 647, it was said:

"The accident happened by reason of an unblocked frog, the presence of which the plaintiff had no reason to suspect. It was held that the question of proximate cause in that case was a question for the jury, because the jury might there have reasonably found that the trap-like character of the unblocked frog was such a new, independent, and unexpected cause of the accident as to break the chain of legal causation between the plaintiff's negligence in stepping in between moving cars and the injury which did occur from the unblocked condition of the frog."

There was no proof in the case tending to show that Quigley knew of, or had reason to anticipate, the defective plank in the crossing. It is entirely probable that without this defective plank he would not have been injured. It is a familiar rule of law that contributory negligence which will bar a recovery must directly contribute to the injury. The jury found, undoubtedly, under the instruction of the court, that whatever negligence there might have been in passing between the cars would not have injured plaintiff's intestate but for the presence of this, to him unknown and unexpected, defect in the crossing. The duty of the railway company to maintain this crossing in a reasonably safe and proper condition was determined in the case of *Railway Co. v. Keegan*, 31 C. C. A. 255, 87 Fed. 849. In that case it was decided that, where a railway company has undertaken to lay planks between the rails of the tracks, the work must be done and maintained in such a way as to be reasonably safe for persons rightfully upon the tracks and in the exercise of due care. The testimony as to the length of time this crossing had been out of repair differs, but it does appear that it had been in that condition for some time, so that the question of responsibility of the defendants could be properly submitted to the jury. The court, upon that subject, left the matter fairly to the jury in the following instructions:

"As to the negligence of the defendant company in keeping the planking at the highway crossing in the condition claimed by the plaintiff, I desire to say to you, gentlemen, that it is the duty of the defendants to keep the highway crossing reasonably safe for the use of the public upon the highway, and also in a certain measure for the protection of the employés of the railroad. In this case, if you find the planking was in a dangerous condition, it will not

necessarily follow that the defendant company is responsible for that negligence, under all circumstances. If the planking was put down in a safe and proper manner and became suddenly warped out of place by frost or some such agency, and the company had no notice of it by or through its employes, using ordinary diligence, such as section foremen or track men, then the defendants would not be liable for such condition; but if the condition had existed there for several days, and their attention was called to it, and the defendants failed to repair it, they would be guilty of negligence. Still, if the decedent knew or had the means of knowing the roadbed at that point was in that condition, then he cannot recover, because it was his duty to report that fact to the defendants, and give them an opportunity to repair it, if he knew it existed."

At the trial an ordinance of the city of Toledo was put in evidence, in which it is shown that the city, in granting the railroad company the right to use Summit avenue, provided that the "tracks, turnouts, side tracks, and switches on or across any street, avenue, or alley shall not be used for the storage of cars, nor shall loaded or unloaded cars be permitted to stand thereon." It does not very clearly appear just what the plaintiffs in error claimed from this ordinance. Counsel say of it:

"The ordinance embodying this grant was not offered in evidence as an absolute defense precluding the plaintiff below from recovery, but as a circumstance bearing upon the question whether the plaintiffs in error were negligent. If the tracks were, by the city, permitted to be constructed across the street upon the express condition that they should not be used except for the transportation of cars over the same, the defendants below, in the absence of knowledge to the contrary, would not be bound to anticipate some other use, which might require a method of construction and maintenance different from that by them adopted."

On this subject the court below charged the jury as follows:

"A good deal has been said by counsel for the defendants about the grant of the right of way to the railroad company by the city of Toledo, and that it provided that the railroad should not allow the storing or coupling of cars on street or highway crossings. That is good as between the parties to it, but the company cannot plead such obligation as a defense to a suit by an employe where negligence is charged. The employe would not be thus barred in the suit of his own against the company, where the injury was the result of the company's own carelessness; and this ordinance should not be pleaded as a defense in this action."

There is nothing in the record tending to show that Quigley was not properly attending to his duties, or violated any rule or instruction of the company in switching cars at the crossing in the manner he did. We do not understand that the fact that the company was violating an ordinance by having cars upon the crossing could relieve it from maintaining the crossing in a reasonably safe condition when used by employes as this one was. We find no error in the court's instruction in this behalf.

It is finally argued that the trial court erred in saying to the jury, "If you find on the issues here in favor of the plaintiff, the court will accept a reasonable and fair verdict as a proper settlement of this controversy between the parties." While it is not apparent that the jury had anything to do with the question whether the court would or would not accept their verdict, we do not find anything in this instruction which took from the jury their power to pass upon the facts in the case under the instructions of the

court. If it had a tendency to curtail freedom of action on the part of the jury, it might possibly be prejudicial to the plaintiff below, as an intimation that only a reasonable and fair verdict would be accepted by the court. A careful review of the record in this case leads us to the conclusion that it was fairly tried, and that no substantial error intervened to the prejudice of the receivers. The judgment of the court below will be affirmed.

CULMER v. CANBY et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 768.

1. LIBEL—PLEADING—INNUENDOES—SUFFICIENCY OF COMPLAINT—DEMURRER.

If the publication complained of in an action for libel, giving to the language its ordinary and usual meaning, is actionable without averment of special damage, the petition will not be demurrable on the ground that it does not state a cause of action, because of innuendoes that attribute a meaning to words which they will not bear.

2. SAME—WORDS INCAPABLE OF DEFAMATORY CONSTRUCTION.

A demurrer to a petition in an action for libel can only be sustained where the court can affirmatively say that the publication complained of is incapable of any reasonable construction which will render the words defamatory.

3. SAME—ACTIONABLE WORDS.

Published words are actionable when they impute to another any act, the tendency of which is to disgrace him or to deprive him of the confidence and good will of society, or lessen its esteem for him.

4. SAME—PETITION HELD GOOD ON DEMURRER—QUESTION FOR JURY.

A petition for libel, which sets forth a publication by defendant, charging plaintiff with making fraudulent representations in the sale of certain patents, for which defendant has commenced an action for \$10,000 damages, and also with carrying away certain personal property belonging to defendant, and using same in the manufacture of an article against the patent rights of defendant, presents a case for the jury, as to its application and meaning, under proper instructions as to what constitutes a libelous publication, and is not, therefore, subject to demurrer on the ground that the petition does not state a cause of action.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

William C. Herron, for plaintiff in error.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

DAY, Circuit Judge. This case presents a single question, namely, the correctness of the ruling of the court below upon a general demurrer to the petition undertaking to recover for an alleged libel. The petition is quite voluminous,—more so than is required under the Ohio practice which prevails on the law side of the federal courts. Under section 5093, Rev. St. Ohio, it is sufficient to state in an action for libel that the defamatory matter was published of the plaintiff. In the petition a part of the alleged libel is set up, with accompanying innuendoes, and a copy in full of the alleged libelous matter is at-

tached as an exhibit to the petition. After the demurrer was filed, but before it was passed upon, it was stipulated that the entire article should be regarded as a part of the petition. In view of this stipulation, we regard the petition as counting upon an alleged libel published of and concerning plaintiff, as set forth in said publication; and the question presented is, should a general demurrer to the petition be sustained? The alleged libel is as follows:

"Important Lawsuits.

"Suit was filed in the United States court at Pittsburg, Pa., on August 6th, by the undersigned, the Computing Scale Company of Dayton, Ohio, against the Keystone Store-Service Company of Beaver Falls, Pa., for infringing computing scale patents owned or controlled by the Dayton company. As the peculiarities of this case, making it one of unusual importance, a short history of the matter may not be amiss: Early in the year 1891 John W. Culmer, now at the head of the Keystone Store-Service Company, as general manager, sold to the Dayton company certain patents on a computing scale wholly different from anything in that line that is now made; making certain representations, which the Dayton company now claim to be fraudulent. At the time, the Dayton company employed this Jno. W. Culmer, as an inventor, to take charge of its experimental department and other matters in its factory. On account of the above alleged fraudulent representations, and the inability of the said John W. Culmer to perform certain things claimed by him, the Dayton company filed suit March last against the said Jno. W. Culmer and others associated with him for \$10,000 damages on account of such alleged fraudulent representations. Furthermore, after a little more than a year's service, the Dayton company dispensed with the services of the said Culmer, about which time the said John W. Culmer carried from the office of the Dayton company certain drawings of a computing scale practically the same as the scale now made by the Keystone Store-Service Company, and for the manufacture of which suit was brought on the 6th inst. for infringement. In view of the above facts the Dayton company claims ownership in and to the scale made by the Keystone Store-Service Company, and, as heretofore stated, will protect its interests by asking the courts to compel the said Jno. W. Culmer and the Keystone Store-Service Company to assign all of their right and title to such patent or patents when issued.

"The Computing Scale Company,

"O. O. Ozias, Gen. Manager.

"Dayton, Ohio, August 12, 1895.

"P. S. To merchants and dealers using scales this case is of extreme importance, as the courts have held that all persons using infringing machines are liable for damages."

It is unnecessary to determine whether the innuendoes undertaking to set forth the meaning of a part of the publication are justified by the terms of the publication itself. An innuendo can neither enlarge nor restrict the meaning of words beyond their ordinary or usual signification, and upon general demurrer the question is not whether the alleged libel will bear the meaning attributed to it in the innuendoes, but whether the publication, giving to the language its ordinary and usual meaning, is actionable without averment of special damage. The fact that an innuendo attributes a meaning to words which they will not bear is no ground for sustaining a demurrer to the declaration on the ground that it does not constitute a cause of action. The innuendo may be treated as surplusage, and yet the publication be defamatory. Newell, Defam. p. 225; Kraus v. Sentinel Co., 60 Wis. 425, 19 N. W. 384. Before a demurrer can be sustained to a petition counting on an alleged libelous publication, it must appear

that the publication is not reasonably capable of a defamatory meaning, and cannot reasonably be understood in a defamatory sense. If an inspection of the publication convinces the court that no such reasonable construction of the language used could give to it a defamatory sense and meaning, a demurrer should be sustained; otherwise, its meaning and interpretation must be left to the jury, under proper instructions as to what constitutes libel. *Twombly v. Monroe*, 136 Mass. 464. In *Sanderson v. Caldwell*, 45 N. Y. 398, it is said:

"If the application or meaning of the words in an alleged libel is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine, under all the circumstances, whether they were applied to the plaintiff, and in what sense they were used."

We think this is the true rule, and applicable to the present case. See, also, *State v. Smily*, 37 Ohio St. 34. In the latter case it is said:

"The objection that the innuendo averring the meaning of the language relating to the search was not justified by the language used is not well founded. Where the meaning of the defendant, by the language employed, is equivocal or doubtful, the question whether the publication is libelous or not is one for the jury. So, too, whether the meaning of the defendant, by the language used, was what the innuendo avers it to be, if fairly susceptible of that meaning, is a question of fact, and not of law."

In the late case of *Insurance Co. v. Buckner* (decided in this court on November 13, 1899) 39 C. C. A. 19, 98 Fed. 222, we had occasion to point out the difference between verbal slander and written defamation, and need not herein repeat the discussion. The authorities there cited, and many others, establish the proposition that there is a broad distinction between the two classes of actions for spoken or written and published words, and that the latter are actionable "when they impute to another any act, the tendency of which is to disgrace him or to deprive him of the confidence and good will of society, or lessen its esteem for him." In the case of *Pfitzinger v. Dubs*, 12 C. C. A. 399, 64 Fed. 696, the rule is thus stated:

"In the first count, if the words, taken in their usual and ordinary sense, as they should be understood by persons reading them, tend to injure or degrade the plaintiff morally or socially, then they are actionable per se. It is not essential that the words should impute dishonesty or immorality of any special kind or character. If they tend to degrade or dishonor him or injure his character, or hold him up to scorn, contempt, or ridicule, or render him of less esteem in the community, morally or socially, then the words are actionable when printed. Of course, the rule is different in slander or mere spoken words, where it is necessary that some offense known to the law should be imputed."

Accepting these settled rules of decision, and remembering that a demurrer can only be sustained where the court can affirmatively say that the words are incapable of any reasonable construction which will render them defamatory, we are of opinion that the alleged publication in this case, when properly pleaded, is not open to general demurrer, but its application and meaning should be left to the jury, under proper instructions as to what constitutes a libelous publication. We do not think it proper, in view of this conclusion, to undertake to analyze or comment upon the construction and meaning

of the alleged libel in this case. In this view of the case, we think the learned judge who heard the demurrer in the court below erred in sustaining the same, and the judgment will be reversed, and the cause remanded to the circuit court for further proceedings in accordance with this opinion.

TEXAS & P. RY. CO. v. WILDER et ux.

(Circuit Court of Appeals, Fifth Circuit. April 17, 1900.)

No. 883.

APPEAL—REVIEW—QUESTIONS DETERMINED ON FORMER APPEAL.

Questions once considered and decided by an appellate court will not be re-examined on a subsequent appeal or writ of error in the same case.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

T. J. Freeman and F. H. Prendergast, for plaintiff in error.

W. H. Pope and Wm. T. Hudgins, for defendants in error.

Before SHELBY, Circuit Judge, and NEWMAN and MAXEY, District Judges.

NEWMAN, District Judge. This was a suit in the court below by J. H. Wilder and wife against the defendant railway company for damages resulting from the killing of their minor son, Frank G. Wilder. The case is before this court for the second time. It was here as now, at the instance of the railway company, at the November term, 1898, and was decided February 27, 1899. 35 C. C. A. 105, 92 Fed. 953. The judgment of the court below was reversed, and the case remanded, with instructions to grant a new trial, because the plaintiff had been allowed to read in evidence at the trial certain depositions which it was held could not be properly used in the federal court, although they might have been so used in the state court from which the case had been removed. Two questions going to the merits of the case, however, were considered and disposed of in the opinion by Judge Parlange. The law of the case in these two respects was distinctly settled. One of these questions was as to the knowledge of the deceased of the defective character of the machinery, the defect in which caused the accident and his death. The other question was as to the measure of damages. Both questions were settled in favor of the Wilders, the defendants in error. Judge Boorman, however, dissented on the ground that the court below erred with reference to the measure of damages. The rule is clearly established that questions once considered and decided in an appellate court will not, in the same suit, and in the same court, be re-examined. In *Railroad Co. v. Carroll*, decided in this court (28 C. C. A. 207, 84 Fed. 772), in the opinion by Circuit Judge Pardee, this is said:

"The ruling now assigned as error was one sustaining the demurrer raising exactly the same question determined in this court on a former writ of

error. It is clear that the trial court did not commit reversible error in following the decision of this court, for such was the command in the mandate. It is equally clear that the ruling complained of cannot be re-examined in this court. It is a well-settled and long-established rule that whatever question has been decided by an appellate court on writ of error cannot, in the same suit, and in the same appellate court, be re-examined. *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; *Chaffin v. Taylor*, 116 U. S. 567, 6 Sup. Ct. 518, 29 L. Ed. 727."

To the case decided by this court and the decisions cited may be added that of the circuit court of appeals for the Eighth circuit in *Balch v. Hass*, 19 O. C. A. 151, 73 Fed. 974. While holding that it did not apply in that case, the rule is thus stated in the opinion of the court by Circuit Judge Thayer:

"It is a well-established doctrine, in the federal courts at least, that a second writ of error or a second appeal in the same case only brings up for review proceedings of the trial court subsequent to the mandate, and that it does not authorize a reconsideration of any questions, either of law or fact, that were considered and determined on the first appeal or writ of error, provided the testimony on each trial was substantially the same. This doctrine results from the fact that a judgment rendered by an appellate court in a given case is conclusive on the parties thereto, and that an appellate court, like a *nisi prius* court, is powerless to review or revise its own judgments after the lapse of a term at which they were rendered, except in cases of fraud. Another form of stating the doctrine is that propositions of law which were considered and decided on the first appeal become the law of that particular case, and, whether right or wrong, must be adhered to on a second appeal. *Thatcher v. Gottlieb*, 19 U. S. App. 469, 8 C. C. A. 334, 59 Fed. 872, and cases there cited; *Tyler v. Magwire*, 17 Wall. 253, 283, 21 L. Ed. 576; *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; *Sizer v. Many*, 16 How. 98, 14 L. Ed. 861; *Corning v. Factory*, 15 How. 478, 494, 14 L. Ed. 768; *Sibbald v. U. S.*, 12 Pet. 488, 492, 11 L. Ed. 337; *Martin v. Hunter*, 1 Wheat. 304, 355, 4 L. Ed. 97."

In the former opinion by this court in this case the questions of the deceased's knowledge of the defective condition of the machinery is briefly disposed of as follows:

"The fourth specification of error, which complains of the refusal of the trial court to give a special charge, is without force. The trial judge in his general charge instructed the jury 'that if the deceased knew of the condition of the engine, or by the use of ordinary care could have known it, plaintiffs cannot recover.' This was sufficient on the matter which is the subject of the special charge refused."

On the second trial in the court below, now under review, the court instructed the jury:

"If you find that Wilder did not know of the defective condition of the machinery, and that by the use of ordinary care he would not have known it, and you find further that the accident was caused by the defective condition of the machinery, in that event you will find for the plaintiffs," etc.

The charge is substantially that approved by this court, as shown by the extract from the former opinion just given.

The other question, concerning the measure of damages, was as to the right of plaintiffs to recover for the loss of the services of their son after he arrived at the age of 21 years. On that subject in the former opinion by this court, after discussing the question and citing authorities, this language is used:

"It was plainly proper in this cause for the trial judge to instruct the jury that they could consider whether the parents had a reasonable expectation that their son would continue to assist them after his majority."

On the second trial in the court below the court instructed the jury in substantial accordance with the law as thus laid down by this court. Where the court below has instructed the jury as to the law substantially as announced by this court in the same case, and the facts are sufficient, as is true here, to support the verdict, the judgment will not be interfered with when the case is here on a second writ of error. The judgment of the court below is affirmed.

AMERICAN IRON & STEEL MFG. CO. v. MIDLAND STEEL CO.

(Circuit Court, D. Indiana. May 5, 1900.)

1. STATUTE OF FRAUDS—MEMORANDUM—NAMES OF PURCHASER AND SELLER.

A memorandum of sale by C. & Co., acting as selling agents of M. S. Co., to J. H. S. & Son, sufficiently describes the purchaser and seller, under 3 Burns' Rev. St. Ind. 1894, § 6635, providing that no contract for the sale of any goods over \$50 in value shall be valid unless some note or memorandum is made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

2. SAME—DESCRIPTION OF PROPERTY—DEFINITENESS.

Where a memorandum of sale stated that the size of steel billets to be delivered should be 4"x5" or 5"x5", the seller had the option to deliver either size, and hence a memorandum was not objectionable for indefiniteness.

Ryan & Thompson, for complainant.

Chambers, Pickens & Moores, for defendant.

BAKER, District Judge. Action by the plaintiff upon a memorandum of sale alleged to have been made by the defendant with J. H. Sternbergh & Son, which contract has been assigned to the plaintiff, for the recovery of damages for failure to deliver the personal property alleged to have been sold. The complaint is founded upon a memorandum in writing as follows:

Philadelphia, February 24th, 1899.

Memorandum of Sale by Cabeen & Company.

To Messrs. J. H. Sternbergh & Son,
Reading, Penna.

Acting as Selling Agents
for Midland Steel Company,
Muncie, Indiana.

Received
Mar. 3,
1899.

Midland Steel Co.

Seven hundred (700) tons acid, open-hearth steel billets, analysis to be

Silicon	.10	} of one per cent. or less.
Phosphorus	.08	
Sulphur	.03	
Manganese	.50	
Carbon	.10 to .12	

Buyer would prefer Manganese from .40 to .45%.

Price. Twenty-four dollars and seventy-five cents (\$24.75) per ton of 2,240 lb., delivered on tracks of P. & R. Ry., Reading, Penna.

Terms. Cash thirty days from date of invoice.

Deliveries. Shipments to commence April or May, 1899, and to continue at the rate of 200 tons per month to completion of the contract.

Note. Sizes to be 4"x5" or 5"x5".

Notice. That sellers are not to be responsible for delay in deliveries as herein specified, when such delay is caused by strikes, accidents, or other causes beyond their control.

Accepted:

Midland Steel Company,
R. B. Beaty, President.

Cabeen & Co.,
Selling Agents.

Mch. 4/99.

[Internal Revenue.]

The defendant has demurred to the complaint for the reason that the memorandum of sale is not sufficient to take the case out of the statute of frauds; and, second, because in the memorandum the steel billets are designated to be 4"x5" or 5"x5", and it is not alleged that the plaintiff notified the defendant which size of billets it would be required to deliver.

The statute of frauds of this state is as follows:

"No contract for the sale of any goods for the price of fifty dollars or more shall be valid unless the purchaser shall receive part of said property, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." 3 Burns' Rev. St. § 6635.

The property agreed to be sold largely exceeds the price of \$50. The sole contract of sale disclosed in the complaint is evidenced by the writing copied above. The plaintiff does not count upon a verbal contract of sale, coupled with a delivery to and acceptance by the purchaser of a part of the property, nor upon part payment, nor upon the giving of something in earnest to bind the bargain. The right to recover damages is grounded solely upon the sufficiency of the above memorandum to constitute a "writing of the bargain" made by the parties. The note or memorandum in writing of the bargain, when relied upon as the foundation of a right to recover damages for failure to deliver the property, must disclose with substantial accuracy every fact material to constitute a contract of bargain and sale. It is therefore essential that such a note or memorandum shall contain within itself a description of the property agreed to be sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and of the party who buys it. It is settled to be indispensable that the written memorandum should show, not only who is the party to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name being signed to the writing; but the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by one does not bind him, save only to the person to whom the promise was made, and, until that person's name is shown, it is impossible to say that the writing contains a memorandum of the bargain. Peoria Grape-Sugar Co.,

v. Babcock Co. (C. C.) 67 Fed. 892. The memorandum in the present case fully meets the requirements above stated. No question is made, nor can there be any, but that the property is sufficiently described; nor is there any question as to the purchase price and terms of payment. The contention as to the insufficiency of the memorandum relates to the parties, purchaser and seller, and to the alleged indefiniteness as to the dimensions of the billets. The language of the memorandum is, "Memorandum of sale by Cabeen & Co., acting as selling agents for Midland Steel Co., Muncie, Indiana, to Messrs. J. H. Sternbergh & Son, Reading, Penna." It is clear, beyond all controversy, as it seems to the court, that the party who sells is clearly shown to be the Midland Steel Company, and the party who buys to be J. H. Sternbergh & Son. No form of language is necessary. Anything from which the intention may be gathered, as in other contracts, is sufficient. In the present memorandum there is no room for doubt or ambiguity as to vendor and vendee, as to the subject-matter of the contract of sale, as to the price and terms of payment, or as to the time and place of delivery. It contains every essential requisite to constitute a bargain, within the terms of the statute of frauds.

Nor does the fact that the contract mentions the size of the billets to be 4"x5" or 5"x5" render the contract uncertain or insufficient. The defendant would have performed its contract if it had tendered either size of billets at the place and within the time specified. The memorandum is in the nature of what is usually termed a "sold note" made by the defendant, through its selling agents, Cabeen & Company, to J. H. Sternbergh & Son, as buyers. In making it the seller designates for its own benefit that it shall have the right to fulfill the contract by the delivery of billets either 4"x5" or 5"x5". The option to determine the size was with the seller, and not with the buyer. For these reasons, the demurrer is overruled, to which defendant excepts.

ENDERS v. LAKE ERIE & W. R. CO.

(Circuit Court, D. Indiana. April 28, 1900.)

No. 9,822.

REMOVAL OF CAUSES—TIME FOR FILING APPLICATION—AMENDMENT OF COMPLAINT.

Where, by reason of an amendment of the complaint in a state court, a defendant becomes entitled to remove a cause not before removable, he is entitled to a reasonable time after such amendment within which to file his petition and bond for removal; and, where the statute fixes no time within which he is required to answer or plead to the amended complaint, the time prescribed therefor by a rule of court will, by analogy, be taken as the time within which he must file his application for removal, unless it appears that such time is unreasonably short.

At Law. On motion to remand to state court.

Gavin & Davis and Kirkpatrick, Morrison & McReynolds, for plaintiff.

J. B. Cockrum, R. B. Beauchamp, and Miller, Elam & Fesler, for defendant.

BAKER, District Judge. This suit was brought in a state court to recover damages for personal injuries, the sum claimed in the original complaint being less than \$2,000. Afterwards, by leave of the state court, the plaintiff amended her complaint by the addition of allegations showing that her injuries were much more serious than they were at first supposed to be, and by increasing her demand for judgment to \$15,000. After the filing of her amended complaint, and after the time fixed by the rule of the state court for the defendant to answer or plead to the amended complaint had expired, the defendant filed a petition and bond for the removal of the suit to this court. The state court ordered the removal, and, the record having been filed here, the plaintiff moves to remand. There is no statute of this state fixing the time within which the defendant is required to answer or plead to an amended complaint.

There can be no question of the defendant's right to remove the suit when the demand for judgment was increased to a sum in excess of \$2,000, but the question remains whether the defendant lost the right of removal by its delay in making and filing the petition and bond therefor. It is said in *Powers v. Railway Co.*, 169 U. S. 92, 101, 18 Sup. Ct. 267, 42 L. Ed. 676, to be a reasonable construction of the removal act "to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought." This court said in *Yarde v. Railroad Co.* (C. C.) 57 Fed. 913, 915, that "a defendant not entitled to removal, who becomes entitled to it by reason of an amendment to the complaint allowed by the state court, may remove the cause, although the time has elapsed within which his removal ought to have been asked for, if he promptly files his petition and bond after such amendment has been made." What is the degree of promptness that must be exercised? The time within which the defendant might have petitioned for the removal of this cause began to run when the amended complaint was filed; and it seems clear, upon principle, and in analogy to the statute, that the right of removal continued, in any event, until the expiration of the time within which, by the rule of the state court, the defendant was required to answer or plead to such amended complaint. But, if the time fixed by the rule of the state court to answer or plead to an amended complaint is so short as to deny to the defendant a reasonable time within which to prepare and file a petition and bond, such rule, it would seem, ought not to defeat the right of removal, if exercised with reasonable promptness. In the present case the rule of the state court is not open to the objection that the time limited was unreasonably short. The defendant failed to file its petition and bond for removal until after the expiration of the time fixed by the rule of the state court for the defendant to answer or plead to the amended complaint, and therefore the application came too late. The petitioner has presented some affidavits to excuse its failure to

present its petition and bond within the time limited by the rule of the state court for answering the amended complaint. Conceding, without deciding, that delay in filing the petition and bond for removal may be shown to be excusable, still the court, after a careful examination of the affidavits, is of the opinion that they disclose no sufficient excuse for the failure to file the petition and bond for removal within the time fixed by the rule of the state court to answer or plead to the amended complaint. Remanded to the state court.

POST v. WISE TP., EDGEFIELD COUNTY, S. C.

(Circuit Court, D. South Carolina. April 28, 1900.)

1. TRIAL—CORRECTION OF VERDICT.

The only method of obtaining the correction or modification of a verdict for an error in law, where no exception was taken at the time of its return, is by motion to set it aside or for a new trial, which, under rule 30 of the circuit court for South Carolina, must be made within two days after the verdict is rendered, unless the time is extended by the court.

2. PLEADING—AMENDMENT AFTER VERDICT.

Under Code Civ. Proc. S. C. § 194, adopted as a rule of the circuit court in that state, which authorizes the court, before or after judgment, in furtherance of justice, to amend any pleading, where a verdict in an action on municipal bonds includes installments of principal and interest maturing after the commencement of the action, and for which judgment was not asked in the complaint, and the time for correction of such verdict has passed, the court will direct the amendment of the complaint to conform to the verdict.

At Law. On motion for amendment of verdict.

Mitchell & Smith, for plaintiff.

G. W. Croft & Son, for defendant.

SIMONTON, Circuit Judge. This case comes up on a motion to amend a verdict taken at the April term of this court, at Charleston. The complaint set out that plaintiff was owner and holder of certain coupon bonds issued by Wise township, in the county of Edgefield, S. C. The bonds are set out by their numbers, and each bond provided that it should be paid in annual installments of 20 per cent. each of the face of the bond. The complaint also set out that plaintiff was owner and holder of certain coupons on said bonds, which were particularly described, as to dates, amounts, and when due. The summons and complaint were filed 13th September, 1898, and the installments on the bonds and the past-due coupons set out in the complaint were those installments and coupons past due and payable at the date of 13th September, 1898. On the first day of the term the cause, being at issue, was fixed for trial on a day certain thereafter. It was called for trial, the counsel for defendant not being present. It was shown to the court that defendants had had 20 days' notice of the trial, and the day fixed for it. It appears that a case of precisely the same character had been heard in this court at a preceding term (Post v. Township of Pickens), and that all the defenses applicable to this case had

been made and argued in that, with the result of a verdict for plaintiff. The counsel for defendant assumed that a similar verdict would be taken in this case, and that further discussion would not avail defendant. At the trial the plaintiff took a verdict, not only for the installments on the bonds and the coupons which had matured at the commencement of the suit, but also for all the installments and coupons which matured up to the date of the trial. The motion now made is to eliminate these from this verdict, and to reduce it *pro tanto*. The formal judgment has not been entered. This is resisted by plaintiff, who insists upon the legality and propriety of his verdict. The term of this court at which this verdict was taken began on the first Tuesday in April, and terminated on the third Monday in April, after the date of the verdict. The next term of the court (that at Greenville) began on the third Tuesday in April. So this motion is made after the term adjourned. It will be noticed also that this motion is not to correct any clerical error, mere irregularity, or mistake in entries (*Bank v. Moss*, 6 How. 31, 12 L. Ed. 331), but to set aside the verdict as erroneous in law. No exception having been taken at the trial, and before the jury retired from the bar, no writ of error or bills of exception would lie, and an order directing a bill of exceptions to be filed as of the date of the trial would be a nullity. *Muller v. Ehlers*, 91 U. S. 249, 23 L. Ed. 319; *Railroad Co. v. McGee*, 8 U. S. App. 86, 2 C. C. A. 81, 50 Fed. 906. The only way of reaching it is by motion for a new trial or to set aside a verdict. But by the thirtieth rule of this court no party shall be entitled to move to set aside a verdict or in arrest of judgment unless notice, with grounds thereof, shall be filed with the clerk and served on the opposite party within two days after the rendition of the judgment complained of, unless the time be enlarged by the court. This is peremptory, and the application to the court must be within the two days. It is clear, therefore, that, under the rules governing this court, it is powerless to relieve the defendant. Had the court been aided by the presence of the counsel for defendant at the trial, the cause of complaint would possibly not have arisen. It goes without saying that a party plaintiff cannot expect to get at the hands of the court more than he has asked. It is true that the bonds, each, are payable in installments, and under such circumstances he could have obtained judgment on all installments falling due up to the day of the verdict. But, to accomplish this, he must so ask in his pleadings. This has not been done. 11 Enc. Pl. & Prac. p. 841. As the pleadings now stand, the defendant is at a great disadvantage. A verdict has been had against it, not only on installments past due 13th September, 1898, on the bonds and the coupons past due at that date, but also on installments and coupons maturing up to April, 1900. As the complaint does not count on these maturing installments and coupons, the judgment could not be used in a plea of *res judicata*. There is, however, this consideration: The suit was on the bonds, and the attached coupons. The defense went to the whole of each bond and each coupon. All were alleged to be invalid,—as well those matured as those maturing and to mature. The plaintiff held and

owned each bond and each coupon. Had the complaint set out the maturing installments and the maturing coupons, no change whatever would have been made in the defense. The only difficulty is as to the *res judicata*. The Code of Civil Procedure of South Carolina, adopted as a rule of practice and proceeding in this circuit court (rule 10), declares at section 194:

"The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

Under this provision an amendment can be made which will effectually protect the defendant. Let the complaint be so amended as to set out the installments of the bonds maturing between 13th September, 1898, and April 7, 1900, and also all the coupons maturing between those dates, and let the prayer for relief correspond therewith; the costs of this amendment and of this particular motion to be paid by plaintiff.

SHARLAND v. WASHINGTON LIFE INS. CO.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1900.)

No. 856.

1. LIFE INSURANCE—ACTION ON POLICY—EVIDENCE OF SUICIDE.

A copy of the findings on a coroner's inquest, furnished by the beneficiary in a life insurance policy as a part of the proofs of death of the insured, is admissible on behalf of the insurance company, in an action on the policy, as *prima facie* evidence to establish a defense of suicide.

2. SAME.

In an action on a life insurance policy, the defense being suicide, where it was shown that the insured was found dead in his room under circumstances indicating suicide, any evidence tending to throw light upon the motives and intentions of the deceased in that regard, such as letters and directions written by him, and also found in his room at the same time, or other letters in his possession shortly before the time of his death, is admissible.

3. SAME—MEASURE OF PROOF REQUIRED.

Where the special defense of suicide is set up in the answer of a life insurance company in an action on a policy containing a provision that the company should not be liable in case the insured committed suicide while sane or insane, the defendant is required to establish such defense by a preponderance only of the evidence.

4. SAME—INSTRUCTIONS.

An instruction that the presumption of law is against suicide is sufficient, and the court cannot be required to give to the jury the reasons on which such presumption rests.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Upon Ernest Sharland's application, two policies on his life, each for the sum of \$5,000, payable in favor of his wife, the plaintiff in error, were issued by the Washington Life Insurance Company, each policy being dated November 12, 1896. This action is brought to recover the amount of said policies.

Ernest Sharland, the assured, died in the city of New York on November 9, 1897, leaving the plaintiff in error as his widow, and a minor child, named Violet, aged about 2 years. The defendant company admitted the execution of the policies, but denied indebtedness thereunder, for the reason, as alleged in the answer, "that the assured, Ernest Sharland, did not die a natural death, or death due to accidental causes, but that the said Ernest Sharland, the assured, did on or about the 9th day of November, 1897, before the expiration of one year after the execution of said policies, deliberately, and with malice aforethought, commit the crime of suicide." The application for the policies contained, among other agreements, the following, to wit: "On behalf of myself, and any person who shall have or claim any interest in any policy issued under this application, I warrant each of the above answers to be full, complete, and true, and I agree: * * * (4) That for one year after the date of issue of the policy * * * self-destruction, while sane or insane, or death in consequence of a duel or criminal violation of the law, will render the policy void." The policy contains the following clause, to wit: "That for one year after the date of the issue of the policy * * * self-destruction, while sane or insane, or death in consequence of a duel or criminal violation of law, will render the policy void."

On the trial in the circuit court, "the plaintiff having offered in evidence two policies of insurance on the life of Ernest Sharland, each for five thousand (\$5,000) dollars, numbered, respectively, 97,023 and 97,024, dated November 12, 1896, issued by the defendant, and made payable to the plaintiff, being the policies sued on in the instant case; and also having offered the admissions of the parties in interest that Ernest Sharland died in New York on November 9, 1897, and that he left the plaintiff as his widow, and one minor child, named Violet, aged about two years; and it having been admitted by counsel for the plaintiff and for the defendant that the premiums on the policies above referred to were paid for one year from the date of issuance; that all of said above referred to documents and admissions were received in evidence without objection; and the plaintiff having rested her case upon the evidence above referred to,—counsel for defendant offered in evidence the proofs of death furnished to the defendant company by the plaintiff, including a certified copy of the coroner's inquest, marked 'P2' and 'P3,' respectively, to which offer counsel for plaintiff objected, on the grounds that the same was and is immaterial and irrelevant; that the coroner's inquest is *res inter alios acta*; that there is no proof of its execution; that it does not make proof of itself; and that it is merely an expression of opinion by the parties therein named,—counsel stating that this objection was principally to the coroner's inquest."

Whereupon counsel for defendant stated that the copy of the coroner's inquest is a part of the proofs of death furnished by the plaintiff to the defendant company, and urged that, the plaintiff having furnished the proof, the same is admissible; that it was a part of the case, and pertinent. Whereupon the court observed and said, in the hearing of the jury: "The whole underlying thought about the admissibility of evidence is this: that evidence which the law does not forbid directly may be considered by the court, and admitted, in its discretion. If it is addressed to some matter issuable in the case, and is forbidden, that ends it in the case. If this evidence is material, and not forbidden, I will admit it for whatever it may be worth." Whereupon counsel for plaintiff urged: "That the coroner's inquest should not be allowed to go into the case at all. These papers were furnished by the plaintiff, it is true, but she was called upon to produce them." Whereupon the court observed and stated as follows: "The paper (the coroner's inquest) may be found full of suggestion on the merits of the case. It may afford a suggestion of fact which the plaintiff is not or may not be bound by, but may be of some value to the defendant in the suggestion of fact. Therefore the court admits it for whatever it may be worth." The execution of the coroner's inquest was subsequently proved by the testimony of the coroner. To which ruling of the court, admitting the said proofs of death and certified copy of the coroner's inquest, marked "P2" and "P3," respectively, which are annexed hereto and made part of this bill, counsel for plaintiff then and there excepted as error on the part of the court.

And the plaintiff having rested her case upon the evidence above referred to, and the defendant having offered, and being about to read, the depositions of Dr. W. Edwin Oakes, Mrs. Louisa Wilmerding, Walter Clark, and William H. Dobbs, all taken under commission in New York City, and it appearing from the answers of the said witnesses that the said Dr. W. Edwin Oakes testified, in answer to interrogatories propounded to him, that he saw the body of the deceased in his room shortly after it was discovered; that he had seen letters to or from the deceased at the time he saw the body of the deceased; and having further testified that the said letters were on the dressing table of the deceased; that one purported to be from the wife of the deceased, in New Orleans, addressed to "Mon Cher Ernest," the whole letter being written in French, with which language the witness testified he was not familiar further than that he could read the address; that there were two other letters, which he did not read, one of them being to the stage manager of the Bijou Theatre, in New York, whose name the witness testified he had forgotten, but which was published in the New York Herald on November 10, 1897, which letter was sealed; that the witness did not see to whom the other letter was addressed; that the police officer came in at that time, and took charge of the correspondence and all the personal effects of the deceased; that the witness did not know what the police officer had done with the letters, or where they were, at the time the witness testified; and the witness having testified that the letter which he mentioned as being written in French was read by Mrs. L. R. Wilmerding, who translated it aloud, and in his presence and hearing. And it appearing from the answer of Walter Clark, another witness on behalf of defendant, that he testified that he saw the body of the deceased in his room shortly after it was discovered; that he saw two letters at the time that he saw the body of the deceased, one letter being apparently from his wife and another from another woman; that the letter from his wife was written in French and the other in English; that there was also another letter, which was sealed, and addressed to the manager of the Bijou Theatre, in New York City, and a package about four inches square, also sealed, to be delivered to him; that the said letters were on the table in the room, and that two of the letters were addressed to the deceased; that he did not know where the letters were at the time he testified, or what was done with them; that he was a police officer, and remained in the room until relieved by another officer at 6 o'clock in the evening in question; that the said letters were read by Mrs. Wilmerding in his presence, and that she translated the letter written in French. And Mrs. Louisa R. Wilmerding having testified that she discovered the body of the deceased in his room, and was the first to see it after death; that she saw a letter from the wife of the deceased written in French, which she translated at the request of Dr. Oakes and the policeman; that she saw another letter, which was addressed to the manager of the Bijou Theatre, in New York City, and a notice asking that he be sent for, and another letter addressed to him; that the letter from the wife of the deceased was lying on the dressing table beside the bed, and with it was a photograph of her, which had written on the back of it "My Wife," and her full name and address in New Orleans; that the other letters were on the bureau, and that there were two unmounted pictures of a child in the pocket of the pajamas of the deceased; that she did not know where the letters were at the time she testified, nor what was done with them; that she only read the letter which was in French, and which she translated in the presence of Dr. Oakes and the policeman. And it appearing that the said witnesses, in answer to interrogatories propounded to them, proceeded to state the substance of the letter purporting to be from assured's wife to him; counsel for plaintiff, before the said answers were read to the jury, objected to the answers of the said witnesses giving the substance of said letters being read to the jury, on the ground that there was no proof of the signatures to the said letters. Whereupon counsel for defendant produced an admission, signed by counsel for plaintiff and defendant, as follows, to wit: "It is admitted that if Mrs. Louise Sharland, the plaintiff in the above-entitled and numbered cause, were called as a witness on behalf of the defendant, she would testify that about three or four weeks prior to the death of her husband she received from him, he being then in the city of New York, a letter

in which he threatened to take his life; that she thereupon wrote to her husband a letter substantially as testified to by Mrs. Louisa R. Wilmerding, a witness on behalf of the defendant; that she, the said Mrs. Sharland, destroyed the letter which she received from her husband shortly after its receipt; that the letter above referred to, which she wrote to her husband, was returned to her in an envelope bearing the stamp of the police department of the city of New York, and marked, 'Letter found in room of Ernest Sharland, 509 5th Ave.,' annexed to this admission, and marked Exhibit 'A,' and was also destroyed by her; that the said envelope and its contents were forwarded to her, with some of the personal effects of her said husband. It is further admitted that the said Mrs. Sharland would testify that the two pieces of paper, with writing thereon, marked, respectively, Exhibits 'B' and 'C,' were also contained in the above referred to envelope, marked Exhibit 'A'; that she recognizes the handwriting of the said Exhibits 'B' and 'C' as being that of her husband. It is further admitted that the said Mrs. Sharland would also testify that at his death her said husband left no property. It is agreed that the above and foregoing admission can be used on the trial of this cause in lieu of the testimony of the witness referred to, reserving to each party the right to object to the admission of the testimony, the same as though the witnesses were present in court and were being interrogated." Whereupon counsel for defendant renewed the offer of the testimony of the witnesses referred to, and particularly the answers of said witnesses giving and stating the substance of said letter, and also offered in evidence the above admission, and the two documents referred to therein, marked "P5" and "P6" (also marked Exhibits "B" and "C"), together with the envelope in which they are inclosed, indorsed, "Letters found in room of Ernest Sharland, 509 5th Ave." Whereupon counsel for plaintiff objected, on the grounds that the letters and documents referred to were not part of the *res gestæ*; that the contents of the letters were irrelevant and immaterial. But the court overruled the objection, and permitted the said answers of the said witnesses, giving the substance of said letters and the above admission, to be read to the jury, and also permitted the said documents and envelope likewise to be read to the jury; to all of which counsel for plaintiff at the time then and there excepted as error on the part of the court.

The evidence being closed, the plaintiff requested the court to give to the jury the following charges:

"(1) In this case, the plaintiff having declared upon two life insurance policies issued by the defendant company on the life of plaintiff's husband, payable in her favor, and the defendant having admitted the issuance of the policies and the death of the person insured, but having set up as a special defense that it was excused or relieved from the payment of the amount due under the policies for the reason, as alleged by the defendant, that the husband of the plaintiff violated one of the conditions of the policies by willfully and intentionally committing suicide, the burden was and is on the defendant to establish the fact of such willful and intentional suicide or taking of his life by Ernest Sharland, the husband of the plaintiff, by evidence which would exclude with reasonable certainty any other hypothesis or cause of death than by such willful and intentional suicide.

"(2) 'Suicide' is the willful and voluntary taking of one's own life by a person who understands the physical nature of the act, and who commits the act with the intention and purpose of destroying himself or taking his own life.

"(3) Suicide is never presumed, but must be affirmatively established by the party alleging the suicide. In order to establish the suicide, it must be shown that the act or thing which caused the death of the person was done or committed by him with the design and purpose of taking his own life, and not through accidental or other external causes.

"(4) If you find that the body of the deceased was found under such circumstances that the death may have resulted from negligence, accident, murder, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind, and gross moral turpitude, not to be presumed in a sane man.

"(5) You are not to give any weight to the findings by the coroner of the city of New York. You must reach your conclusions from the facts testified to in this case, irrespective of any conclusions reached by the coroner."

Whereupon the court charged the jury as follows, to wit: "The plaintiff in this case has the burden on herself of showing the contract under the policies and the death of the deceased. That much has been shown, and, as a matter of fact, been admitted by the defendant. The case of the plaintiff would be made out by that showing and admission, but for the denials in the defenses set up by the defendant. The defendant admitting the death, and admitting the obligation under the contract, sets up as a special defense that the contract is not enforceable in this case, because the assured, Sharland, committed suicide in the city of New York. Under the terms of this policy, this defense is good, if sustained by the proof. On that defense the defendant has the burden of proof. The defendant is required to make out its case on that defense by a preponderance of proof; that is, to make you, by its proof, or the proof in the case, believe that its defense has been established with a reasonable degree of certainty. It does not have to establish its case, as was suggested by counsel, as if this was a criminal case, where the party was charged with murder, beyond a reasonable doubt. It must establish that defense by a preponderance of testimony. You will take up the testimony offered by the defendant, and test it by the rule I have just suggested. On the evidence offered by the defendant showing suicide, your inquiry will be, has the defendant shown by a preponderance of evidence that Sharland committed suicide, whether he was then sane or insane? If the defendant has shown that by a preponderance of testimony, you must find for the defendant. If the defendant has failed to establish that by a preponderance of testimony, you must find for the plaintiff. The evidence offered by the defendant will lead you into the room in the city of New York where the deceased was found, and that evidence will illustrate, one way or the other, the question as to whether Sharland committed suicide or not. It is upon that and all the other evidence in the case that you must reach your verdict, one way or the other, on that issue."

But the court refused to give the charge firstly requested by counsel for plaintiff in the words as requested, but instead thereof charged the jury in the words following, to wit: "In this case, the plaintiff having declared upon two life insurance policies issued by the defendant company on the life of plaintiff's husband, payable in her favor, and the defendant having admitted the issuance of the policies and the death of the person insured, but having set up a special defense that it was excused or relieved from the payment of the amount due under the policies for the reason, as alleged by the defendant, that the husband of the plaintiff violated one of the conditions of the policies by willfully and intentionally committing suicide, the burden was and is on the defendant to establish the fact of such willful and intentional suicide or taking of his life by Ernest Sharland, the husband of the plaintiff, by evidence which, by the preponderance in favor of defendant, shows you satisfactorily that the deceased committed suicide."

And the court gave the charges secondly and thirdly requested by counsel for plaintiff. But the court refused to give the charge fourthly requested by counsel for plaintiff in the words as requested, but instead thereof charged the jury in the words following, to wit: "If you find that the body of the deceased was found under circumstances that the death, so far as the evidence shows the cause thereof, may have resulted as reasonably from negligence, accident, murder, or suicide, the presumption is against suicide, because suicide is contrary to the general conduct of mankind." And the court refused to give the charge fifthly requested by counsel for plaintiff.

Whereupon counsel for plaintiff at the time then and there excepted to the charge of the court firstly hereinbefore set out, and particularly to the portion of said charge contained in the words following, as error on the part of the court, to wit: "The defendant is required to make out its case on that defense by a preponderance of proof; that is, to make you, by its proof, or the proof in the case, believe that its defense has been established with a reasonable degree of certainty. It does not have to establish its case, as was suggested by counsel, as if this was a criminal case, where the party was

charged with murder, beyond a reasonable doubt. It must establish that defense by a preponderance of testimony. You will take up the testimony offered by the defendant, and test it by the rule I have just suggested. On the evidence offered by the defendant showing suicide, your inquiry will be, has the defendant shown by a preponderance of evidence that Sharland committed suicide, whether he was then sane or insane? If the defendant has shown that by a preponderance of testimony, you must find for the defendant. If the defendant has failed to establish that by a preponderance of testimony, you must find for the plaintiff. The evidence offered by the defendant will lead you into the room in the city of New York where the deceased was found, and that evidence will illustrate, one way or the other, the question as to whether Sharland committed suicide or not. It is upon that and all the other evidence in the case that you must reach your verdict, one way or the other, on that issue." And counsel for plaintiff further at the time then and there excepted to the refusal of the court to give the charge firstly requested by him, in the words as requested, as error on the part of the court. And counsel for plaintiff also and further at the time then and there excepted to the refusal of the court to give the charge fourthly requested by him, in the words as requested, as error on the part of the court. And counsel for plaintiff also and further at the time then and there excepted to the refusal of the court to give the charge fifthly requested by him as error on the part of the court.

Whereupon the court further charged the jury in the words following, to wit: "I wish to call your minds back to this fact: After weighing the evidence offered by the defendant on the issue of suicide vel non, if you find that the defendant has established its defense by a preponderance of evidence, preponderating in favor of the side of the defendant, you will find for the defendant, bearing in mind the other modifications I have given you in the charges." Whereupon counsel for plaintiff at the time then and there excepted to the said last charge immediately above written, and to the giving thereof, as error on the part of the court. The assignments of error are based on the rulings of the court as above set forth.

J. Zach Spearing, for plaintiff in error.

Chas. E. Fenner, Chas. P. Fenner, and Sam Henderson, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

After stating the case as above, PARDEE, Circuit Judge, delivered the opinion of the court.

The coroner's inquest, made a part of the proofs of death as presented by the plaintiff to the defendant company, was admissible in evidence. *Insurance Co. v. Newton*, 22 Wall. 32, 22 L. Ed. 793; *Insurance Co. v. Higginbotham*, 95 U. S. 380, 24 L. Ed. 499; *Richeieu Nav. Co. v. Boston Ins. Co.*, 136 U. S. 435, 10 Sup. Ct. 934, 34 L. Ed. 398. See, also, *Association v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; *Steamship Co. v. Tugman*, 143 U. S. 31, 12 Sup. Ct. 361, 27 L. Ed. 87; *Crotty v. Insurance Co.*, 144 U. S. 621, 626, 12 Sup. Ct. 749, 36 L. Ed. 566.

In *Insurance Co. v. Newton*, supra, the second headnote fairly states what was decided, and is as follows:

"(2) The preliminary proofs presented to an insurance company, in compliance with the condition of its policy of insurance, are admissible as prima facie evidence of the facts stated therein against the insured and on behalf of the company."

In *Insurance Co. v. Higginbotham*, supra, we find:

"The effect of facts set forth in preliminary proof as admissions is discussed in *Insurance Co. v. Newton*, 22 Wall. 32, 22 L. Ed. 793. Where an agent of the insurance company stated that the proofs were sufficient to show the death of the insured, but that they showed that he committed suicide, it was held that the whole admission must be taken together. Where the party or her agent stated in the preliminary proofs that the deceased had committed suicide, furnishing the verdict of a coroner's jury to that effect, and where the narration of the manner of the death of the deceased was so interwoven with the death of the deceased that the two things were inseparable, it was held that the whole was competent to go before the jury. We see no occasion to question the positions of that case."

In *Richelieu Nav. Co. v. Boston Ins. Co.*, supra, a maritime protest, consisting of statements signed by the master, mates, and wheelmen, against storm, heavy winds, and gales, high and dangerous seas, fogs, and defective compass, etc., was held admissible in a suit on an insurance policy, and the court says:

"But it was admissible in this case, not on the ground of agency, but because it was made part of the proofs of loss; being directly referred to in the proofs in the statement that the vessel ran ashore, and became a wreck and total loss, and was duly abandoned by the owners to her insurers, as will appear by certified copy of the protest of her master and mariners, heretofore served upon you." Hence the admission of the proofs of loss involved the admission of the explanatory writing."

In *Association v. Sargent*, supra, proofs of death containing the statement of the coroner's physician, which tended to show suicide, were admitted, and one of the questions passed upon was whether such proofs did not estop the plaintiff from proving the contrary, and it was held (Mr. Justice Brown dissenting) that the proofs of death, as furnished in that case, were not conclusive, but no question whatever was made or suggested as to the propriety of their being admitted in evidence as an entirety. These authorities are conclusive in this court, and it is needless to review the decisions of the various state courts on the same subject.

The contents of certain letters, which were found in the room of the deceased, Ernest Sharland, at the time his body was there discovered, and an envelope of the police department of the city of New York in which the letters were subsequently put, and two pieces of paper containing writings in the hand of the deceased, were admitted in evidence over the objections of the plaintiff. The issue in the case was whether the assured committed suicide. From undisputed facts, it appears he was found dead in his bed at about 4 o'clock in the afternoon on November 9, 1897, in his room at 509 Fifth avenue, New York; that he died from asphyxiation by illuminating gas; that when his room door was forced it was found that the two gas cocks in the room were both turned on; that the rugs which were in the room had been piled against the door, evidently for the purpose of preventing egress of gas and ingress of air; that the assured was lying upon the bed dressed in a suit of pajamas, in the pocket of which was a picture of his child; that on the dressing table, opposite the bed, was a photograph of his wife, which had written upon it, "My Wife," and her full name and address; that on this dressing table there was also a letter from his wife,

written in French; and that on the bureau were found two papers in the handwriting of the deceased, one an unfinished letter of farewell to his child, dated November 3, 1897, and the other was a request to send for a Mr. Bernard at a given address, and to mail the sealed letters, which were also on the bureau. It is admitted that the letter from his wife was written in response to a previous letter from him threatening suicide. The contents of the letter and the documents in the handwriting of the deceased tended to show that the assured was intending to commit suicide. The envelope of the police department of the city of New York, mentioned, was evidently offered as part of the identification of the documents. Bearing in mind that the issue was whether the assured committed suicide, we are of opinion that the evidence was properly admitted.

Counsel for plaintiff in error argues that, as the letters and documents were not made at the time of the act done, they constituted no part of the *res gestæ*, and were therefore inadmissible. It would seem that the papers written by the assured and the letters found in his close possession, shortly before and at the time of his death, would be the very best evidence to show the condition of his mind and the acts which he was then contemplating. Exactly what constitutes the *res gestæ* in a case of this kind need not be determined. Whatever throws light upon the motives and intentions of the assured, found dead under such circumstances, seems clearly admissible.

In regard to the instructions to the jury asked and refused by the court, we notice the first complaint is that the court refused a charge instructing the jury that, as the defense to the suit on the policies was suicide, the burden was on the defendant to establish the fact of such willful and intentional suicide by evidence which would exclude with reasonable certainty any other hypothesis of the cause of death than by such willful and intentional suicide. In the first place, it is to be noticed that the agreement in the policies was not limited to willful or intentional suicide, but included self-destruction while sane or insane. The court, while refusing the charge as requested, charged the jury as follows:

"The plaintiff in this case has the burden on herself of showing the contract under the policies and the death of the deceased. That much has been shown, and as a matter of fact been admitted by the defendant. The case of the plaintiff would be made out by that showing and admission, but for the denials in the defenses set up by the defendant. The defendant, admitting the death and admitting the obligation under the contract, sets up as a special defense that the contract is not enforceable in this case, because the insured, Sharland, committed suicide in the city of New York. Under the terms of this policy, this defense is good, if sustained by the proof. On that defense the defendant has the burden of proof. The defendant is required to make out its case on that defense by a preponderance of proof; that is, to make you, by its proof, or the proof in the case, believe that its defense has been established with a reasonable degree of certainty."

This covered the case, and was correct. See *Association v. Sargent*, *supra*; *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308.

The next complaint as to the charge is that the court refused to charge the jury as follows:

"If you find that the body of the deceased was found under such circumstances that death may have resulted from negligence, accident, murder, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind, and gross moral turpitude not to be presumed in a sane man."

While refusing this precise charge, the court gave the following:

"If you find that the body of the deceased was found under such circumstances that death, so far as the evidence shows the cause thereof, may have resulted as reasonably from negligence, accident, murder, or suicide, the presumption is against suicide, because suicide is contrary to the general conduct of mankind."

It seems that the court charged the jury that the presumption of law was against suicide, but refused to give the reasons for such presumption, precisely as requested by the plaintiff. In this we think there was no error. As the court charged the jury that the presumption of law was against suicide, it was sufficient. The trial judge was not bound to give all, if any, of the reasons upon which the presumption of law is based. The plaintiff in error relies upon *Insurance Co. v. McConkey*, supra, but that case does not support the contention. While, in the opinion of the court, the charge approved in *Mallory v. Insurance Co.*, 47 N. Y. 54, was recited and approved, in the case then actually under consideration the court approved the following, which was this charge, to wit:

"It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast, and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed. The plaintiff is therefore entitled to recover unless the defendant has, by competent evidence, overcome this presumption, and satisfied the jury, by a preponderance of evidence, that the injuries which caused the death of the insured were intentional on his part."

A close examination of the bill of exceptions will show that the plaintiff in error, otherwise than by excepting to the refusal of requested charges, did not except to any of the charges actually given by the court, except the following, to wit:

"I wish to call your minds back to this fact, after weighing the evidence offered by the defendant on the issue of suicide vel non, if you find that the defendant has established its defense by a preponderance of evidence, preponderating in favor of the side of the defendant, you will find for the defendant, bearing in mind the other modifications I have given you in the charges."

The objection to this charge, as given in the argument and brief, is that thereby the judge unduly impressed upon the minds of the jury that it was only necessary for the defendant to establish suicide by a preponderance of evidence, and so much so that it is difficult to avoid believing that the jury clearly saw that to the mind of the judge suicide had been established by the preponderance of evidence, and that, therefore, the verdict should be for the defendant. As, in our opinion, the trial judge was correct in charging the jury that the defendant was only called upon to establish the suicide of the assured with reasonable certainty by a preponderance of evidence, and as the uncontradicted evidence in the case clearly pointed to suicide as the cause of Ernest Sharland's death,—which cause was, however, left to the jury to find,—we are unable to hold that the language of the trial judge in his presumably closing charge to the jury was reversible error.

Counsel for defendant in error contend with much force that, under the evidence adduced on the trial, the judge should have directed a verdict in favor of the defendant, and it is therefore immaterial whether any errors were committed in the charge to the jury. The evidence found in the transcript apparently excludes with reasonable certainty any other hypothesis than that of suicide, but we find no certificate or admission that all of the evidence offered in the case is included in the bills of exception. The judgment of the circuit court is affirmed.

In re ADAMS SARTORIAL ART CO.

(District Court, D. Colorado. March 5, 1900.)

1. BANKRUPTCY—FEES AND COSTS—COMPENSATION OF MARSHAL.

Where the court of bankruptcy, upon the filing of a petition in involuntary bankruptcy, orders the marshal to take possession of the property of the bankrupt and hold the same until a trustee is appointed, the marshal is entitled to receive, out of the estate, compensation for his services under such order, in addition to the costs and expenses incurred.

2. SAME—AMOUNT ALLOWED.

Where the marshal, under such order, took possession of the property and held it for 17 days, when a trustee in bankruptcy was appointed and qualified, to whom the marshal turned over the estate, *held*, that the marshal should be allowed \$20, as a reasonable compensation for his services.

In Bankruptcy. On review of decision of referee in bankruptcy.
Bicksler, McLean & Bennett, for creditors.

HALLETT, District Judge (orally). A question has arisen before the referee in respect to the compensation of the marshal for taking possession of the goods of the bankrupt before adjudication. The marshal took possession of the goods, under order of the court, December 4th. The trustee was appointed on December 21st, and the marshal then, under order, turned over the goods to the trustee. In passing his accounts before the referee, the marshal demanded \$100, in addition to the costs incurred in keeping the goods, as compensation for his services. The referee denied this compensation, except as to the sum of \$5. The matter was brought before the court for review. The contention of counsel for the creditors is that the marshal, under such circumstances, is not entitled to anything for his services; he may have the costs and expense of keeping the goods during the time he is in charge; he cannot have anything for his services. The question arises under the third clause of section 2 of the bankruptcy act, by which the court has authority to appoint a receiver, or the marshal, upon application of parties in interest, in cases where it shall appear to be necessary for the preservation of the estate, to take charge of the property of the bankrupt, and after the filing of the petition, and until it is dismissed or the trustee is qualified. If a receiver should be appointed under this clause of the act, there would be no question as to his right to compensation for his services, and I do not perceive that it can make any difference if the marshal shall act in that capacity. The circum-

stance that he receives a salary for all services performed by him is not controlling. The referee seems to have assumed that, because he did not personally get the compensation allowed, therefore it was not intended that he should have it. That is not the fact. The marshal does get personal compensation for all services rendered by him, in the way of a salary; and fees which were allowed him as compensation before the act fixing a salary are still collected in suits of all kinds, as a fund out of which salaries shall be paid. So that the fact that there is a salary is a matter of no weight. I think the marshal is as much entitled to pay for his services in keeping the property as a receiver would be if a receiver had been appointed. The pay ought to be in amount such as the act requires in respect to other services which may be rendered by officers, and the fees allowed to all officers under this act are small,—so small that there is a good deal of grumbling about them,—but still the officers go on and accept what they can get. The time was short in which the marshal held this property. I think that a reasonable compensation for the service would be \$20, and that amount will be allowed for his service.

In re LEHIGH LUMBER CO. et al.

(District Court, W. D. Pennsylvania. February 13, 1900.)

No. 304.

BANKRUPTCY—PARTNERSHIP AND INDIVIDUAL DEBTS—PREFERENCES.

A creditor of a firm, holding their promissory note for money loaned, surrendered the same, and accepted in lieu thereof the individual note of a member of the firm for the same amount; the assumption of the debt by that partner being part of the consideration for the purchase of an interest in the firm for her son-in-law. The latter note was twice renewed, and was finally reduced to a judgment against the maker. Within four months thereafter the partnership and its members became bankrupt. *Held*, that the debt was that of the individual partner, not of the firm, notwithstanding the fact that the interest on the new note had always been paid by the firm, and that, since the firm creditors could not come upon the individual assets of that partner in competition with her individual creditors, the former had no standing to object to the judgment as a preference under the bankruptcy act, or to restrain the creditor from its enforcement.

In Bankruptcy. On petition of certain creditors of the bankrupt firm to restrain the enforcement of a judgment against one of the bankrupts.

R. B. Ivory, for Lehigh Lumber Co.

Thomas B. Alcorn, for judgment creditor and Florence A. Hylton, bankrupt.

BUFFINGTON, District Judge. On April 21, 1899, Palen & Burns and other creditors of the Lehigh Lumber Company, a partnership lately composed of Florence A. Hylton and W. V. Larkin, then lately deceased, filed a petition in bankruptcy in this court against the said firm and Florence A. Hylton. After due notice both the firm and

Florence A. Hylton were adjudged bankrupts. On the 2d day of May, 1899, Palen & Burns presented a petition in this court, setting forth that on the 1st day of March, 1899, judgment was entered in the court of common pleas of Luzerne county against Florence A. Hylton in favor of Ellen F. Hayden for \$10,000 on a note dated the 3d day of January, 1899; alleging that said note constituted the giving of a preference, in violation of subdivision "a" of section 60 of the bankruptcy act, and that the effect of the enforcement of such judgment would be to enable Ellen F. Hayden, as a creditor of Florence A. Hylton, to obtain a greater percentage of her claim than any other of her creditors of the same class. Testimony was taken, and, from an examination of it and the argument of counsel, the contention of the parties may be thus stated: The Lehigh Lumber Company was a partnership composed of Florence A. Hylton and William V. Larkin since December, 1897. William V. Larkin died February 15, 1899, and Palen & Burns were creditors of said firm. They contended that Ellen F. Hayden was also a creditor of the Lehigh Lumber Company to the extent of \$10,000; that Florence A. Hylton, as a member of the firm, was individually liable for the partnership debt owing to them by the Lehigh Lumber Company, and also individually liable for the alleged partnership debt owing to Ellen F. Hayden by the Lehigh Lumber Company; that the Lehigh Lumber Company was insolvent, and that, in order to give an undue preference to Ellen F. Hayden, the said Florence A. Hylton gave her individual note for said indebtedness; and that thereby, and by suffering it to be entered as a judgment and become a lien upon her individual real estate, she has enabled Mrs. Hayden to obtain a greater percentage of her debt than the petitioner or any other of such creditors of Florence A. Hylton of the same class. On the other hand, it is contended by Ellen F. Hayden that the \$10,000 debt represented by this judgment is not a debt of the Lehigh Lumber Company, but is the individual debt of Florence A. Hylton, and that Palen & Burns, being firm creditors, and not individual creditors of Florence A. Hylton, are not injured by the entry of this judgment. Since subdivision "f" of section 5 of the bankruptcy act provides that "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the proceeds of the individual estate of each partner to the payment of his individual debts," the case therefore turns on the question of fact, whether the debt of Ellen F. Hayden is a firm or individual one.

We have carefully examined the testimony, and find the facts as follows: In 1895 W. V. Larkin and J. C. Hayden were partners doing business as the Lehigh Lumber Company. Larkin was a son-in-law of Mrs. Florence A. Hylton, and Hayden the husband of Mrs. Ellen F. Hayden. On June 28, 1895, Mrs. Hayden loaned that firm \$10,000; receiving from it its note for that sum, at one day. This partnership continued until December, 1897, when negotiations were begun looking to the purchase by W. V. Larkin of the interest of J. C. Hayden for \$20,000 (which was to include payment of Mrs. Hayden's note), and Larkin to assume the debts. This agreement was evidenced by papers dated January 1, 1898, which were not signed,

by reason of the inability of Larkin or his mother-in-law, Mrs. Hylton, who was furnishing the funds for him, to pay the said sum. The evidence shows that the original agreement was modified so that \$10,000 should be paid to Hayden, and that Mrs. Hylton should assume payment individually, by her note for \$10,000, of the money then owing to Mrs. Ellen F. Hayden by the Lehigh Lumber Company. We find from the evidence in the case that in point of fact Mrs. Ellen F. Hayden surrendered to Mr. Larkin, for the Lehigh Lumber Company, the note of that company for \$10,000, and in return therefor received Mrs. Hylton's individual note, dated some time in January, 1898. This note of January, 1898, was in July surrendered, and a renewal note then given her by Mrs. Hylton; and in January, 1899, the note of July was again surrendered for a renewal note of Mrs. Hylton, upon which the judgment now in question was entered. The only evidence which controverts these facts is that, after the surrender of the note of the Lehigh Lumber Company by Mrs. Hayden, the interest upon the Hylton note was paid by checks of the Lehigh Lumber Company. From that fact it is urged that she never surrendered her claim against the Lehigh Lumber Company, and that that company continued to pay her interest upon its own indebtedness. There is no evidence whatever that, after the assumption of the debt of the Lehigh Lumber Company by Mrs. Hylton, that company ever paid her the \$10,000 represented by her assumption. It is therefore clear, as between her and the Lehigh Lumber Company, that, having allowed the \$10,000 assumed by her to remain in possession of and be used by that company, it should continue to pay the interest which she was bound to pay Mrs. Hayden. Indeed, this was but the natural course to follow; and such would seem to have been the one pursued by Mr. Larkin, who was the sole manager and controller of the affairs of the firm. But this was a matter that concerned the partners alone, and could not, under the circumstances, bind or affect Mrs. Hayden. She was only interested in receiving the interest on her loan, and whether it came from the lumber company or not was no concern of hers. That these interest payments were so made may have afforded some ground for creditors of the Lehigh Lumber Company supposing the debt was that of the firm; but we think the testimony has fully explained the matter, and shows conclusively that the debt is the individual one of Mrs. Hylton. The assumption was made six months before the passage of the bankruptcy law, and, of course, was not made with a view of eluding its provisions. At the time the original note of Mrs. Hylton was given, Mrs. Hayden's husband, who was individually liable for the firm loan, was retiring, and it was the most natural thing for Mrs. Hayden to require an individual judgment note from Mrs. Hylton. After full consideration, we are of opinion that Mrs. Hayden in January, 1898, ceased to be a creditor of the firm, and the note in question is for the individual debt of Mrs. Hylton. Whether the judgment is valid as against her individual creditors is a question not before us, and not decided, but it is clear that the rights of the creditors of the firm are not affected by its entry. The petition of Palen & Burns will therefore be dismissed at their costs.

In re SILVERMAN et al.

(District Court, W. D. Missouri, W. D. June 19, 1899.)

1. BANKRUPTCY—PROVABLE DEBTS—BREACH OF CONTRACT OF EMPLOYMENT.

Where a person employed by a mercantile firm for a year on a fixed salary is discharged, without fault on his part, by a trustee to whom the employers had made a trust deed for the benefit of their creditors, on their becoming insolvent, before the expiration of the year, such employé has an immediate right of action against the employers for the breach of contract, the measure of damages being the amount he would have received under the contract for the remainder of the year, less such amount as he will be able to earn during that time from other sources; and, upon the bankruptcy of the employers, his claim for such damages becomes a debt which, after liquidation, may be proved and allowed against the estate in bankruptcy.

2. SAME—ESTIMATE OF EXPECTED EARNINGS.

Where the contract stipulated that such employé, besides his salary, should receive a commission on all sales made in the business above \$15,000 annually, and he presents a claim in bankruptcy for commissions, to which he alleges he would have become entitled had the contract remained in force, the burden is on him to furnish the court substantial and reliable data on which to estimate his probable earnings; and, in the absence of any satisfactory evidence to show that the sales during the year would probably have exceeded \$15,000, any estimate of expected commissions would be merely speculative, and cannot be allowed as a debt against the estate.

3. SAME—PROOF OF DEBT—UNLIQUIDATED CLAIMS.

Under Bankr. Act 1898, § 63b, a creditor who has a claim against a bankrupt for unliquidated damages should first make application to the court to direct the manner in which it shall be liquidated, and, when that is done, he may prove and file the claim with the referee for allowance.

In Bankruptcy. On review of decision of referee in bankruptcy disallowing claim of Nathan Rosenberg.

Karnes, New & Krauthoff, for creditor.

PHILIPS, District Judge. Nathan Rosenberg presented a claim against said estate for \$1,200 for unliquidated damages growing out of a breach of contract. The referee having disallowed the claim, the controversy is before the court for review. The controversy grows out of substantially the following state of facts: The bankrupts, Silverman Bros., were engaged in mercantile business in Kansas City, Mo., and for the year prior to September 6, 1898, the claimant, Nathan Rosenberg, was in their employ on a salary of \$15 per week. On September 6, 1898, Silverman Bros. executed the following instrument of writing:

"Kansas City, Mo., Sept. 6th, 1898.

"We, Silverman Bros., agree to pay Mr. Rosenberg \$60.00 per month, and three per cent. for sales over \$15,000.00, for one year, to manage our shoe department.

"[Signed]

Silverman Bros.,

"By S. Silverman."

Rosenberg claims to have accepted this contract, and entered upon its performance, and so continued until the 9th day of January, 1899, at which time Silverman Bros. made a deed of trust on their stock of goods in favor of their creditors, they being largely indebted, and

probably unable to proceed further as a "going concern." One Swift was named as trustee in the deed of trust, and under its provisions he took possession and control of the stock of goods on the 9th day of January, 1899, and discharged from the store the employes under Silverman Bros., including said Rosenberg. On the 18th day of January, 1899, proceedings in involuntary bankruptcy were instituted against Silverman Bros.; and, upon the application of petitioning creditors, said Swift was appointed receiver, and continued in possession thereof as such until the 2d day of February, 1899, when said Silverman Bros. were adjudged bankrupts; and, upon reference of the papers to the referee, creditors' meeting was had, and said Swift was duly elected trustee. The claim of Rosenberg is based upon the breach of the contract of employment, and the \$1,200 claimed by him is made up of items of \$60 per month to the end of the contract year, and of 3 per cent. commissions on estimated sales over and above \$15,000. There can be no question but what if, on the 9th day of January, 1899, there was a breach of the contract between Silverman Bros. and Rosenberg by his discharge from their service, or by their voluntary act which rendered the performance of the contract on their part impossible, a cause of action at once arose in favor of Rosenberg against Silverman Bros. for damages; and it is equally clear that the subsequent adjudication of bankruptcy in February, 1899, did not put an end to the cause of action, as it was then an existing right; which the mere adjudication in bankruptcy could not destroy. So, the real question in this case is not whether an adjudication in bankruptcy against the employer would put an end to a contract with an employe, like the one in question, so that the discharge of the employe would be under the operation of the bankrupt law, and not by reason of the voluntary act of the employer, but it is whether or not the act of Silverman Bros. in making the deed of trust, and placing Swift in absolute charge of the store and its business, whereby Rosenberg was displaced as manager and employe, did not constitute a breach of the contract, and create a subsisting cause of action, three weeks before the adjudication in bankruptcy. While the memorandum of contract was signed only by Silverman Bros., yet, when Rosenberg accepted and entered upon the performance thereof, and so continued until he was discharged, that was sufficient to make it a mutual contract, and as such binding upon both parties. As said by Wagner, J., in *Lewis v. Insurance Co.*, 61 Mo. 538:

"It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be applied; as, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract, will be necessarily implied."

The insolvency of Silverman Bros., and their inability to proceed with their business, whereby Rosenberg was thrown out of employment, constitutes no defense to an action by the employe for a breach

of the contract. 2 Pars. Cont. 672; *Worsley v. Wood*, 6 Term R. 718; *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272; *White v. Mann*, 26 Me. 361; *Lewis v. Insurance Co.*, 61 Mo. 534.

On the discharge of Rosenberg without his fault or consent, a cause of action at once arose in his favor against Silverman Bros. He would not have to wait until the expiration of the year covering the term of his employment before he could institute the action. In such action he would be entitled to recover the amount that would have been due him if he had continued to work for Silverman Bros. under the contract from the date of his discharge until the expiration of the contract, after allowing credit for anything which he may have earned from services rendered to others, or under other contracts, after allowing further credit for what the court or jury hearing the case may believe from the facts and circumstances in evidence he will be able to earn between the time of trial and the termination of the year. *Boland v. Quarry Co.*, 127 Mo. 520, 30 S. W. 151.

The evidence in this case shows that the claimant was paid his monthly wages up to the 9th day of January, 1899, when the trustee discharged him. The evidence further tends to show that he was thereafter for a few days employed by the trustee in and about the store in taking an inventory, and that shortly thereafter he earned about \$15 in some other work that he had undertaken. His testimony further discloses the fact that he was at the time of giving his testimony before the referee employed by some other party on commissions to be earned by him. Taking into consideration, therefore, the fact that at the time of taking his deposition he was not engaged in so remunerative business as his former employment, which insured him at least \$60 per month, and his known energy and activity, it is reasonable to assume that between the 1st day of February and the 6th day of September, 1899, he could earn at least 30 per cent. of his former definite salary, which sum, deducted from the aggregate of his salary up to September 6, 1899, would leave, say, in round numbers, \$300 as a claim against the estate.

In respect of the 3 per cent. commission on sales over \$15,000 for one year, provided for in the contract, there is more difficulty. On this issue the burden of proof rests upon the claimant to furnish the court some tangible, substantial data upon which to estimate such probable earning, to enable the court to keep out of the field of mere speculation and guess. The evidence in this case shows that the amount of sales or business done by Silverman Bros. for the year preceding September, 1898, was \$13,000; and when one of the Silverman Bros. was on the witness stand he was inquired of as to how he came to fix upon \$15,000 as the amount beyond which he allowed the 3 per cent. commission. His answer was that he figured upon an increase of \$2,000 in business. So, it is made manifest that, taking as a basis for reasonably estimating the amount of business for the year between September, 1898, and September, 1899, the accomplishment of the preceding year, he did not expect a business of over \$15,000, and therefore the 3 per cent. commission would largely depend upon the extraordinary energy and good management of the claimant himself. The claimant seeks to base his estimate upon an excess

over \$15,000 upon the amount of sales made between the 6th of September, 1898, and the 9th day of January, 1899, when the deed of trust was made, which aggregated about \$10,000. This achievement, however, was so unusual and sporadic as at least to excite inquiry, if not suspicion. It does not even appear whether or not the goods were sold during these four months above or below cost. The evidence shows that at the time of the failure, January 9, 1899, the total indebtedness of the concern was about \$22,000, while the schedule in bankruptcy disclosed the amount of goods on hand to be only \$12,000 worth. This abnormal condition of affairs naturally enough warrants the inference that the concern was hurrying off its goods either to meet its pressing liabilities, or in anticipation of failure, and therefore the amount of such sales for a few months under such conditions can afford no safe basis for estimating what amount of goods in excess of \$15,000 would or could have been sold in a legitimate course of business for the whole year. While it may be conceded to the contention of claimant's counsel that there was an implied obligation on the part of the merchants to continue and keep up their business to afford the claimant an opportunity to realize his just expectations under the contract, yet there was no express or implied obligation on their part to increase their purchases and to enlarge their business. The law would only exact that their business should proceed in the usual and ordinary way, as it was being conducted at the time of the execution of the contract, and was subject to the vicissitudes of trade and the ordinary incidents of misfortune in business. The case is quite unlike that relied on by claimant in *Lewis v. Insurance Co.*, supra. In that case the claimant was employed as an agent of an insurance company on a compensation of 35 per cent. on premiums of insurance effected by him and the renewals thereof; and because of the fact, found in that case, of a well-known custom or usage among insurance companies by which the adjustment was made as to the value of renewals of policies for any length of time, readily ascertainable by statistical tables and comparisons, a certain degree of accuracy was obtainable for the estimation of future earnings of the claimant, and therefore the court was enabled to approximate with some degree of certainty as to what would be the future earnings of the agent. No such criterion is furnished in this case. And when the amount of sales for the preceding year amounted to nearly \$13,000, and that, too, under the assistance of this same claimant, it does seem to the court that it would be the merest guesswork to assume that the sales for 1898 and 1899 would exceed \$15,000. The claimant has not even furnished the court with any evidence as to the amount of goods on hand on the 6th day of September, 1898, when he made his contract. And, as he was then in practical management of the store and its business, he is presumed to have known what was then on hand. Nor has he furnished the court with any evidence as to the quantity or value of the goods purchased by the concern between the 6th day of September, 1898, and the 9th day of January, 1899. And if its business was so conducted under his auspices as that by the 9th day of January, 1899, its stock was run down to \$12,000, with accumulated debts of \$21,000

or \$22,000, the very least that can be said is that he has furnished a very unsafe criterion by which the court is to award him a judgment for commissions on sales beyond \$15,000. While it is true, as a general proposition, that, as against the party who has occasioned the breach of a contract giving the employé a right of action on account of his discharge, the court should indulge a large liberality in favor of the party wronged in ascertaining the amount of his damages on indefinite criteria, yet the court, to avoid a bald act of confiscation and of injustice to other creditors of the bankrupt, should not proceed to judgment for mere speculative damages. The claim being unliquidated, its allowance against the estate is provided for by subsection b, § 63, of the bankrupt act, which provides that "unliquidated claims against the bankrupt may, pursuant to application of the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." The claimant was therefore premature in presenting his claim for allowance before the referee without first making application to the court to direct the manner of liquidating it. To obviate this difficulty, the parties have stipulated that the court, on this alleged review, may liquidate the claim, and the court has so directed.

The conclusion of the whole matter is that the court finds that the claimant is entitled to have allowed against said estate the sum of \$300, which covers a period of eight months; and as under Bankr. Act, § 64b, subsec. 4, wages due to clerks or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed \$300, are given priority, to work out the equity of the case the claimant should be allowed three-eighths of \$300 as a preferred claim, amounting to \$112.50, and the balance as a general creditor; and the claim will be certified to the referee, to be allowed accordingly.

IN re McCAULEY.

(District Court, E. D. New York. April 27, 1900.)

BANKRUPTCY—DISCHARGEABLE DEBTS—JUDGMENT FOR BREACH OF PROMISE OF MARRIAGE.

A judgment recovered by a woman against her seducer for breach of his contract to marry her is a debt provable against his estate in bankruptcy, and which will be released by his discharge; and consequently, pending the determination of the question of discharge, the plaintiff will be enjoined from proceeding in the state courts for the enforcement of her judgment.

In Bankruptcy.

Joseph A. Burr, for bankrupt.

Edward Kaufmann, for creditor.

THOMAS, District Judge. Josephine Disler moves to set aside an order made by this court staying proceedings in an action in the supreme court of the state wherein said Disler recovered a judgment against the bankrupt for breach of promise to marry. It seems that,

under McCauley's promise to marry said Josephine Disler, he effected her seduction, which resulted in the birth of a child; that proceedings were instituted through the commissioner of public charities of the city of New York, borough of Brooklyn, against the bankrupt, wherein the said bankrupt was found guilty, and adjudged to be the father of the child; that on or about the 3d day of October, 1898, the aforesaid action in the supreme court was begun; that on October 4, 1898, the defendant was arrested under an order for arrest issued out of the supreme court, and thereafter admitted to bail; that on the 24th day of January, 1900, plaintiff recovered judgment against the defendant in such action for \$3,295.80; that execution against his property was issued to the sheriff of the county of Kings; that on the 13th day of March, 1900, the defendant became a voluntary bankrupt in this court; that the schedules annexed to his petition disclose only four alleged creditors,—the plaintiff in the above action, and three others. The aggregated indebtedness of the other three creditors is \$60. The question is whether such judgment is dischargeable in bankruptcy. If it is, the demands of the law must be met, however great the hardship to the plaintiff, and however beneficial it may be to the person who would dishonor his moral obligation. The judgment is based upon a contract, and cannot be withdrawn from the operation of the bankruptcy act. Neither research nor consideration enables the court to reach other conclusion. Hence the motion to vacate the order of injunction is denied.

In re SUMNER.

(District Court, E. D. New York. May 4, 1900.)

1. **BANKRUPTCY—PROOF AND ALLOWANCE OF CLAIMS.**

Bankr. Act 1898, § 57d, providing that claims which have been duly proved shall be allowed upon presentation to the court, unless objected to, or unless their consideration is continued for cause by the court on its own motion, intends that, if objection to a claim is interposed, or if the court is not satisfied with the prima facie case made out by the claimant's sworn statement, the claim shall not be accepted as proved until the objection has been disposed of, or until the court is convinced of the validity of the claim.

2. **SAME—EVIDENCE IN OPPOSITION TO CLAIM.**

Where a creditor of a bankrupt makes proof of his claim in the manner directed by the statute, his verified statement of the claim makes out a prima facie case for its allowance. If any party in interest objects to the allowance of such claim, he must assume the burden of producing evidence against it of at least equal probative force to that furnished by the claimant's sworn statement.

3. **SAME—EXAMINATION OF WITNESSES.**

A party in interest, objecting to the allowance of a claim proved against the estate of a bankrupt, is entitled, in support of his objection, to examine the claimant and other witnesses, if their attendance can be secured without embarrassing delay. But the proceeding should not be suspended for the purpose of obtaining the evidence of witnesses beyond the jurisdiction, unless the court is satisfied that the objection is interposed in good faith, and that the evidence desired is of substantial value, and necessary to a just determination of the case.

In Bankruptcy. On certificate of referee in bankruptcy.

Nathan D. Stern, for Kane and others.

L. M. Merchant, for James B. Weed & Co.

William H. Janes, for James Lumber Co. and others.

John Jay McKelvey, for S. E. Sargent and others.

THOMAS, District Judge. The first question to be decided relates to the method that should be employed by a creditor for the purpose of presenting his claim to the referee for allowance, and to the evidence that should be furnished by him for that purpose.

Section 57a of the act provides:

"Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

Section 57b provides:

"Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim."

This section provides both the method of presenting the claim and the evidence necessary, in the first instance, to sustain it. The "statement under oath," if it contain the matter pointed out, is at once the claimant's pleading and his evidence, and makes for him a *prima facie* case.

Section 57d provides:

"Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

The meaning of this subdivision is that, if objection be interposed, or the court be not satisfied with the *prima facie* case thus made, the claim shall not be accepted as proven, until disposition shall have been made of such objection, or, if the court continue the consideration, until the court shall be convinced of its validity.

Just here arises the second inquiry: If objection be made to the claim, must the claimant present evidence in addition to the statement provided for in sections 57a and 57b, or has he made such a *prima facie* case as to place the burden upon the objector of furnishing evidence that shall overcome the evidence conveyed to the court by the statement? It is apparent that, if the statement makes a *prima facie* case, the claimant may rest, and await the introduction of evidence that shall be opposed to the sufficient evidence presented by the claimant.

Section 57f provides:

"Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit."

It is apparent from subdivision "f" that the statute contemplates that, after the claimant has presented his claim in the prescribed manner, objection may be made, and that thereafter the question of the objection shall be taken up and decided. This does not mean that the burden of proof is upon the objector to disprove the claim, but that he shall produce evidence whose probative force shall be equal to, or greater than, the evidence offered in the first instance by the claimant. The burden of proof is always upon the claimant, but the statute points out how he may meet it for the purpose of making a prima facie case; and further provides that a creditor, or other person entitled, may, by interposing objection, so relate himself to the record as to be able to give evidence in opposition to the claim. Therefore, if the creditor shall have complied with section 57a, by filing with the referee a statement under oath, he shall be entitled to have his claim accepted; unless from some circumstance the referee demands further evidence from him, or unless an objection is interposed, and such objection is followed by evidence offered by the objector, which shall overthrow the presumptive case made by the claimant. It is proper to inquire, in this connection, whether the objector is entitled to examine the claimant. It is considered that an opportunity should be given to examine the claimant and other witnesses, if the attendance of the same can be procured seasonably and without embarrassing delay, and it may be that in suitable cases the referee should suspend a determination of the matter until evidence can be taken by deposition. But a suspension of the proceeding for the purpose of obtaining the evidence of witnesses not within the jurisdiction of the court should only be exercised where the referee is convinced that there is not only formal objection to the claim interposed in good faith, but also that there is substantial reason for believing that such evidence is necessary for the just administration of the estate. The proceeding before the referee at the first meeting of creditors, looking to the election of a trustee, is intended to be summary. The expeditious administration of the estate is of importance, and no considerable delay should be permitted for the purpose of obtaining evidence respecting claims, unless the court is satisfied that such evidence is of substantial value and necessary to just determination. Experience in this district under the present act illustrates that the provision of the statute committing the selection of the trustee to the creditors permits embarrassments which seriously tend to delay the speedy and proper distribution of the estate. It usually happens that, where there are assets, coteries of creditors are formed for the purpose of controlling the election of a trustee, either in the interest of particular creditors, or for the purpose of carrying to some particular lawyer the emoluments arising from the conduct of the business. As a result, the court has been compelled to appoint a receiver in almost every important proceeding pending the contest over the election of the trustee. Such receiver usually performs a considerable part of the duties that belong to the trustee, and the expense of the administration is largely increased. It is not within the power of the court to withdraw from the creditors their due right to select the trustee, but every effort should be made to put

an end to the undue contention, and the consequent delay that accompanies the attempted exercise of that right.

The objection that certain creditors were debarred from proving the balance of their debts, because preferential payments had been made thereon within four months, and while the bankrupt was insolvent, cannot be sustained.

Pursuant to the above views, this proceeding is remanded to the referee, with direction to pass upon the claims presented, and the objections already made thereto, and to give each party such opportunity to produce evidence as shall accord with this opinion.

In re MAYER.

(District Court, E. D. Wisconsin. April 30, 1900.)

BANKRUPTCY—PRIORITY OF CLAIMS—WAGES OF LABOR.

A claim against a bankrupt merchant by one who acted as his agent in making sales of his goods on a stipulated commission is not entitled to priority of payment out of the estate in bankruptcy, commissions so earned not being included in the language of Bankr. Act 1898, § 64b, cl. 4, giving priority to "wages due to workmen, clerks or servants."

In Bankruptcy. On claim filed by Peter Shepero for \$99.98, as entitled to priority in payment as wages due under section 64b of the bankrupt act, which was allowed by the referee as an indebtedness, but disallowed for priority, and the question thereupon certified for the opinion of the district judge.

M. N. Lando, for petitioner.

Bloodgood, Kemper & Bloodgood, for trustee.

SEAMAN, District Judge. The testimony of the claimant is not clear, and is far from satisfactory, either as to the terms or the fact of his service; but the referee gives to the claimant the benefit of the most favorable construction the testimony will bear, namely, that the bankrupt promised to pay him absolutely \$5 per week for services, and to further pay a commission of 5 per cent. on the amount of all sales made by him; that he was not engaged in selling goods over the counter in the store, but any commissions were earned outside the store in hunting up purchasers of goods. The fixed wages at five dollars per week were fully paid, and the claim is for commissions alleged to be due upon two transactions of sale to jobbers within three months prior to the commencement of the bankruptcy proceeding, in which the participation of the claimant is indefinitely stated. What service was rendered about the store or business for the several weeks during which the wages were paid does not appear, but the claimant states that he was engaged in selling goods for various parties about the city, and brought the purchasers in question to the bankrupt. On this version of the transactions the commission service was merely an incidental agency in procuring customers, with no obligation to serve, and the claim is not one entitled to priority, within the meaning of the act, as "wages due to workmen, clerks or

servants." Bankr. Act 1898, § 64b, cl. 4. See *In re Greenwald* (D. C.) 99 Fed. 705, and *In re Scanlan* (D. C.) 97 Fed. 26, for definitions of these terms. However the rule may be held in reference to traveling salesmen in the service of a bankrupt and on salaries, I am clearly of opinion no construction is admissible which would grant priority to these commission claims. On behalf of claimant, *Conlee Lumber Co. v. Ripon L. & M. Co.*, 66 Wis. 481, 29 N. W. 285, and *Palmer v. Van Santvoord* (N. Y. App.) 47 N. E. 915, are cited, but neither case furnishes support for the contention. On the contrary, the *Palmer Case* approves the ruling in *People v. Remington*, 45 Hun, 329, which appears to be directly in line with this opinion. The ruling by the referee is approved.

In re WAXELBAUM.

(District Court, N. D. Georgia. February 17, 1900.)

No. 111.

1. **BANKRUPTCY—EXEMPTIONS—CONCEALMENT OF ASSETS.**

Where the exemption law of the state (Code Ga. § 2830) declares that a debtor shall forfeit his right to the exemption allowed, if he is guilty of willful fraud in concealing from his creditors any part of the property of which he is possessed at the time he seeks the benefit of the exemption, a bankrupt who does not make a full and fair disclosure of all the property owned by him at the time of the filing of his petition in bankruptcy is not entitled to have any exemption set apart to him by his trustee in bankruptcy.

2. **SAME—REVIEW OF REFEREE'S DECISION—FINDINGS OF FACTS.**

On review of a decision of a referee in bankruptcy, the district court will not reverse the findings of facts made by the referee, unless the same are manifestly erroneous.

In Bankruptcy. On review of decision of referee in bankruptcy.

Slaton & Phillips, for bankrupt.

Mayson & Hill, for objecting creditors.

NEWMAN, District Judge. This case comes before the court on an exception to the action of the referee in refusing the bankrupt an exemption of the amount allowed by the statutes of the state (\$1,600), out of the proceeds of a stock of goods owned by him, and sold by the trustee in bankruptcy. The referee, in an elaborate finding on the facts involved, holds that the bankrupt did not make a full and fair disclosure of all the property owned by him at the time his petition in bankruptcy was filed, and states wherein he failed to do so. The exemption allowed by Bankr. Act, § 6, is that allowed by the laws of the state of the bankrupt's residence. The law of this state (Code, § 2830) provides that:

"The debtor guilty of willful fraud in the concealment of part of his property from his creditors, of which he is possessed when he seeks the benefit of the exemption, shall, on account of his fraud, lose the benefit of such exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed."

The supreme court of Georgia, in passing on this section (McNally v. Mulherin, 79 Ga. 614, 4 S. E. 332), held that to entitle a person to an exemption in Georgia he must come into court with clean hands. "He must make a full and fair disclosure of all his property. He cannot retain any amount of money which he may deem necessary and needful to employ attorneys, pay licenses, and carry on business, but he must account for it; and, if the schedule exceeds the amount to which he is entitled as an exemption, he must produce the money in court, and pay it over, so that his creditors may get it." The facts found by the referee in this case are such that it would be impossible to allow the bankrupt the exemption claimed. Independently of the conclusions of the referee as to other matters and other business in which he says the bankrupt was engaged, and as to which he was guilty of fraud in withholding assets from the bankruptcy court, the fact alone disclosed by the referee, that 11 months before the petition in bankruptcy was filed the bankrupt had a large amount of stock and a very small amount of indebtedness, and that at the time the petition was filed he had a very large amount of indebtedness and a comparatively small amount of stock, without any more satisfactory explanation than is shown in the record in this case, would be sufficient to defeat the exemption. Indeed, under the facts disclosed by this record, the bankrupt is fortunate in only being deprived of his right to an exemption. The rule is well recognized that the district court will not interfere with the action of the referee in bankruptcy as to his findings on facts, unless the same are manifestly erroneous. This is certainly not such a case. The referee's decision denying the exemption will be sustained.

In re ROZINSKY et al.

(District Court, S. D. New York. April 21, 1900.)

1. **BANKRUPTCY—COSTS—EXPENSES OF EXAMINATION.**

Where the assets of an estate in bankruptcy are no more than sufficient to pay certain labor claims, proved and allowed as preferred debts, and an examination of the bankrupt is undertaken in the hope of discovering concealed assets, at the suggestion of the attorney for the trustee (who previously represented the creditors by whom the trustee was chosen), but against the objection of the labor claimants, and without resulting benefit to the estate, the expenses of such examination, including the hire of a stenographer, should not be paid out of the funds of the estate, but must be borne by the creditors who procured it.

2. **SAME—FEE OF TRUSTEE'S ATTORNEY.**

The claim of the trustee's attorney for a fee for professional services rendered in connection with such examination, no benefit to the estate having yet resulted, will not be allowed out of the general funds of the estate. His services must be regarded as virtually rendered in behalf of those creditors who were his clients, and on the credit of what they might succeed in realizing.

In Bankruptcy.

Engel, Engel & Oppenheimer, for petitioners.
Morris Meyers, for trustee, opposed.

BROWN, District Judge. Two motions are made in the above matter asking for a direction that the trustee make a dividend to certain preferred creditors for wages, and also that an allowance of \$50 to counsel employed by the trustee, and \$100 for stenographer's expenses in examination of the bankrupt, be disallowed.

By the trustee's report it appears that on February 20, 1900, he received from the previous receiver \$182.50, and subsequently \$5.24, making in all \$187.74. These are all the assets thus far received and there is no trustworthy expectation of more. The trustee was chosen by the attorney of four creditors February 7th, who held powers of attorney to act for them, and he was thereupon employed as attorney by the trustee. Several creditors presented proofs of preferred claims for wages. One claim amounting to \$85, appears to have been allowed; another claim of Hyman Brunheim was for \$70 on his own account, and for about \$750 additional in behalf of 13 other workmen who it is stated had assigned their claims to him; this was not allowed but held in suspense, because there were neither proofs of the assignments nor affidavits as required by the act. It would seem, however, to be good for the sum of \$70 in behalf of Hyman Brunheim. These two sums amounting to \$155 with certain other necessary expenses of administration would absorb all the funds in the trustee's hands without allowance for the items objected to. Upon the suggestion of the attorney for the trustee, that assets had been fraudulently disposed of by the bankrupts, which might be discovered, an examination of the bankrupts by the trustee was authorized by the referee and a stenographer allowed. The attorney for the wages claimants objected to any such examination at the expense of the funds in hand; but being overruled, he attended upon the examination on several days subsequent and took some part in the examination. The stenographer's transcript of the proceedings amounts, as I find upon examination, to about 230 folios. On March 16th the attorney for the trustee was paid \$50 on account of services, so far without any benefit to the estate; and \$100 has also been paid on account of the stenographer's fees in the examinations; so that the balance now in the hands of the trustee amounts to but \$37.74. No additional assets have been secured through the examination, nor have proceedings therefor been instituted. The amount remaining will be no more than sufficient to meet the necessary expenses of administration prior to the preferred claims for wages under section 64, Bankr. Act.

Although under section 38a, subd. 5, an examination of the bankrupt and the employment of a stenographer therefor, may as a general rule be allowed at the expense of the estate, that should not be allowed for the benefit of general creditors at the expense of the wages' claims of workmen objecting thereto, when the funds in hand are only sufficient to pay the preferred claims. Such expenses should be at the charge of the general creditors alone. The workmen's attorney, however, should have brought the objection earlier to the attention of the court.

In the present case it is manifest that the examination was conducted in the interest of the general creditors. The trustee was

elected by the attorney of those creditors, and the latter was in turn immediately employed by the trustee in an uncertain search after assets. The funds in hand necessary to pay preferred claims should not be thus depleted, but such services should be regarded as virtually in behalf of the creditors who are the clients of the attorney and upon the credit of what they may succeed in realizing. The amount drawn by the attorney in this case should therefore for the present be disallowed, and the charges of the stenographer are referred to the referee in charge for revision and reduction to 10 cents per actual folio, the statutory rate, and a dividend declared among the preferred creditors whose debts have been or shall be sufficiently proved, to the extent that the assets in hand are sufficient to pay them, after deducting only the necessary prior charges.

In re EMRICH.

(District Court, W. D. Pennsylvania. March 28, 1900.)

No. 41.

1. BANKRUPTCY—ASSETS—LICENSE.

A license to occupy a stall in a city market is property of the licensee, which will pass to his trustee in bankruptcy; and the court of bankruptcy has power to order the bankrupt to transfer such license to his trustee, and to make such application to the licensing authorities for the reissue of the license to the trustee or his vendee as is customarily required by those authorities.

2. SAME—JURISDICTION—PARTIES.

On the trustee's application for an order requiring the transfer of such license to him, it being contended that the license was a mere personal privilege, which the bankrupt was exercising in connection with the business carried on by his wife at such stall, she was brought into the case by petition and rule to show cause. She made no objection before the referee to the jurisdiction of the court, or the mode in which she was made a party, and did not claim the license by transfer from her husband, but contested the application on the ground that the license was not such property as would vest in the trustee and that the latter was chargeable with laches. *Held*, that she could not be heard to object to the jurisdiction of the court on petition to review a decision of the referee adverse to her claims.

In Bankruptcy. On review of decision of referee in bankruptcy.

Chas. A. Woods, for petitioner.

H. L. Castle and M. R. Trauerman, for trustee.

BUFFINGTON, District Judge. That a license to occupy a stall in a city market is property which passes from a bankrupt licensee to his trustee is established by the authorities. In re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192 (a market stall); In re Becker (D. C.) 2 Nat. Bankr. News, 245, 98 Fed. 407 (a liquor license in Pennsylvania); In re Brodbine (D. C.) 93 Fed. 643 (a liquor license in Massachusetts); Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264; Sparhawk v. Yerkes, 142 U. S. 12, 12 Sup. Ct. 104, 35 L. Ed. 915; In re Warder (D. C.) 10 Fed. 275 (stock-exchange seat). As the bankruptcy

act provides that "the trustee of the estate of the bankrupt * * * shall be vested by operation of law with the title of the bankrupt * * * to all * * * powers which he might have exercised for his own benefit, * * * [and] property which prior to the filing of the petition he could by any means have transferred," and this court is authorized to "make such orders * * * as may be necessary for the enforcement of the provisions of this act," it is clear it has power to order the bankrupt to transfer such license to the trustee, and thus enable such trustee, or his vendee, to secure the re-issue of the license by the city. In *re Gallagher*, *supra*. The court therefore had jurisdiction of the subject-matter and of the person of the bankrupt to make and enforce such order. In this case it was denied the license was property passing to the bankrupt's trustee, but contended it was a mere personal privilege, which the bankrupt could not be compelled to transfer. It was not pretended the bankrupt had conveyed the license, but that it was a mere personal privilege which he was now exercising in connection with his wife's business at said stall. Therefore his wife, Amelia Emrich, was brought into the case by petition and rule. She raised no question of jurisdiction or objection as to the mode in which she was brought into the proceeding. She filed an answer, in which she averred the license in question was a mere personal privilege to Charles Emrich; that it was not a right which passed to the trustee; and that the laches of the trustee were such as to preclude him from asserting it against her. At no time before the referee, or, indeed, until the hearing of this certificate, was any question of jurisdiction raised. On the contrary, testimony was taken, a statement of facts agreed upon, and certain previously taken testimony stipulated into the case. On the issues raised by her, the referee has found against her. She now complains, not that the conclusion reached was wrong, but that the referee had not jurisdiction of the case presented above. We think the court had jurisdiction of the case presented by the original petition, and had power to determine whether this was property such as passed to a trustee, and whether the bankrupt should execute a transfer. When Amelia Emrich was brought in, she showed no title or transfer adverse to the bankrupt. There was no pretense that the license did not still stand in the bankrupt's name, but she asserted it was a personal right in the bankrupt which was not a subject of bankrupt administration, and that the laches of the trustee was such as to now prevent him from succeeding to the licensee's rights. She made no pretense of having purchased the license from the bankrupt. She merely claimed to be availing herself in her business of the said license. We think these questions were incidental to the main question of which the court had already taken jurisdiction; and in determining the nature of this license, and whether it should be transferred to the trustee, it had the right to call before it all parties concerned in that question, and dispose of all incidental questions. *Fetter*, Eq. p. 13; *Winton's Appeal*, 97 Pa. St. 395; *Allison's Appeal*, 77 Pa. St. 227; *McGowin v. Remington*, 12 Pa. St. 63; *Souder's Appeal*, 57 Pa. St. 498; *Socher's Appeal*, 104 Pa. St. 615. Whatever her answer to the rule on her might be, it is clear it could not divest the

court's jurisdiction of the original subject-matter. Whether she could thus be brought in by rule, and her claim determined by this means, if objected to, is a question not now before us, and upon which we express no opinion. Suffice it to say she has submitted herself to the jurisdiction of the court, has invited its action upon her rights, and, having taken the chance of a favorable decision by the referee, she cannot now for the first time complain of lack of jurisdiction when the decision is adverse. *Mays v. Fritton*, 20 Wall. 418, 22 L. Ed. 389; *Adams' Appeal*, 113 Pa. St. 454, 6 Atl. 100; *Edgett v. Douglass*, 144 Pa. St. 100, 22 Atl. 868; 12 Enc. Pl. & Prac. 191; *In re Ulrich*, 3 Ben. 355, Fed. Cas. No. 14,327. We are therefore of opinion that Charles Emrich, the bankrupt, was and is the licensee of the stall, that his rights as licensee are vested in the trustee, and that he should be ordered to execute and deliver to the trustee such transfer and assignment to James A. Cooper, trustee, of such license, and such request to be made to the authorities of the city for a reissue of the license to him or his vendee, as is customarily required by said authorities.

In re HOADLEY et al.

(District Court, S. D. New York. May 1, 1900.)

BANKRUPTCY—ASSETS—CONTINGENT REMAINDER—EXPECTANT ESTATES.

Where property is devised by will to trustees with directions to apply the income for the benefit of a named beneficiary during her life, and at her death to divide the estate in equal portions among such of the children of the testator as may then be living, and the issue of deceased children, but with no specific devise to any child by name, none of the testator's children has any right or interest in the estate, during the lifetime of the first beneficiary, such as to be devisable or alienable under the laws of the state of New York as interpreted by its courts; and consequently, if one of such heirs is adjudged bankrupt while the life estate is still outstanding, he has no estate or interest under the will such as will vest in his trustee in bankruptcy as assets of his estate.

In Bankruptcy. On review of decision of referee in bankruptcy.

Russell & Percy, for trustee.

George Walton Green, for the bankrupts.

BROWN, District Judge. The trustee in the above matter petitioned for an order that the bankrupts, Russell H. Hoadley, Jr., and Chester C. Munroe, should transfer to him their interests in certain estates devised under the wills of Russell H. Hoadley, Sr., and Chester Clark and Sarah S. Munroe, hereinafter referred to. For the bankrupts it is claimed that neither of them had any transferable interest in the estates or any estate that could be levied upon or sold under judicial process, and none, therefore, which passes to the trustee under section 70 of the bankruptcy act. The following is the opinion of the referee sustaining the bankrupts' contention:

"The provisions of the wills so far as they affect the question at issue are as follows:

"The will of Russell H. Hoadley after making a bequest to his wife of certain personal articles and household goods and of the sum of ten thousand dollars for her immediate necessities provides as follows:

"Fourth. 'All the rest, residue and remainder of my estate, both real and personal, whatsoever and wheresoever, I give, devise and bequeath unto my executors hereinafter named or to such of them as shall qualify and undertake the execution of this my will, and the survivors or survivor of them, in trust, nevertheless, and to and for the uses and purposes following, that is to say: To sell and dispose of all my real estate at public auction or by private contract at such time or times and in such manner and upon such terms as my said executors or the survivors or survivor of them shall deem proper, and to convert all my personal estate into money, to invest the net proceeds of my said real and personal estate and keep the same invested in any good securities in their discretion, and to collect and receive the interest, income and profits thereof and to pay and apply the net interest and income arising therefrom to the use of my wife Alice H. for and during her natural life. And upon the decease of my wife, I direct that my said residuary estate shall be divided by the said trustees into as many equal shares or portions as I shall have children then living and children who shall have died leaving issue surviving my wife, and I give, devise and bequeath one of said shares or portions unto each of my said children who shall survive my wife, and one of said portions or shares to the issue of any child who may have previously died leaving issue surviving my said wife, such issue of any one deceased child to take collectively the share his, her or their parent would have taken if living.'

"The will of Chester Clark, after making provision for his widow and for a life estate to his daughter Emily, proceeds as follows:

"Fifthly. At the decease of my daughter Emily, after making the provision for my wife as specified in the next preceding article, I order and direct all the residue of my estate (except the homestead as hereinbefore provided for) to be converted into money and distributed among my descendants as follows, that is to say: I direct the same to be divided into as many shares as I shall have children then living, and children who have died leaving issue, each then living child of mine taking equal shares thereof, and the issue of a deceased child taking by representation the share the parent would have taken if living.

"Sixthly. In case my wife survives my daughter Emily, then at the decease of my wife all the property invested for her, including the homestead or the proceeds thereof, shall be equally divided into as many shares as I shall have children then living, and children who shall have died leaving issue, that is to say: Each then living child of mine taking one equal share, and the issue of a deceased child taking by representation the share the parent would have taken if living.'

"The widow of Chester Clark died prior to 1898. Emily Vernon Clark still survives. Sarah S. Munroe, a daughter of Chester Clark and the mother of Chester C. Munroe, died prior to November 28, 1898, leaving four children.

"The will of Sarah S. Munroe, the mother of Chester C. Munroe, after making certain provisions for her husband and for her daughter Sarah, provides:

"(7) I direct my executors on the death of both my said husband and my daughter Sarah, to divide, transfer and convey all my estate, real and personal, as follows, viz.: All the estate, real and personal, in which I have by the second clause hereof, given my husband a life estate, including herein all the proceeds arising from the sale of any part thereof, to be divided equally among all my children then living and the issue of any deceased child or children, the issue of any deceased child to receive the share which such deceased child would take if alive, and all the rest and residue of my estate, real and personal, to be divided equally among my daughters then living and the issue of any deceased daughter or daughters, the issue of any deceased daughter to receive the share which such daughter would take if alive.'

"It will be noticed as before remarked that the provisions of all of these wills are sufficiently alike to be considered together under one general rule of law.

"It seems to me that there can be no question but that under the provisions of the Revised Statutes, the estates taken by the bankrupts under these wills are vested remainders. Clearly there is in each case a person in being who would take the estate on the determination of the life estate, but the question here involved does not, in my opinion, necessarily depend upon the bare ques-

tion of whether the estates of the bankrupts fulfill the statutory definition of vested remainders; they are vested in interest but not vested in possession, and are subject to be divested by the happening of the contingency mentioned in the several wills at any time before the property is divisible as therein provided.

"It will be noticed that in none of the wills is there a direct gift to either of the bankrupts by name or description alone, but the devise is to a class to which the bankrupts may or may not belong at the time of the absolute vesting of the gift, that depends upon their surviving the present life tenant. If Russell H. Hoadley dies before the decease of his mother, the life tenant, his estate is at once divested and becomes vested in his issue, if any, and the same rule applies to Chester C. Munroe.

"The clear distinction in my mind between the case at bar and that of an ordinary vested remainder where property is left to one for life, and remainder to another in fee, is that in the case at bar futurity attaches to the gift and there can be no estate until the time arrives for the gift to vest, whereas in the latter case the estate vests completely and only the enjoyment of it is postponed.

"This doctrine has been held by the appellate division and the court of appeals in a continuous line of decisions for a great number of years, and has never been questioned by those courts in any case where the identical question has been presented. *Geisse v. Bunce*, 23 App. Div. 289, 48 N. Y. Supp. 249; *Teed v. Morton*, 60 N. Y. 506; *Warner v. Durant*, 76 N. Y. 133; *Deianey v. McCormack*, 88 N. Y. 174; *Smith v. Edwards*, Id. 92; *Shipman v. Rollins*, 98 N. Y. 311; *Delafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184; *In re Baer*, 147 N. Y. 348, 41 N. E. 702; *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388; *In re Tienken*, 131 N. Y. 391, 30 N. E. 109; *Bisson v. Railroad Co.*, 143 N. Y. 125, 38 N. E. 104; *In re Smith*, 131 N. Y. 239, 30 N. E. 130.

"Some of these cases involved exactly the same point as the case at bar, while in others, the facts are somewhat different and the exact point here at issue was not the paramount question, but in every one of them the language of the court is so strong and pointed as to have all the weight of authority. I quote only from a few of them:

"The case of *Delafield v. Shipman*, supra, is particularly in point.

"The will of Richard Delafield, deceased, gave his residuary estate to trustees in trust to apply and manage the same for the benefit of his wife and six children, and upon the death of the widow to make an equal division of the trust estate between his children then living, the issue of a deceased child to receive the share the parent would have received if living.

"One of the children died during the lifetime of the widow, leaving a husband and one child, and leaving a will by which she gave all her property to her husband for life, and remainder to her child.

"Held that the testator's children took no vested interest in the corpus of the trust estate until the death of the widow.

"Earl, J., says at page 467, 103 N. Y., and page 185, 9 N. E.: 'We agree with the court below, and with the contention of the respondents, that the corpus of the residuary estate did not during the life of the widow vest in the testator's children, and for this conclusion the cases of *Warner v. Durant*, 76 N. Y. 133, *Smith v. Edwards*, 88 N. Y. 92, and *Shipman v. Rollins*, 98 N. Y. 311 are ample authority. The whole income is not given to the children during the life of the widow, and during her life the estate is vested in the trustees. There is no direct gift to the children, but simply a direction for a division among them after the death of the widow. In *Warner v. Durant*, *Folger, J.*, said: "Where there is no gift, but a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting will not take place until that time arrives." In *Smith v. Edwards*, *Finch, J.*, said that "it has been often held that if futurity is annexed to the substance of the gift, the vesting is suspended," and that "when the only gift is in the direction to pay at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift." These general rules must control the construction of this will, as there is nothing in its context or general language which renders them inapplicable. This construction, too, is in harmony with the presumed intention of the tes-

tator. He vested the whole estate in the trustee during the life of his widow, and during that time evidently intended that it should remain there, and not be subject to the disposal of his children, or liable to be seized by their creditors; and after the death of his widow he gave it, not to the children living at his death, but to the children and descendants of children, deceased, living at her death.'

"*Geisse v. Bunce*, supra: Mr. Justice Barrett, delivering the opinion, says at pages 291, 292, 23 App. Div., and page 250, 48 N. Y. Supp.: 'There is no direct gift to these latter individuals, and it is well settled that, where the only gift or devise of property is contained in the implication resulting from a direction to pay or divide at a future time, futurity is annexed to the substance of the gift, and no title or interest vests until the arrival of the specified period. This doctrine plainly applies here to each of the three individuals named in the direction to pay and divide. It applies with additional force to the one-quarter payable to the children of Chauncey D. Bunce, for there another rule reinforces the first, namely, that where the direction is to pay to and divide among a class, only those persons who are members of the class at the date fixed for distribution take, and their interests do not vest until that period. Ample authority for both rules will be found in the following cases: *Delaney v. McCormack*, 88 N. Y. 174; *Delafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184; *In re Baer*, 147 N. Y. 348, 41 N. E. 702. In order that the interest of the beneficiary may vest at once there must be, in addition to the direction to the trustee, either express words of gift, or circumstances from which may be fairly inferred an intention to appropriate at once the subject of the gift to the use of the beneficiary although the full enjoyment thereof is postponed to a later date. *Warner v. Durant*, 76 N. Y. 133; *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388; *In re Tienken*, 131 N. Y. 391, 30 N. E. 109.'

"The language of *Finch, J.*, in *Delaney v. McCormack*, supra, is particularly applicable:

"'But there is no gift to the next of kin, and no language importing such gift, except in the direction to convert the real estate into money and then make distribution; and in such case the rule is settled that time is annexed to the substance of the gift and the vesting is postponed. Much more is that true where the gift is only to vest upon the happening of a future contingency, until the occurrence of which it is uncertain whether a gift will be made at all. *Warner v. Durant*, 76 N. Y. 136; *Leake v. Robinson*, 2 Mer. 387; *Smith v. Edwards*, 88 N. Y. 92. Here a future condition or contingency attached to the substance of the gift. It was conditioned upon the death of James without having had lawful issue, so that the vesting was plainly postponed and the gift was future. There is the further and important fact that at the death of James the land was to be converted into personalty and be distributed as such, and the very subject of the gift was not to come into existence until the prescribed contingency. *Vincent v. Newhouse*, 83 N. Y. 511; *Hoghton v. Whitgreave*, 1 Jac. & W. 146. The case, therefore, falls within the rule that where the gift is money, and the direction for the conversion absolute, the legacy given to a class of persons vests in those who answer the description and are capable of taking at the time of distribution. *Teed v. Morton*, 60 N. Y. 506.'

"The same judge says in *Smith v. Edwards*, 88 N. Y., at pages 103 and 104: 'It has been often held, that if futurity is annexed to the substance of the gift, the vesting is suspended; but where the gift is absolute and the time of payment only is postponed, the gift is not suspended, but vests at once. Critically examined, this is little more than stating the same problem in another form of words, and amounts practically to saying that if the gift is future, it is not present; but nevertheless it has been useful in drawing sharply the distinction between a gift presently given, and its deferred payment. 1 Jarm. Wills, 759; *Warner v. Durant*, 76 N. Y. 136. Out of that distinction has grown a rule which bears directly upon the present case, that where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift. 1 Jarm. Wills, 762. The cases cited as holding this doctrine were instances in which the

gift was conditioned upon an event to be determined in the future. *Leake v. Robinson*, 2 Mer. 363; *Ford v. Rawlins*, 1 Sim. & S. 328; *Taylor v. Bacon*, 8 Sim. 100. In such cases, until the happening of the future event, it must necessarily remain uncertain whether a gift would exist at all, and that could not be said to have vested which was not certainly given.

"The other cases cited are quite as authoritative as those quoted from, but it is unnecessary to elaborate the decisions further, as I consider them fatal to the contention of the trustee in this proceeding.

"I am of opinion that the bankrupts took no property under the wills referred to which can be reached for the payment of their debts or which can be taken by the trustee in this proceeding.

"It follows that the motion must be denied.

"Dated, Manhattan, Mch. 23/00.

Ernest Hall, Referee."

After considerable examination and no little doubt, I am inclined to concur with the conclusion of the learned referee, upon the ground, that according to the construction given to the state statutes by the highest court of the state, which is binding upon the federal courts (*Leffingwell v. Warren*, 2 Black, 599, 603, 17 L. Ed. 261; *City of Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Forsyth v. City of Hammond*, 166 U. S. 506, 519, 17 Sup. Ct. 665, 41 L. Ed. 1095), and according to its construction of devises like the present, the bankrupts, during the life of the beneficiary for life, take no vested interest or estate under the wills in question. If they were vested with any present right or interest at all, it would constitute I think a future expectant estate, which by the state statute is expressly made alienable. On this ground in the cases of *Moore v. Littel*, 41 N. Y. 66, 84, 98; *Ham v. Van Orden*, 84 N. Y. 257; *Hennessy v. Patterson*, 85 N. Y. 91; and *Griffin v. Shepard*, 124 N. Y. 70, 26 N. E. 339, such expectant estates based upon a present interest were held to be alienable, even though treated as contingent remainders.

The present case, however, differs from those (except *Moore v. Littel*, where the remainder was a present gift) in the fact that here the bankrupts are not personally named as devisees in either of the wills and that they can take only as members of a special and limited class of children living at the death of the life tenants; and as the latter are still living, it is at present wholly uncertain whether the bankrupts will ever be in the class of persons among whom the estates are to be divided on the death of the beneficiaries for life. The contingency being as to the persons who will take and not as to the event merely, a contingent remainder of that kind, it is said, not being vested in right or interest in the person, is inalienable. Chap. Susp. 49, 50. In the other cases last cited the persons to take ultimately were named in the will; there was no uncertainty as to the person, but only as to the event that might defeat their right. They were regarded therefore as having a present right or interest in a future expectant estate, which by the state statute is devisable and alienable.

Besides the above considerations, the cases quoted by the referee, confirmed also by the still later cases of *In re Brown*, 154 N. Y. 313, 48 N. E. 537, *Paquet v. Melcher*, 156 N. Y. 399, 51 N. E. 24, and *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709, show that where, as under these wills, the testator directs a division of the estate

into shares upon the termination of the life tenancy, and a gift to his children then living, or in the case of the death of either then to the lawful issue of any deceased child, the intent of the testator, if nothing else indicates the contrary, will be construed to be to convey to the future beneficiaries no estate or interest of any kind until the termination of the life estate; or as stated by Earl, J., in *Delafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184:

"He [the testator] vested the whole estate in the trustee during the life of his widow, and during that time evidently intended that it should remain there, and not be subject to the disposal of his children, or to be seized by their creditors; and after the death of his widow he gave it not to the children living at his death, but to the children and descendants of children deceased, living at her death." Page 468, 103 N. Y., and page 185, 9 N. E.

And again in *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811, Andrews, C. J., explaining the case of *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805, observes:

"That case arose under a trust deed, whereby the grantor retained the beneficial use of the property for life, and which contained directions for the disposition of the fee after her death, to persons who were not ascertainable until the happening of that event. The intention of the grantor, deduced by the court from the transaction, was to postpone the accruing of any future interests until that event happened."

In such cases, therefore, it is held that there is no alienable or descendible interest while the precedent life estate is outstanding.

The explanation of some apparent discrepancies in the many decisions on this subject, is I think to be found in the endeavor to adopt that construction of the will which will most nearly carry out the apparent intent of the testator and make that intent controlling, so far as is possible consistently with the established rules of law. This is well illustrated in the two cases of *Clark v. Cammann* and *In re Brown*, above cited, in one of which an interest was held vested and descendible during the life estate, and in the other not.

The language of both the wills here in question is precisely like that which according to the later cases in the state court of appeals vests no right or interest in the children until the termination of the life estate; and this, as I understand, is what is intended by the somewhat modern phrase so frequently applied in the later reports to cases like the present, that "futurity is annexed to the substance of the gift."

Upon the view, therefore, that the testators here intended no present gift of any estate or interest, in expectancy or otherwise, to pass to either of the bankrupts, and none until the death of the beneficiaries for life and then only to persons then living, that until then the trustees under the will held the entire estate, and that until then the bankrupts have no interest capable of being devised or aliened, the report is confirmed, and the application of the trustee in bankruptcy is denied. 1 *Thomas, Estates*, 250, 341; 2 *Thomas, Estates*, 1717-1719.

In re McDONNELL.

(District Court, N. D. Iowa, E. D. April 30, 1900.)

1. BANKRUPTCY—ASSETS—PATENTS AND PATENT RIGHTS.

A trustee in bankruptcy takes no title to a patent for an invention granted to the bankrupt after the date of the adjudication in bankruptcy, although the application for such patent was made before the bankruptcy, and was pending at the time of such adjudication.

2. SAME.

Bankr. Act 1898, § 70a, providing that a trustee shall be vested by operation of law with the bankrupt's title, as of the date he was adjudged a bankrupt, to "interests in patents and patent rights," includes interests then owned by the bankrupt in patents already issued and in force, whether as patentee, assignee of the patent, or holder of rights acquired under a patent to a third person, such as licenses or manufacturing rights; but it does not include the interest of the bankrupt in a patentable invention, or in a pending application for a patent.

3. SAME—LIFE INSURANCE POLICY.

A trustee in bankruptcy takes no title to policies of life insurance where-in the bankrupt is named as a beneficiary, when the bankrupt is not himself the contracting party with the insurance company, and would not be entitled to receive the value of the policies if surrendered at the date of the adjudication.

In Bankruptcy. Submitted on question of the right of the trustee to certain letters patent issued to the bankrupt, and to two policies of insurance issued by the Northwestern Life Association.

J. P. Conway, for trustee.

H. T. Reed, for bankrupt.

SHIRAS, District Judge. It appears in this case that John McDonnell was adjudged a bankrupt on the 6th day of June, 1899, upon a voluntary petition filed on that date. It further appears that on the 9th day of April, 1898, the bankrupt, in conjunction with Goodwin W. McDonnell, filed an application for the issuance of letters patent to them for an improvement in the mode of constructing bicycles, and on the 20th day of June, 1899, letters patent No. 627,199 were duly issued to the petitioners by the patent office. The question at issue between the trustee and the bankrupt, and which is now submitted to the court, is whether the interest of the bankrupt in this patent passes to the trustee under the provisions of section 70 of the act, which declares that the trustee "shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * interests in patents, patent rights, copyrights and trade-marks."

It seems to be settled that the letters patent, and the rights conferred thereby on the patentee, cannot be seized and sold on execution at law. *Carver v. Peck*, 131 Mass. 291; *Bank v. Robinson*, 57 Cal. 520; *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155; *Stephens v. Cady*, 14 How. 528, 14 L. Ed. 528; 2 Rob. Pat. § 766. The right to a patent is created by the acts of congress, and whether the letters patent, when granted, can be assigned, and the mode and effect of an assignment, are questions to be determined by the legislation of congress upon these subjects. By section 4898, Rev. St., it is pro-

vided that every patent or interest therein shall be assignable in law, by an instrument in writing, which, as against subsequent purchasers or mortgagees without notice, must be recorded in the patent office within three months from the date thereof. It being provided in section 70 of the bankrupt act that the trustee shall, by operation of law, be vested with the title of the bankrupt, as of the date of the adjudication, in and to all patents in which the bankrupt has an interest, it follows that in cases of bankruptcy it is not necessary that the patentee should execute an assignment in writing, in order to convey the title to the trustee, as that passes by operation of law; but the question remains whether anything passes to the trustee, except such matters as are expressly named in section 70. That section does not declare that the bankrupt's interest in patentable inventions or in pending applications for patents shall be vested in the trustee, but only his interest in patents and patent rights; the latter words, to wit, "patent rights," being intended to include rights acquired under a patent to a third party, such as a license or manufacturing right; and the word "patents" to include cases wherein the title in the letters patent, in whole or in part, is vested in the bankrupt, either by the issuance of the letters in his name, or by a proper assignment in writing from the patentee. As I construe this section, if the trustee has acquired a title to the patent in question, it must be because such a construction can be given to the word "patents," as used in section 70, that it will include pending applications for letters patent; and I do not deem such a construction to be admissible. If it had been the intent of congress to confer upon the trustee a right and title to pending applications for patents, we should expect to find, not only apt words used to express that intent in the section defining the kinds of property which vest in the trustee, but also authority to the trustee to take the necessary steps needed to perfect the pending application; and in the absence of such authority, or of words referring to pending applications, the word "patents," as used in section 70, must be held to include only patents in existence and in force on the day of the adjudication in bankruptcy.

In the construction of statutes, it is a well-recognized rule that regard may be had to all statutory provisions touching a given subject, as aids in arriving at the legislative intent; and we may therefore turn to the provisions of the Revised Statutes dealing with the subject of patents, in order to seek light therefrom on the question under consideration. Turning to section 4896 of the Revised Statutes, we find it therein enacted that:

"When any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the heirs at law of the deceased, in case he shall have died intestate, or if he shall have left a will, disposing of the same, then in trust for his devisees in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime."

Can there be any question, under the provisions of this section, that if the bankrupt had died after the date of the adjudication, but before the issuance of the letters patent, his administrators would

have had the right to perfect the application for the patent, and that the patent would then have been issued in the name of the administrator? If, however, the contention of the trustee in this case be sustained, to the effect that the title to the pending application for a patent passed to him, by operation of law, as of the date of the adjudication in bankruptcy, then, upon the subsequent death of the bankrupt, if that had occurred before the issuance of the patent, the administrator would have had no right to proceed in the procurement of the patent, but that right would be vested in the trustee. It will be noticed that, in case of the death of the inventor, provision is made for the executors or administrators making the necessary affidavits or proofs needed to secure the issuance of a patent; but in section 70 of the bankrupt act there is no provision of this character, and therefore the fair conclusion is that section 70 has reference only to letters patent actually issued at the date of the adjudication in bankruptcy. I therefore hold that the trustee in this case is not entitled to hold letters patent No. 627,199, as part of the estate of the bankrupt, for the reason that the same had not been issued at the date of the adjudication in bankruptcy.

I also hold that the bankrupt has no interest in the policies issued by the Northwestern Life Association, of such a nature that the trustee can claim a right thereto under the last clause of section 70 of the bankrupt act. In these policies the bankrupt is named as a beneficiary, but he is not the contracting party with the company, nor would the surrender value therein be payable to him or his estate, and therefore the trustee has no interest therein.

In re McDUFF.

WATSON v. McDUFF.

(Circuit Court of Appeals, Fifth Circuit. April 24, 1900.)

No. 903.

1. BANKRUPTCY—APPLICATION FOR DISCHARGE—REFERENCE TO REFEREE.

An application for a discharge in bankruptcy, with such briefs and pleas as may be made in opposition thereto, must be heard and determined by the judge of the court of bankruptcy. The decision of the question whether or not a discharge shall be granted cannot be delegated to a referee. But the application for discharge may be referred to the referee to ascertain and report the facts.

2. SAME—APPEAL.

A bankrupt's application for discharge having been referred to a referee to report thereon, a creditor appeared before the referee, and objected to the power of the latter to determine and pass upon the application. The objection was overruled, and the referee reported a recommendation that the discharge should be granted. The creditor renewed his said objection in the court of bankruptcy, but the same was dismissed, but with leave to the creditor to ask for a recommitment of the case to the referee, in order to enable him to present objections to the discharge of the bankrupt. Thereafter, no further proceedings having been taken or objections filed by the creditor, the discharge was granted, and the creditor appealed. It did not appear that he had any legal ground for objecting to the discharge.

Held, that no prejudice had resulted to the appellant from the course of proceedings below, and his appeal was without merit.

Appeal from the District Court of the United States for the Eastern District of Louisiana, in Bankruptcy.

Robert J. Maloney, for appellant.

Wm. K. Horn, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. On August 15, 1899, George W. McDuff was duly adjudicated a bankrupt. January 15, 1900, D. L. Watson proved an unsecured debt of \$525. October 18, 1899, the bankrupt filed a petition in due form for a discharge, which on the same day was, in accordance with a rule of the court, referred to a referee to report. The referee reported as follows:

"In the Matter of George W. McDuff. (No. 84, in Bankruptcy.)

"The petition of the bankrupt for discharge herein was called at my office this 10th day of November, 1899, at the hour of 3 p. m., at which time due proof was made of publication, and the sending of notices to all creditors, all as required by law. But one opposition was filed to the discharge, to wit, that of Dr. D. S. Watson, which objected to the right and power of the referee to 'determine and pass upon the application for the discharge of the bankrupt.' I was of opinion that this opposition was not well founded, and as I was not required to grant the discharge, but only to make a recommendation thereon, to be acted upon by the honorable, the district judge, in accordance with rule 20 of the rules adopted by this court I therefore dismissed the opposition, to which ruling exception was taken, and a note was made in lieu of a formal bill of exceptions. I am of opinion that the bankrupt herein should be granted his discharge, and recommended accordingly.

"[Signed]

Hewes T. Gurley, Referee."

On the filing of this report the creditor, Watson, filed in the bankruptcy court an objection to the consideration of the application for a discharge, for the reason that the referee was without right and power to determine and pass upon the application. In due course, and on November 24, 1899, the application for the bankrupt's discharge came on for hearing before the judge, who, after argument, entered the following order:

"Upon due consideration thereof, it is now ordered that said opposition be, and the same is, dismissed. But leave is hereby granted to said opponent to apply to the court within three days from this date for an order recommitting this case to the referee, to enable opponent to urge such objections to the discharge of the said bankrupt as he may be advised to make."

December 1, 1899, no proceedings or oppositions having been filed in the meantime, the judge granted a discharge to the bankrupt. The creditor, Watson, sued out this appeal, and his contention is that the court *a quo* was without power to refer the application for a discharge to a referee to report the facts. It nowhere appears that the appellant, as a creditor, has any legal ground for opposing the discharge of the bankrupt; and, unless he has such ground, it is very difficult to see wherein a reference of the application for the bankrupt's discharge to a referee to report the facts was in any wise prejudicial. And, even if the creditor had legal grounds to oppose the discharge, as long as he was not denied the privilege of filing his

opposition in the bankruptcy court it is difficult to see wherein a reference of the application for a discharge to the referee resulted to his prejudice. We consider that under the bankruptcy act of 1898 the judge is required to hear and determine the application for a discharge, and such briefs and pleas as may be made in opposition thereto, and that the decision of the question as to whether or not a discharge shall be granted cannot be turned over to a referee. We find in section 30 of the bankruptcy law the following:

"All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the supreme court of the United States."

And we find in rule 12, par. 3, of the general orders of the supreme court (18 Sup. Ct. vi.), the following:

"Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."

As by this rule of the supreme court the application for a discharge may be referred to a referee to ascertain and report the facts, and as in the instant case no prejudice whatever has resulted to the alleged opposing creditor from or through such reference, the appeal herein is without merit. The order appealed from is affirmed.

In re CHRISTENSEN.

(District Court, N. D. Iowa, Cedar Rapids Division. April 27, 1900.)

BANKRUPTCY—PROOF AND ALLOWANCE OF CLAIMS—TRIAL BY JURY.

A creditor presenting a claim for proof and allowance against the estate of a bankrupt, which is contested by the trustee, is not entitled to demand a trial by jury. Proceedings in bankruptcy being of equitable cognizance, the seventh amendment to the constitution of the United States does not apply thereto, and no act of congress at present in force authorizes trial by jury in such cases.

In Bankruptcy. On review of decision of referee in bankruptcy.
Chase & Seaman, for trustee in bankruptcy.
George B. Phelps and C. H. George, for creditor.

SHIRAS, District Judge. In the above proceedings, pending before the referee for Clinton county, there was filed, on behalf of E. S. Randall, a claim against the estate of the bankrupt in the sum of \$386.50, against which the trustee entered a contest, denying some of the items of the claim, and pleading a counterclaim as to the remainder. Thereupon the creditor filed before the referee a written demand, asking that the issues thus presented should be tried before a jury, and in support of the demand relies upon the provisions of the seventh amendment to the constitution of the United States, which declares that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." It is well settled that this provision of the constitu-

tion does not apply to cases of admiralty or equitable jurisdiction. *Waring v. Clarke*, 5 How. 441, 12 L. Ed. 226; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368. It is equally well settled that proceedings in bankruptcy are of equitable cognizance, and therefore the provisions of the seventh amendment are not applicable thereto. Thus, in *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672, it is said:

"The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing him, persons having claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right. * * * But those who use this argument lose sight of the fundamental principle that the right of a trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. * * * So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus, a claim of debt or damages against the bankrupt is investigated by chancery methods."

These decisions were rendered under the bankruptcy acts prior to that now in force, but they settle the proposition that the provisions of the seventh amendment to the constitution are not applicable to proceedings in bankruptcy, because the same are in equity. By section 19 of the act now in force, it is provided that a person against whom an involuntary petition is filed shall be entitled to a trial by jury if he demands the same, but as to other matters in controversy the right to a jury trial is to be determined by the laws of the United States now in force or such as may be hereafter enacted. There is no statute now in force granting a jury trial in equity cases, and therefore it follows that the rule announced in *Barton v. Barbour*, *supra*, is applicable under the act now in force; and consequently it must be held that the creditor is not entitled, as a matter of right, to demand a jury trial on the issues presented by the contest over his claim.

In re FUNK.

(District Court, N. D. Iowa. April 26, 1900.)

1. BANKRUPTCY—INSANITY OF RESPONDENT.

A court of bankruptcy will not take jurisdiction of a petition in involuntary bankruptcy against a person who, prior to the filing of such petition, had been formally and duly adjudged insane by a state court of competent jurisdiction, and for whose person and estate a guardian had been appointed by such court.

2. SAME—ACTS OF BANKRUPTCY.

A transfer of property by a person who is so insane as to be wholly incapable of managing his business affairs cannot be held to be an act of bankruptcy on which a petition in involuntary bankruptcy may be maintained by his creditors against the objection of his guardian.

In Bankruptcy. On petition for adjudication in involuntary bankruptcy.

J. T. Sullivan, for creditors.

C. M. Nagle, for guardian of respondent.

SHIRAS, District Judge. From the papers submitted to the court it appears that on the 4th day of October, 1899, Jacob A. Funk, then residing in Livingston county, Ill., was duly adjudged to be insane by the county court of the named county, and F. L. Rieke was appointed the guardian of his person and estate, and qualified as such guardian; and on the 12th day of March, 1900, a duly-certified copy of the record of such proceedings was filed in the office of the clerk of the district court in Wright county, Iowa; and thereupon, by order of that court, the said Rieke was appointed guardian of the property of said Funk in the state of Iowa,—it appearing that he then had a stock of goods in Wright county in charge of an agent or clerk. It further appears that on the 13th day of April, 1900, a petition on behalf of certain creditors was filed in this court, averring that Jacob A. Funk was insolvent, and had committed certain acts of bankruptcy in the months of March and April, 1900, by transferring property to secure debts due to certain named creditors. To this petition an answer has been filed by the guardian of the alleged bankrupt, in which is set forth the adjudication of the court in Illinois, declaring Funk to be insane, and the appointment of the guardian in Illinois, and also in Iowa, and then, by proper averment, the answer presents the question whether Funk can be adjudged a bankrupt for acts done by him after the date of the adjudication of insanity, and the appointment of a guardian for his person and property. By section 8 of the bankrupt act, it is declared that "the death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane." In this section provision is made for cases wherein the proceedings in bankruptcy are commenced during the lifetime of the party, or at a time preceding his becoming insane, and, in effect, the meaning of the section is that, in cases wherein the jurisdiction of the court in bankruptcy has rightfully attached, the proceedings shall not be abated by the subsequent death or insanity of the bankrupt. In cases wherein the party, although giving evidence of insanity, has not been adjudged insane, but remains in possession and control of his property, and his creditors seek his adjudication as a bankrupt, it might be held that the bankruptcy court could rightfully exercise jurisdiction, and could hold the party responsible for his acts done before the fact of his insanity had been ascertained and established; but, however this may be, it cannot be so held in cases like that now before the court, wherein it appears that, prior to the filing of the petition in bankruptcy on behalf of creditors, the party proceeded against had been adjudged to be insane by a competent court, and a guardian had been put in possession of his property. By section 3227 of the Code of Iowa, it is provided that, if the estate of an insane person "is insolvent, or will probably be insolvent, the same shall be settled by the guardian in like manner and like proceedings may be had, as are required by law for the

settlement of the insolvent estate of a deceased person." Under the provisions of this section, it becomes the duty of the guardian appointed by the district court of Wright county to settle up the estate placed in his hands under the direction of the court appointing him, and it will be the duty of that court to determine the question of the validity of the liens or conveyances executed since the date of the adjudication of the insanity of the alleged bankrupt, and to make due and proper distribution of the assets belonging to the estate now in its charge. It certainly cannot be held that the present bankrupt act confers upon the courts of bankruptcy the right to settle the estates of insolvent decedents unless jurisdiction in the court of bankruptcy had attached during the lifetime of the bankrupt, and the same rule must hold good in cases wherein, before the petition has been filed in the bankrupt court, the debtor has been adjudged to be insane, and his property has been taken charge of by a state court of competent jurisdiction.

It is further contended by the guardian in this case that the acts of bankruptcy charged in the petition were committed after Funk had been adjudged to be insane, and that he cannot be held responsible therefor in such sense that these acts can be held to be acts of bankruptcy; and in support of this contention the ruling of Judge Dillon in the case of *In re Marvin*, 1 Dill. 178, Fed. Cas. No. 9,178, is cited, wherein it was said that "the court is of opinion that a person who is so unsound in mind as to be wholly incapable of managing his affairs cannot in that condition commit an act for which he can be forced into bankruptcy by his creditors, against the objection of his guardian"; and it would seem clear that a person who, by reason of insanity, is wholly incapable of managing his business affairs, cannot be held to have intended to violate the provisions of the bankrupt act by entering into transactions which, by reason of his mental disability, would not be binding upon him under the rules of the common law. Under the admitted facts in this case, this court, as a court of bankruptcy, should not entertain jurisdiction of the petition filed by the creditors, and the same will therefore be dismissed, at the costs of petitioners.

In re CLISDELL.

(District Court, N. D. New York. April 24, 1900.)

BANKRUPTCY—OPPOSITION TO DISCHARGE—WANT OF JURISDICTION.

Where an adjudication in bankruptcy has been duly made, upon a petition sufficient on its face, and without any challenge to the jurisdiction of the court, creditors cannot oppose the bankrupt's application for discharge on the ground that he had not resided within the district for a sufficient length of time to give the court jurisdiction over him.

In Bankruptcy. On motion to confirm report of referee recommending the bankrupt's discharge and upon exceptions thereto.

John F. Parkhurst and R. R. Martin, for bankrupt.

Waldo W. Willard, for opposing creditor.

COXE, District Judge. The discharge is opposed upon the ground that the bankrupt was not domiciled within this district for six months, or the greater portion thereof, prior to filing his petition in bankruptcy. This question upon the facts is close and difficult. A similar issue was presented in *Re Williams* (D. C.) 99 Fed. 544, with the same result as that reached by the referee. It is unnecessary to decide this question here for the reason that, in the opinion of the court, it cannot be considered in this proceeding. Whether or not the court was right in adjudicating Clisdell a bankrupt, is not now in issue. He has been adjudicated a bankrupt. The petition was sufficient on its face, and nothing appeared in that proceeding challenging the jurisdiction of the court. The opposing creditor appeared and filed his proof of claim and examined the bankrupt before the referee. Here then is a bankrupt duly adjudicated. His petition for a discharge is a separate and distinct proceeding. The court is familiar with no rule of law by which, in such circumstances as are here shown, objections disputing jurisdiction in the original proceeding can be thus determined collaterally. It is too late. Certainly there is no provision of the bankruptcy law which authorizes such a course. The petition for a discharge rests upon the fundamental proposition that the petitioner has been adjudicated a bankrupt, and the objections which may be interposed and litigated are those pointed out in sections 14 and 29 of the act. It would involve the administration of the law in endless confusion if the issue of domicile can be raised in every matter growing out of, or ancillary to, the original bankruptcy proceedings. The question has been recently decided in *Re Mason* (D. C.) 99 Fed. 256. This court is in accord with the views there expressed.

The discharge is granted.

IN RE LEVY.

(District Court, E. D. Wisconsin. April 24, 1900.)

1. BANKRUPTCY—DEPOSIT OF FEES—POVERTY AFFIDAVIT.

The statutory affidavit of a voluntary bankrupt that he has not, and cannot obtain, the money with which to pay the filing fees, is *prima facie* evidence of his inability to make the deposit required; and if, upon examination as to his available means, proper inquiries being fairly answered, it appears that there was no money or property held by the petitioner at the institution of the proceedings, or obtainable through his individual earnings or efforts, the exemption from making such deposit must be allowed, and the case proceed.

2. SAME—NO ASSETS—APPOINTMENT OF TRUSTEE.

In a case of voluntary bankruptcy, if no substantial assets are disclosed by the schedules, or discovered aliunde, the appointment of a trustee is not indispensable; and no person elected to that office can be compelled to serve without compensation. If creditors insist upon the appointment of a trustee, they must advance the statutory fees, or otherwise arrange for his compensation.

In Bankruptcy.

SEAMAN, District Judge. In this case the bankrupt filed with his petition the statutory affidavit that he is without, and cannot

obtain, the money with which to pay the advance fees. His testimony in that regard taken on the examination before the referee is certified for consideration by the court, and instructions are requested upon the following questions: (1) Whether further proceedings should be had under the petition until deposit by the bankrupt of the advance fees; and (2) whether it is necessary that a trustee be appointed, as the assets scheduled are esteemed to be worthless; and, if so, has the referee power to compel one to accept and qualify as such without compensation.

1. On the examination of the bankrupt inquiry was made both as to his individual means, earnings, and circumstances and the means and circumstances of his wife and other relations; and in reference to the latter inquiry, if material, his answers are neither satisfactory nor ingenuous. No means are disclosed, however, within the present ownership or control of the bankrupt to justify an order requiring deposit of the advance fees of \$25. The provision of the statute in this regard has received various constructions, and the utmost liberality in favor of the bankrupt is indicated in the opinion of the circuit court of appeals for the Fifth circuit in *Sellers v. Bell*, 94 Fed. 801, 814, 36 C. C. A. 502. Without adopting the extreme view there expressed, I am clearly of opinion that the statute intends to exempt a petitioner who has no means from making the preliminary deposit of \$25, and must be fairly interpreted to that end; that the affidavit in connection with the schedules establishes prima facie right to such exemption, subject, however, to investigation; and, if the inquiry is fairly answered respecting available means, and none appear held by the petitioner when the proceedings were instituted, nor obtainable through his individual earnings or efforts, the exemption must be allowed.

2. In the absence of substantial assets, either appearing from the schedules or discoverable, the appointment of a trustee is not indispensable, and clearly no power exists to require acceptance and qualification by one who may be chosen, but refuses to accept without compensation. If creditors insist on an appointment under such circumstances, they must furnish the advance fee, or otherwise arrange with the proposed trustee.

In re RUSSELL et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 132.

1. **BANKRUPTCY—APPEAL AND REVIEW—APPEALABLE ORDERS.**

An order of the district court, in bankruptcy, enjoining the prosecution of an action of replevin brought in a state court against a trustee in bankruptcy by a third party, claiming goods in his possession, and referring the claim of such party to a referee in bankruptcy to ascertain and report the facts, is not a final decision, or appealable, under Bankr. Act 1898, § 25, but may be brought before the appellate court for review on a petition invoking the supervisory power of that court under section 24b.

2. **SAME—JURISDICTION—STATE AND FEDERAL COURTS.**

State courts have jurisdiction, concurrent with that of the courts of bankruptcy, of actions to determine the rights or titles of third persons,

not parties to the bankruptcy proceedings, claiming property adversely to the bankrupt, or in hostility to his trustee.

3. SAME—REPLEVIN AGAINST TRUSTEE—INJUNCTION.

A person claiming to be the owner of property in possession of the bankrupt, and which has passed into the hands of the trustee in bankruptcy, will not be allowed to prosecute replevin in a state court without the consent of the bankrupt court.

4. SAME—REMEDIES OF CLAIMANT—JURY TRIAL.

Such claimant has the right to trial by jury in the federal court, and cannot be required to submit his claims to adjudication in a summary proceeding, on petition, rule to show cause, and reference of the case to the referee in bankruptcy. He may maintain a plenary action against the trustee in the bankruptcy court, or trespass or trover in a state court.

Appeal from the District Court of the United States for the Northern District of New York, in Bankruptcy.

Wm. De Graff, for appellant.

Calvin J. Huson, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The order sought to be reviewed is not a final decision, and, as it does not fall within any of the classes mentioned in section 25 of the bankrupt act, should have been presented for review pursuant to section 24, cl. "b," by a petition invoking the supervisory power of the court. The petition and assignments of error upon which the appeal was allowed contain, in substance, everything which should appear by such a petition; and as no objection has been made to the method of review which has been adopted, and as it is not disputed that the record presents the case between the parties adequately, we will treat the appeal as though it were a petition of review, but not intending by doing so to make a precedent for the future.

April 15, 1889, the United States district court for the Northern district of New York adjudged Russell & Birkett bankrupts, and appointed Wise trustee in bankruptcy. The trustee duly qualified and entered upon the discharge of his duties, and took into his custody certain property in the possession of the bankrupts, claimed to belong to the Machinists' Supply Company. June 10, 1889, the Machinists' Supply Company brought an action of replevin against the trustee in the supreme court of the state of New York to recover possession of such property. Thereupon the trustee applied to the district court for the Northern district of New York, as a court of bankruptcy, for an order enjoining the Machinists' Supply Company from prosecuting its action of replevin, and for such other relief as the court might deem proper to grant. The application was based upon a petition by the trustee, and an order by the court to show cause, both of which were personally served upon the Machinists' Supply Company. Upon the return day the Machinists' Supply Company resisted the application, but an order was made by the court enjoining the prosecution of the action, and, as a preliminary to a final adjudication of the rights of the parties, referring "the claim of said Machinists' Supply Company" to a referee in bankruptcy to take proofs and report. It is now insisted by the Ma-

chinists' Supply Company that it was entitled to bring and prosecute its action in the state court, that the stay of its proceedings by the bankruptcy court was an erroneous exercise of power, and that the bankruptcy court was without jurisdiction to compel it to litigate its title to the property in question in that court in a summary proceeding upon a petition.

We have recently had occasion to consider the question whether courts of bankruptcy have jurisdiction to adjudicate the rights or titles of persons not parties to the bankruptcy proceeding, claiming adversely to the bankrupt or in hostility to the trustee, and have held that they have such jurisdiction when a plenary suit is brought by the trustee. *In re Baudouine* (C. C. A.) 101 Fed. 574. The jurisdiction is not exclusive, and the adverse claimant is at liberty to assert his rights by an action in the circuit court, or a state court, if he sees fit.

Under the bankrupt act of 1867, the state courts had cognizance of such actions,—not by express grant, but because the act did not divest them of jurisdiction. As was said in *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403:

"The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit or district courts of the United States, it is concurrent with, and does not divest them of, the state courts."

This doctrine was approved in *Claflin v. Houseman*, 95 U. S. 130, 23 L. Ed. 833, where many decisions of other tribunals to the same effect are cited. Upon the same considerations, the state courts have cognizance since the present act, not being divested of jurisdiction by any of its provisions.

We should entertain no doubt that the Machinists' Supply Company was entitled to bring an action of trespass or trover for the recovery of the value of the property against the trustee in the state court. But the action brought, being replevin, is one for the seizure of property in the custody of the bankruptcy court, because in the custody of its officer, which, upon the principle decided in *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749, is protected from any interference by state process, or by the process of any other court not exercising supervisory jurisdiction. When property is in the actual possession of a court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control (*Rouse v. Letcher*, 156 U. S. 47, 49, 15 Sup. Ct. 266, 39 L. Ed. 341); and, as between two courts exercising concurrent jurisdiction, the court which first acquires possession will maintain its possession intact. In *Taylor v. Carryl*, 20 How. 594, 15 L. Ed. 1032, it was said:

"The court of chancery does not allow the possession of its receiver, sequestrator, committee, or custodian to be disturbed by a party, whether claiming by title paramount, or under the right which they were appointed to protect, as their possession is the possession of the court."

The power of protecting itself from such a disturbance is co-extensive with the right of self-preservation, and, if not inherent in

every tribunal, is in all having the powers of courts of equity. A federal court will neither interfere with property in the lawful custody of a state court, nor tolerate interference by a state court with property in its custody. *Summers v. White*, 36 U. S. App. 395, 17 C. C. A. 631, 71 Fed. 106; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 334, 76 Fed. 296. Authority to courts of bankruptcy to protect the property in their custody from such interference would seem to be specifically conferred by that provision of section 2 of the act permitting them to make such orders and issue such processes as may be necessary for enforcing their jurisdiction. The prohibition of section 720 of the Revised Statutes against enjoining the proceedings of a state court does not apply when any law relating to bankruptcy authorizes an injunction; nor does it when the proceedings sought to be enjoined have been commenced after the jurisdiction of the federal court has attached. *Fish v. Railroad Co.*, 10 Blatchf. 518, Fed. Cas. No. 4,830; *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497.

We conclude that the order under review, so far as it stayed the prosecution of the replevin action, was properly made, and that, unless leave is obtained of the court of bankruptcy, the Machinists' Supply Company must bring its action in that court. By clause "c" of section 19 of the bankrupt act, it is entitled to a trial by jury. In *Re Baudouine*, we pointed out that, in the absence of provisions to the contrary in the act, it is to be presumed that congress intended the ordinary procedure of courts of law or equity, according to the nature of the controversy, should be observed. The order under review, so far as it undertook to deprive the Machinists' Supply Company of the right to be heard in a plenary suit by a reference of the controversy to a referee, was an erroneous exercise of power, and to that extent should be reversed, with costs.

It is accordingly so ordered.

In re VEITCH et al.

(District Court, D. Connecticut. April 11, 1900.)

No. 165.

BANKRUPTCY—LIENS—TAXES.

Where real estate of a bankrupt, mortgaged for more than its value, and also subject to the lien of taxes assessed thereon (the tax lien being made paramount to that of the mortgage by the laws of the state), is sold to the mortgagee, and his claim against the bankrupt's estate for the deficiency proved and allowed, the court will not order the taxes to be paid out of the funds of the estate, since such payment would operate to the benefit of the mortgagee, in prejudice of the rights of general creditors, and since the taxes are, in any event, secured.

In Bankruptcy. On review of decision of referee in bankruptcy.

A. Heaton Robertson, Corp. Counsel, for city of New Haven.

H. W. Asher, for trustee in bankruptcy.

TOWNSEND, District Judge. In this estate was real estate mortgaged for \$5,700, which was also subject to tax liens for taxes assessed upon said real estate, amounting to \$446.59. These tax liens, by the laws of the state of Connecticut, take precedence of the mortgage. There remains in the hands of the trustee approximately \$500 above the expenses of settling the estate. The mortgaged property was sold to the mortgagee at auction for \$1. It was worth less than the mortgage. The mortgagee sold it for \$3,000, and the referee allowed his claim at \$2,700; being the amount of his indebtedness above the mortgage. The referee ruled that the taxes upon personal property, amounting to \$211.30, should be paid by the trustee, and that the \$446.59 assessed upon and secured by said real estate should not be paid by the trustee. The referee held that the taxes secured by liens upon the real estate were secured claims; that the only result of payment would be to take the amount from the general creditors for the benefit of the mortgagee, without benefit to the tax collector; that such result would be inequitable; and that taxes so secured came within the rule of secured claims, under the statute. That the practical result of payment of these taxes on real estate by the trustee would be to take the amount from the general creditors and give it to the mortgagee must, of course, be conceded. If the tax collector is obliged to enforce his lien, there are legal fees compensating him for his trouble. The municipalities to which the tax is due have no real interest in the controversy. The only precedent under the law of 1867, so far as I am aware, is *Foster v. Inglee*, 13 N. B. R. 239, Fed. Cas. No. 4,973. In this case an execution had been levied upon real estate subject to taxes. It was held that, if the taxes had been deducted in estimating the value of the real estate, the rules of equity would forbid their payment by the trustee. It follows, then, that, upon precedent, taxes should not be paid by the trustee, where such payment would operate to the advantage of a third party against another; the taxes being, in any event, secured. Under the law of 1898, in *Re Tilden*, 1 Am. Bankr. Rep. 300, 91 Fed. 500, the taxes were assessed against an exempt homestead of the bankrupt. The referee refused to order the taxes paid by the trustee. The attention of the court was not called to any decision under former bankruptcy statutes throwing light on the question. Held, "the exemption laws are to be liberally construed to accomplish the purpose of the exemption," and ordered the taxes paid. The contest in that case was apparently between the bankrupt and the general creditors, the tax collector taking no part; and the decision does not indicate that the tax collector was considered as having any interest therein. John C. Hurley, referee for the Eastern district of Texas, made the same decision in a similar case. In *re Baker*, 1 Am. Bankr. Rep. 526. In that case the taxes were a lien upon the personal as well as upon the real property. No precedent under bankruptcy laws was cited by counsel, and no case similar to the present has been found by me. Under section 64b, taxes seem to come fifth in order among the debts which have priority. It has always been recognized that the general rules of equity are to govern the administration of bankruptcy laws. These

rules include the marshaling of assets, where necessary to do justice between the parties. It ought not to be construed to be the intent of the law that taxes should be paid where it is not questioned but that they are otherwise secured, and where such payment would work *supra*, and, so far as is shown, has not been held otherwise. Decision affirmed.

In re DAWSON.

(Circuit Court, D. New York. April 30, 1900.)

INTERNATIONAL EXTRADITION—DELAY IN REMOVAL OF PRISONER—DISCHARGE.

Under Rev. St. U. S. § 5273, providing that, if a person committed for extradition is not delivered up and conveyed out of the United States within two calendar months after commitment, it shall be lawful for any judge of the United States to order him discharged out of custody, unless sufficient cause be shown why such discharge should not be ordered, one who has been arrested as a fugitive from justice from a foreign country, and detained for more than two months in jail without trial, is entitled to be discharged, though at the time of the application an officer from the country asking extradition is on his way to remove the prisoner, where, with reasonable diligence, the officer might have been present before the application was made, and no sufficient cause is shown why he has been delayed.

Chas. Fox, for British consul general.
James Dawson, in pro. per.

LACOMBE, Circuit Judge. The facts in the case are as follows: On February 20, 1900, the British consul general at New York made a complaint charging that one James Dawson did heretofore, at Durban, South Africa, commit the crime of embezzlement of the sum of £700; that he was a fugitive from justice, and now within the territory of the United States. Upon such complaint a warrant was issued by the United States commissioner for the Southern district of New York, duly authorized to act as commissioner concerning extraditions. Dawson was arrested, and on February 21, 1900, was brought before the commissioner. The prisoner waived examination, and requested that he be sent back to South Africa, that he might there meet the charges against him. The commissioner thereupon committed Dawson for extradition, pursuant to the provisions of said treaty, and from the 21st day of February, 1900, until to-day he has been held by the marshal and kept in jail. The prisoner has appealed to the court, stating that he is totally without means to employ counsel, and praying to be discharged.

It is provided by section 5273, Rev. St. U. S., that whenever a person who is committed for extradition, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed by the readiest way out of the United States, it shall be lawful for any judge of the United States, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable

notice of the intention to make such application has been given to the secretary of state, to order the person so committed to be discharged out of custody, unless sufficient cause be shown to such judge why such discharge ought not to be ordered. A reasonable notice of the intention to make this application in behalf of Dawson has been given to the secretary of state, who has transmitted a copy of some correspondence with the British ambassador. The consul general in New York and his counsel have also been notified, and were heard upon the application; submitting copies of official correspondence. As has been already stated, Dawson was committed for extradition on February 21, 1900, and the commissioner states that upon the same day he notified the counsel for the British consul general who had applied for such commitment. The British consul general thereupon acted with the greatest promptness, and on February 22d, although it was a legal holiday in this state, he telegraphed to the British foreign office, in London, stating that Dawson had been arrested, had waived examination, and was prepared to return, and asking if an officer would be sent. Two days later, on February 24th, the foreign office telegraphed to South Africa, advising the governor of the contents of the dispatch received from the British consul general at New York, and asking what answer should be returned. Certainly the British authorities have acted in the matter with the very utmost promptness. In opposition to the application for discharge, it is now stated that an officer is on the way from South Africa to remove the prisoner, and that he may be expected to reach here about the 12th of May. Had the South African authorities acted with any measure of diligence upon receipt of the dispatch from the foreign office, and even had they taken a week or ten days to select the officer and start him on his way, he could have reached here before the 10th of April. No sufficient cause is shown why the coming of the officer has been so long delayed. There seems to be some suggestion that the authorities in South Africa were expecting that further proceedings in extradition were to be taken, but such a conclusion was certainly not warranted by the telegram of the British consul general, which clearly advised them that all that was wanted from them was their officer. It is to be taken into consideration that the petitioner here interposed no captious objection to the proceeding, nor did he require the demanding government to assume the burden, so often laid upon it, of making at least *prima facie* proof of the averments of the charge. On the contrary, with commendable frankness, he admitted his identity, and stated his entire willingness to go back to South Africa and stand his trial. Without such trial, or any conviction of the offense, he has now been imprisoned over two months. The case seems a proper one for the exercise of the power conferred by section 5273, and Dawson is hereby discharged out of custody. It certainly seems that he has been imprisoned long enough, awaiting the leisurely movements of the authorities in South Africa.

CONTINENTAL INS. CO. v. CONTINENTAL FIRE ASS'N.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1900.)

No. 880.

1. TRADE-NAMES—NAME OF CORPORATION—SUIT BY FOREIGN CORPORATION.

A foreign corporation, doing business in a state only by license, has no standing in a court of equity to question the right of a corporation of the state to do business therein under the name by which it was chartered, on the ground that such name is similar to its own, and that it has an exclusive right to its use.

2. SAME—GEOGRAPHICAL TERMS—"CONTINENTAL."

The Continental Insurance Company, a corporation of New York, has no exclusive right to the use of the word "Continental" in the name of an insurance company, and is not entitled to an injunction restraining another company from the use of such name, where there is no attempt to deceive the public as to the identity of the two companies, and no such deception in fact is shown.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

John L. Henry, for appellant.

Geo. W. Armstrong, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. This is an appeal from an interlocutory order refusing an injunction pendente lite to restrain the defendant from using the word "Continental" in its corporate name in transacting insurance business in the state of Texas. 96 Fed. 846. The complainant, the Continental Insurance Company, is a corporation created under the laws of the state of New York, with its principal office and place of business in the city of New York, and is a stock company issuing fire policies for a fixed premium only, and advertises and describes itself in its literature and in its policies as the "Continental Insurance Company of the City of New York." The defendant, the Continental Fire Association, is a corporation created under the laws of Texas, with its principal office and place of business in the city of Ft. Worth, state of Texas, and is a mutual association, without capital stock, but with a guaranty fund, issuing fire insurance policies on the mutual plan only, and advertises and describes itself in its literature and in its policies as the "Continental Fire Association of Ft. Worth, Texas." As under and in accordance with the laws of the state of Texas the defendant was incorporated under the specific name of the "Continental Fire Association" it has a prima facie right, certainly, under that name to carry on in the state of Texas the business for which it was incorporated; and it would seem that a foreign corporation, with no such franchise, and doing business in the state of Texas only by license, is without standing to question the right of the defendant to use in its business the name granted and authorized by the state of Texas. See *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436, 21 N. E. 875; *Saunders v. Assurance Co.* [1894] 1 Ch. 537. In the

adjudged cases coming under our observation wherein it has been held or assumed that a court of equity can enjoin a corporation in the use of its corporate name, the controversy has generally been between corporations created by the same sovereign. See *Holmes v. Manufacturing Co.*, 37 Conn. 278; *Newby v. Railroad Co.*, 1 Deady, 609, Fed. Cas. No. 10,144; *Van Auken Co. v. Van Auken Steam Specialty Co.*, 57 Ill. App. 240; *Hygeia Water Ice Co. v. New York Hygeia Ice Co.*, 140 N. Y. 94, 35 N. E. 417; *Tobacco Co. v. Randle*, 114 Ill. 412, 2 N. E. 536; *Plant Seed Co. v. Michel Plant & Seed Co.*, 37 Mo. App. 313; *German Hanoverian & Oldenberg Coach Horse Ass'n of America v. Oldenberg Coach Horse Ass'n of America*, 46 Ill. App. 281; *Merchant Banking Co. of London v. Merchants' Joint-Stock Bank*, 9 Ch. Div. 560. In *Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535, the alleged infringing corporation was a foreign corporation where the suit was brought. We have found no case in which a foreign corporation has been heard to complain of the corporate name given by the sovereign to a domestic corporation. In view of the fact that laches on the part of complainant in not acting more promptly in enjoining the incorporation of defendant company is herein suggested, the case of *Coal Co. v. Hamblen* (D. C.) 23 Fed. 225, is interesting. In that suit, Judge Gresham said:

"The complainant is a foreign corporation, and it is only by comity that it is doing business in Illinois at all. The state can say to it any day, 'Go!' and it must go. That being so, I do not see that the complainant has a legal right to say a corporation shall not be created in Illinois bearing its [the complainant's] name. If the state of Illinois may create a corporation bearing the same name as the complainant,—and it certainly can,—this court has no right by injunction to prevent anything from being done under the state law which is necessary in the creation of such a corporation."

However all this may be, if it is assumed that the corporate name of a business corporation is practically its trade-mark, and that equity will deal with it in a proper case on principles analogous to those governing the use of trade-marks, still the present record shows no case for equitable interference. Both companies do business in the state of Texas, mainly, if not entirely, through local agents, who are well informed as to the business, character, strength, and location of the insurance companies doing business in that territory, and they are little likely to be deceived in the names used by the different companies. While both companies do a fire insurance business in the same territory, they do business on different plans, and so decidedly different as to the cost and expense and risk of the assured that the slight similarity in name can have no appreciable effect in deceiving the public. The word "Continental" as a part of the defendant's corporate name has not deceived anybody, and was not adopted for the purpose of deceiving anybody. The complainant presents some stereotyped affidavits of agents and employes to the effect that they "believe the name adopted by the defendant will have a direct tendency to mislead the customers, and those who may desire to become the customers, of plaintiff, and to injure its business, and cause it pecuniary loss, and greatly impair its prestige, popularity, and the good will which it has estab-

lished for itself"; but we think these affidavits are of little worth, and, under all the facts presented in the record, we cannot hold that the use of the word "Continental" as a part of the defendant's corporate name will have any injurious effect upon the business of the complainant. We do not find that there has been, or is likely to be, any imposition upon the public, or any confusion in business transactions and correspondence, because the same word is a part of the name of each corporation, and both do business in the same territory. We think it clear that the transaction of fire insurance business by the defendant under its corporate name of the "Continental Fire Association of Ft. Worth, Texas," will only injure the business of the "Continental Insurance Company of the City of New York" in that competition shall be increased, and to the extent that the advertisement, circulars, and representations of the defendant company shall satisfy the public of the advantages of fire insurance on the mutual plan over fire insurance for fixed premiums; and all this, if damage at all, is *damnum absque injuria*. Further than this, we think that the word "Continental," a geographical adjective, meaning pertaining to or relating to a continent, is a word in common use, more or less descriptive of extent, region, and character, and, like the words "Columbian," "International," "East Indian," and some other geographical adjectives, it cannot be exclusively appropriated as a trade-mark or trade-name. See *Mill Co. v. Alcorn*, 150 U. S. 460, 466, 14 Sup. Ct. 151, 37 L. Ed. 1144. The learned judge in the court *a qua* filed an elaborate opinion, assigning reasons for refusing the injunction prayed for mainly on the lines we have followed. His order of refusal was correct and proper, and it is affirmed.

RAHTJEN'S AMERICAN COMPOSITION CO. v. HOLZAPPEL'S COMPOSITION CO.

(Circuit Court of Appeals, Second Circuit. April 11, 1900.)

No. 119.

1. TRADE-NAMES—UNFAIR COMPETITION—"RAHTJEN'S COMPOSITION."

A composition paint for use on the hulls of vessels was originally made and sold in Germany, prior to 1865, by Rahtjen & Sons, and acquired a high reputation, under the name of "Rahtjen's Composition." In 1869 it was introduced into this country, and has since that time been sold here continuously by the authorized agents of the original manufacturers or their English licensees, under the trade-name of "Rahtjen's Composition." In 1873 the paint was patented in England, but the patent lapsed in 1880 for nonpayment of dues. In 1883 defendant commenced the manufacture of the same paint in England, using the name of "Rahtjen's Composition," and since 1890 has sold its products in the United States. *Held*, that the expiration of the English patent did not affect the right of the original makers to protection in this country in the exclusive use of the name, which had, since its introduction here, constituted the trade-name of their product.

2. SAME—SUIT FOR INJUNCTION—LACHES.

A delay of eight years before commencing suit to enjoin infringement of rights in a trade-name will not bar relief, where the defendant's competition during that time was inconsiderable.

Wallace, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Timothy D. Merwin and Thomas B. Kerr, for appellant.

R. B. McMaster and William B. McAdoo, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. John Rahtjen invented, in Germany, between the years 1860 and 1865, paints specially prepared to protect the hulls of steel and iron ships from rust, and also from becoming covered by growths animal or vegetable in character. In connection with his sons, he began in 1865 to manufacture for general use, and the paints speedily acquired a high reputation in the maritime world, under the name of "Rahtjen's Composition." After his death in 1873, the business was continued in Germany by his sons, and is now carried on by John Rahtjen and Heinrich Rahtjen, under the firm name of John Rahtjen. In 1869, the Rahtjens made Henry Gelien, of Hoboken, their exclusive agent to sell their paint in the United States, with the provision that it shall be brought on the market under the name of "Rahtjen's Composition," and with the information that no patent would be applied for in this country. Gelien issued a show card for the purpose of advertising the paint under its trade-name, copyrighted the card, advertised the paint in other ways, and sold it under this trade-name to the extent of about \$17,500, until the end of 1877, when he was succeeded by Hartmann, Le Doux & Maecker. In January, 1878, Suter, Hartmann & Co., of London, were appointed sole agents for the sale of the paint in this country, for whom the Hartmann firm acted as subagents for a time. The Suter Company was succeeded in 1888 by the Suter, Hartmann & Rahtjen Composition Company, Limited, which was succeeded in 1891 by the complainant corporation, which was organized under the laws of the state of New York. During the entire period from 1869 to the commencement of this suit, the goods were continuously advertised and sold under the name "Rahtjen's Composition," and the value and commercial importance of the article which Rahtjen originated, and which, as made by his firm and their successors and sold in this country, has been distinctly and widely known. The packages which came to this country from 1869 to July, 1879, were sent from Germany, and were marked "Rahtjen's Composition" or "Rahtjen's Patent Composition." From 1879 to 1883 upon each package which came to this country from the complainant's predecessors were stenciled the words "Rahtjen's Composition" in some form. Since 1883 the drums which contain the paint have been marked:

Genuine
Rahtjen's Composition
Trade (Symbol of open hand) Mark.
Hartmann's
Manufacture.

The origin of the words "Hartmann's Manufacture" will be stated hereafter. The complainant's gross business in this paint in 1897 was \$128,300, in 1898 was \$145,200, and in the last six months of 1898

was \$106,000. The firm of John Rahtjen has continued to manufacture in Germany without patent protection. In 1871, the English firm of Suter, Hartmann & Co. was formed to sell "Rahtjen's Composition" in England, and became the sole agents of the firm of John Rahtjen for that purpose. All the paint was manufactured in Germany by the Rahtjens until 1874, when they built a factory in Liverpool, having obtained on November 29, 1873, an English patent for the product. They continued the manufacture in Liverpool until February, 1880, when they assigned their leasehold interest in the factory and the patent, and the exclusive right to manufacture the paints for sale in Great Britain and the United States, to Hartmann Bros., who carried on the manufacture, under an agreement with the Rahtjens, from 1880 until the Suter, Hartmann & Rahtjen Composition Company, Limited, was formed in 1888. Suter, Hartmann & Co. remained the salesmen until 1888, when the corporation became both the manufacturers and the vendors. The English patent, which was apparently the only one ever taken out for the paint, was forfeited for nonpayment of dues on November 29, 1880. During the manufacture by Hartmann Bros. the Rahtjens were also manufacturing in Germany, and to distinguish the English product Hartmann Bros. marked their drums "Hartmann's Manufacture," and adopted in 1883 an open hand, usually colored red, with the word "Composition" above, and the words "Hartmann's Manufacture" below, the hand, as their trade-mark for all their paints, including Rahtjen's. Suter, Hartmann & Rahtjen Composition Company, Limited, obtained the same trade-mark in the United States in 1889. Hartmann, Le Doux & Maecker had obtained a United States trade-mark in 1885 for the words "Rahtjen's Composition." The complainant is the owner of the good will and trade-mark rights of its predecessors, and is their successor in ownership thereof. The assignment of the trade-mark of 1885 by Hartmann, Le Doux & Maecker to Hartmann Bros. was not apparently acknowledged, and has not been proved by the witness to the signature. In 1883, after the Rahtjen patent expired, three brothers, under the name of Holzappel & Co., commenced to manufacture "Rahtjen's Composition" in connection with their other paints, and in 1890 became a joint-stock company under the name of Holzappel's Composition Company, Limited, which was organized under the laws of Great Britain and is the defendant. A. C. Holzappel, who joined them in 1887, had been from 1875 to November, 1881, an agent of Suter, Hartmann & Co., or connected with them or with a member of that firm, in the sale of "Rahtjen's Composition." In 1890 the defendant or its predecessors began to send its "Rahtjen's Composition" and other paints to John A. Donald & Co. of New York for sale, and in 1894 the defendant took the business, and has since carried it on in this country in its own name. It manufactures and sells other paints, the leading brand being called the "International," which kind it makes special effort to sell. The business of the defendant in the United States from 1890 to 1895, including a few small invoices sent to different persons from 1883 to 1890, amounting to about 92 cwt., was a fraction over 2,142 cwt. It has always been sold as "Rahtjen's Composition, Holzappel's Manufacture," and no

effort has been made to conceal the fact that the defendant was the manufacturer. After the English patent expired, the successors of Rahtjen attempted to obtain an English trade-mark bearing the name of "Rahtjen," but were unable to do so, except upon a disclaimer of an exclusive use of the words "Rahtjen's patent composition for ships, bottoms, buoys, etc., or of any of such words, except as a part of the combination constituting our trade-mark."

Although minor issues of fact were presented in the proofs, the facts which have been recited are those of chief importance in the case, with the exception of those bearing upon the question of laches. The defendant's case rests mainly upon the position that, after the forfeiture in 1880 of the English patent of 1873, the name "Rahtjen's Composition" became generic in this country, and the article could be manufactured and sold in this country by any person who described himself as the manufacturer. Reliance is placed upon the case of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. It appears that the firm of John Rahtjen introduced their paint into this country in 1869, and preferred not to attempt to obtain the protection of a patent, but to gain both reputation and protection by the character of the article, and for that purpose required that it should be sold as their product, and under a trade designation. That system has been continued by each owner of the business in this country to the present time, and the name of the inventor has become fastened upon the products. If a trade-mark exists in this country in the name of "Rahtjen's Composition," the complainant is the owner of it by virtue of the right of succession, as stated in the well-known case of *Le Page Co. v. Russia Cement Co.*, 2 C. C. A. 555, 51 Fed. 941:

"It is equitable that a manufacturer or dealer, who has given reputation to any article, should have the privilege of realizing the fruits of his labors by transmitting his business and establishment, with the reputation which has attached to them, on his decease to his legatees or executors, or during his lifetime to purchasers; and it is also in accordance with the principles of law, and with justice to the community, that any trade-mark, including a surname, may be sold with the business or the establishment to which it is incident, because, while it may be that individual efforts give them their value at the outset, yet afterwards this is ordinarily made permanent as a part of the entire organization, or as appurtenant to the locality in which the business is established, and thenceforward depends less on the individual efforts of the originator than on the combined result of all which he created."

It further appears that after 1869 the only patent which was ever taken out in any country for the paint was the English patent of 1873, which lapsed by Hartmann & Bros.' nonpayment of dues in 1880. The asserted consequence is that, because the name then became *publici juris* in Great Britain, it became public property everywhere. There was in 1880 a valid trade-mark right in the United States, which the Rahtjens and their successors had acquired. The lapse of the English patent neither broke this trade-mark nor interfered with the title of its owners. They owned it, and, although the lapse of the English patent interfered very seriously with their title to exclusive rights in Great Britain, it was ineffectual upon title in another country. In England the Rahtjens undertook to acquire ex-

clusive rights by virtue of the patent laws. In the United States they had previously acquired exclusive rights by the common law. Their failure in England does not cause a cessation of their common-law rights in the United States. The lapse of the English patent could not cause a lapse of trade-mark rights throughout the world.

The Singer Mfg. Co. Case, *supra*, had exclusive reference to the continuance of a monopoly in this country upon which letters patent of this country had expired, and the court held that the right to use the name passed to the public in this country with the expiration of the exclusive right created by the patent to make and sell the article. The decision followed the previous general course of decisions in the courts of this country and elsewhere, but it did not relate to the facts of this case, as obviously appears in the opinion of Mr. Justice White, who spoke for the court. In the Scotch and English and French sewing-machine cases for an injunction against the use of the name of the maker, wherein the injunction had been granted, the machines had not been patented in those countries. In the French case of *Howe*, where the French courts enjoined the use of that name on a sewing machine, the court, as a basis of its decree, used the following language:

"And whereas, they [*Howe and his heirs*] did not take patents in France for the invention and their improvements, which have therefore fallen into the public domain, and have never, either expressly or tacitly, abandoned the right to affix his name [*that of Howe*] to the products of the invention." *Singer Mfg. Co.'s Case*, 163 U. S. 195, 196, 199, 16 Sup. Ct. 1014, 41 L. Ed. 129.

It is a matter of common knowledge that *Howe* took out patents upon his machine and its improvements in this country.

Attention is called by the defendant to two continental decisions, one of the Brussels court of appeals and the other of the criminal chamber of the land court at Hamburg, in cases respecting the exclusive right of the *Rahtjens* to the trade-mark. The Brussels decision was based upon the fact, as found, that in Belgium the name indicated an article, and not the maker. The attempt is made in this case to show that in the public mind in this country the name of "*Rahtjen's Composition*" is a descriptive name, which is understood to designate a thing, and not its origin; as, for example, the word "*hansom*," when applied to a cab, now means simply a particular style of vehicle. We are not able to find from the record, as a fact, that in the United States the name "*Rahtjen's Composition*" has become a generic name, and now means a composition made by any one after the original formula of *Rahtjen*. A few witnesses say that they supposed that the complainant and the defendant were competitors in the manufacture of an article called by the same name, but the testimony does not show that the fact exists in this country, which was found by the Brussels court of appeals, that:

"In the eyes of the public, this name of '*Rahtjen*' has become a sort of qualifying adjective, indicative of this special product."

The Hamburg case was a criminal one, founded upon a criminal statute, and the representatives of *Holzappel* were not found to have committed the offense which was defined by the existing statute, and

which was, in substance, having knowingly made untrue statements of fact.

The defendant next insists that the complainant's laches should prevent any decree in its favor. It is true that the defendant has sold its manufacture of "Rahtjen's Composition" to a certain extent since 1890, but the sales have been comparatively small, and did not interfere with the complainant's business to any marked extent, until the defendant obtained a contract with the naval department of the United States government, in answer to a call for offers of "Rahtjen's Composition," when suit was promptly commenced. The defendant's chief brand of paint is the "International Composition," and it has been their endeavor to sell that brand, if they could, "and, failing that, 'Rahtjen's Composition.'" The defense of laches is nominal, rather than real, for the defendant's interference with the property rights of the plaintiff was for many years inconsiderable, and under no decision merits a refusal of a decree of injunction. Under all the circumstances of the case, we are not inclined to direct a decree for an accounting.

The decree of the circuit court (97 Fed. 949) is reversed, with costs, and the case is remanded to that court, with instructions to enter a decree enjoining the defendant from selling or offering to sell paint under the name of "Rahtjen's Composition," and from using that name upon its packages or in its advertisements as belonging to paint of its manufacture, in accordance with the foregoing opinion, and for costs of that court.

WALLACE, Circuit Judge. I dissent from the opinion of the court. I am of the opinion that the alleged trade-mark of the complainant is public property—First, because the name was the generic description of a patented article, and passed to the public upon the expiration of the patent; and, secondly, because the name has long ceased to denote the source of the manufacture of the article. Rahtjen and his sons were the original manufacturers and sellers in Germany of an article which they called "Rahtjen's Composition," made after a formula originated by one of them, and having properties peculiarly useful for preserving the hulls of vessels. In November, 1873, Rahtjen obtained a patent in England for the article. "Rahtjen's Composition" gradually became known to the maritime world as the name of an article made according to the formula of the patent. The monopoly under the English patent expired in 1880. Thereafter the article was made and sold by manufacturers by the name of "Rahtjen's Composition" in England and on the continent, and the name ceased to designate any particular source of manufacture. The successors of the original manufacturers, who had acquired the sole right to manufacture and sell the article in England, when they applied there for the registration of a trade-mark for the article, disclaimed the exclusive right to that name. When they sought in 1886 to prevent manufacturers in Belgium from selling the article as "Rahtjen's Composition," the Belgian courts refused relief; deciding that any person who did not represent the article as purporting to be manufactured by the Rahtjens or their successors

in business had a right to sell it under the name by which it had become generally known. I am at a loss to understand why any different decision should be made in this country; but the court seems to be of opinion that the name is a good trade-mark here, because no patent was ever obtained for the article in this country, and because the successors in business of Rahtjen have always sold it here under the name originally applied to it. This means that a man can have a trade-mark in this country in a name which is common property everywhere else. If this is good law, then any person here buying in Belgium, or elsewhere in Europe, or in England, the article known as "Rahtjen's Composition," can be prevented from dealing in it here under the name by which he bought it. So long as Rahtjen and his associates and successors in business enjoyed a monopoly of the manufacture of the article, the name not only identified the characteristics of the article, but also denoted the source of manufacture; but when the monopoly ceased, and the article passed into the domain of public property, the name which had been its generic designation also passed. Their monopoly has ceased to exist in this country as well as abroad, and the property in the name can no more survive here than it can abroad.

Irrespective of the effect of the expiration of the patent, the designation has become *publici juris* through its long use by dealers in the article which it describes; and whether this is attributable to the acquiescence of the complainant and its predecessors, or to their laches, is immaterial, since their conduct, active or passive, has led to the result. One test by which to determine whether a word which was originally a trade-mark has become *publici juris* is whether the use of it by persons other than the original owner is still calculated to mislead the public, and induce them to buy goods not made by the original owner, upon the supposition that they are his goods. Whenever the name has come to be so generally understood by the public dealing in the article, as denoting the article itself, that nobody can be deceived by the use of it into the belief that it was made by any particular person, the right to it as a trade-mark is gone. *Ford v. Foster*, 7 Ch. App. 611. If that test is applied to this case, there can be no doubt the name is no longer a valid trade-mark.

There is no pretense that the defendants have represented their article to be the manufacture of the complainants, or of their predecessors in business. I think the case was properly decided in the court below, and that the decree should be affirmed.

MALONEY v. FOOTE et al.

(Circuit Court, N. D. Georgia. April 5, 1900.)

No. 1,096.

COPYRIGHT—SUIT FOR INFRINGEMENT.

Complainant and defendants, each contemplating the publication of a directory of the same city, entered into a contract by which they agreed to share in the work of canvassing, compilation and typesetting; complainant to first use the type after it was set, and then deliver it to defendants, who were authorized to use it in printing their directory in the same form, with certain restrictions. *Held*, that the fact that defendants, inadvertently or otherwise, failed to observe such restrictions in all cases, thereby violating the contract, afforded no ground for a suit in a federal court by complainant for infringement of copyright; he having copyrighted his directory before defendant's was issued, but after it was printed.

In Equity. Suit to enjoin infringement of copyright. On motion for temporary injunction.

Tompkins & Alston, for complainant.

Ulysses Lewis, Clyde L. Brooks, and C. W. Smith, for defendants.

PARDEE, Circuit Judge. The complainant, alleging that he has copyrighted a directory of the city of Atlanta for the year 1900, complains of the defendants for infringing his copyright. A difficulty is experienced at the outset because the complainant's case shows that, prior to his compliance with the law in regard to copyrights, the defendants had already printed and had ready for delivery the alleged infringing directory. The undisputed facts appear to be that complainant and defendants, both contemplating to publish a directory for the city of Atlanta for the year 1900, entered into a contract in which it was agreed to jointly take the canvass of residence and business portions of Atlanta, and jointly to do the compilation, typesetting, and proofreading of their respective "1900 Directories of Atlanta." The complainant was to have the first use of the type, when set, after which he was to immediately deliver it, with press proof, to the defendants for use in their directory, exactly as used in complainant's directory, except as to certain restrictions, i. e. the defendants were not to use directory of suburban towns, not to use the word "street," not to use a star indicating "married," nor to use names of white and colored separately. Both parties acted under the contract, and no complaint is made of the action under the contract up to the delivery of the type and press-proof sheets to the defendants, and it seems clear that up to this time, and even to the making up of the respective directories, there was nothing that either could copyright against the other. There is nothing in the evidence showing, or tending to show, that the defendants have in any respect copied anything from the directory copyrighted by the complainant. The case does show that in the use of the type and press-proof sheets furnished by the complainant the defendants have possibly, if not probably, through neglect and inadvertence, violated the contract, and the result is the insertion in the defendants' directory of some names which ought not to appear

therein. If it be conceded, as against the defendants, that the complainant has a valid copyright of his 1900 directory, still it is clear from the above that the defendants have not infringed it. It is only for infringement of the copyright that this court has jurisdiction, and, no case being shown in that respect, the injunction pendente lite prayed for is refused, and the restraining order is discharged.

SPROULL v. PRATT & WHITNEY CO.

(Circuit Court, S. D. New York. April 25, 1900.)

PATENTS—CONSTRUCTION OF LICENSE—ROYALTIES.

The presumption must be, in the absence of express language to the contrary, that royalties payable under a license are intended to expire with the patents; and a contract by which the licensee agreed to manufacture and to pay royalties under a number of patents relating to the same art, and expiring at different times, should not be so construed as to require him to pay the same royalty after all the patents but one have expired, when only a very small portion of the goods thereafter manufactured were covered by the remaining patent, and they were capable of being separately used, and were ordinarily sold for separate use, which fact must have been known to the contracting parties.

Suit in equity for an accounting and the recovery of royalties under a license to manufacture under certain patents.

J. Edward Ackley and Paul N. Turner, for complainant.
Saunders, Webb & Worcester, for defendant.

TOWNSEND, District Judge. The original opinion herein will be found in 97 Fed. 807. Of the four patents involved herein one expired in 1891, one in 1892, and one will expire in 1905. The fourth was dated November 21, 1882, and the question has arisen whether it expired on February 17, 1895, or November 21, 1899. The Canadian patent for the same invention expired February 17, 1895. I do not understand that complainant seriously claims that this patent did not expire on the earlier date, and I decide accordingly. *Bate Refrigerating Co. v. Hammond Co.*, 129 U. S. 151, 9 Sup. Ct. 225, 32 L. Ed. 645. Defendant paid royalties on all these patents up to March 31, 1894. The report of the master, as well as the evidence taken before him, has satisfied me that the articles made under these various patents could readily be separately used, and are ordinarily sold for separate use, and that this fact must have been known to the contracting parties, especially in view of the fact that there is a period of 14 years between the dates of the first and last patent, and that in a majority of the cases they were so used after having been bought, and it is admitted that the sales for the period covered by the account, as far as the character of the sales and of the articles sold separately or together are concerned, is a fair sample of the sales from the whole period from 1888. Since the expiration of the punch patent in 1895, less than 6 per cent. of the articles on which royalties are claimed are covered by the patents. During the five years or more covered by the accounting, only six of the machines sold, of the

value of \$286, have been of such character that they could be used conjointly with the couplers and punches, while more than \$1,500 worth of such machines has been sold on which a royalty is claimed, but which could not be conjointly used with the couplers and punches. This situation is very different from that supposed to exist when the former opinion was written. In regard to the vast majority of sales the principle of the decision in *Wales v. Manufacturing Co.* (C. C. A.) 101 Fed. 126, does not apply. The articles were not united and then sold, and there is no reason to suppose that the sale of the patented articles caused the sale of the others. Out of the more than \$19,000 worth of goods on which royalty is claimed not more than \$50 worth of goods covered by the patents appear to have been sold conjointly with the machines. The presumption must be, in the absence of express language to the contrary, that royalties are intended to expire with the patents. In these circumstances I think it ought not to be held that the parties intended that the same royalty should continue after the expiration of these patents, when only a very small portion of the goods manufactured remained covered by the patents. A decree may be entered for complainant.

STOKES BROS. MFG. CO. v. HELLER et al.

(Circuit Court of Appeals, Third Circuit. May 2, 1900.)

1. PATENTS—INFRINGEMENT—RASP-CUTTING MACHINES.

The Stokes patents, Nos. 376,400 and 397,254, for improvements in rasp-cutting machines, are neither for primary inventions, and the claims must be limited to the specific combinations described. As so construed, *held* not infringed.

2. SAME.

The Stokes patent, No. 397,254, for improvements in rasp-cutting machines, *held* not infringed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 96 Fed. 104.

W. C. Strawbridge, for appellant.

John Dane, Jr., for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This appeal involves two letters patent for improvements in rasp-cutting machines, namely, No. 376,400, granted January 10, 1888, to James and George W. Stokes, and No. 397,254, granted February 5, 1889, to Philip S. Stokes. The case turns upon the question of infringement.

The earlier of these patents has five claims, but infringement of the fifth claim only is charged. That claim reads thus:

"(5) In a rasp-cutting machine, the combination of a punching hammer-head, B, the adjusting screw, 33, the flat spring, and the punch, 34, substantially as set forth."

The constituents entering into this combination will be best understood by reference to the following extract from the specification, namely:

"The hammer, E, is recessed in its outer side (see Figs. 5 and 6), and the punch socket, 30, is hinged therein by pivot, 31. The spring, 32, presses the socket outwardly as far as the screw, 33, passing loosely through the back of the hammer-head, will permit. The punch, 34, being driven into the rasp blank, will be carried against the tooth by the inclination of the bevels on the back of the punch, and the more ready yielding of the metal in front of it, which will cause the teeth to be raised very nearly, if not quite, as much as the total displacement of the metal by the punch. The essential feature of this part of the device is the elastically held punch, the details of which may be somewhat changed without departure from the spirit of this invention."

Looking at the above quotation, in connection with the patent drawings, we see that the punching hammer-head, E, of claim 5, is the lower end of the hammer, and includes, as an essential part of the described apparatus, a tool-holding frame, "the punch socket, 30," which is hinged to the hammer-head by the pivot, 31. This socket, carrying the punch, 34, and swinging in its pivot, 31, is pressed outwardly by the flat spring, 32, the movement being limited by the screw, 33, the turning of which will vary the extent of the outward movement, as the screw is set in the socket, 30, and passes loosely through the back of the hammer-head on which the head of the screw bears. It is manifest that the claim here in question is a very specific one. The calls are for "the combination of a punching hammer-head, E, the adjusting screw, 33, the flat spring, and the punch, 34, substantially as set forth." It is not pretended that the defendants infringe any of the other claims of this patent. Do they employ the particular combination described in and covered by claim 5? The proofs require us to answer negatively. We do not find in the defendants' machine the hammer-head, E, of the patent or anything like it. The defendants' hammer moves separately from, and independently of, the tool-holder. Again, the defendants' machine has neither the adjusting screw, 33, nor the flat spring of the patent. Here the parts of the two machines differ substantially, both structurally and in function.

We cannot accede to the proposition advanced by the appellant's counsel that patent No. 376,400 is for a pioneer invention. Not only are earlier patents for rasp-cutting machines produced, but the proofs show that operative rasp-cutting machines were in actual use prior to the date of this invention. That fact is recognized by the specification of this patent; for therein the described invention is represented as an improvement upon prior machines, curing defects therein. The relation of these patentees to the art is that of improvers only. But, if the invention of this patent could be classified as a primary one, still the terms of claim 5 are so restricted that upon no sound principle of construction could it be held to cover the devices used by the defendants. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Railroad Co. v. Mellon*, 104 U. S. 112, 26 L. Ed. 639; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; *Wright v. Yuengling*, 155 U.

S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64; *Lewis v. Steel Co.*, 17 U. S. App. 296, 8 C. C. A. 41, 59 Fed. 129. We are obliged to hold that infringement by the defendants of claim 5 of patent No. 376,400 is not shown.

The claims of the second patent, No. 397,254, alleged to be infringed, are the following, namely:

"(1) The punch stock held in the anvil frame, and pivoted at or about its center, in combination with a spring or springs applied to its upper end above the pivot, the cutter or punch being held in the stock with its point below the pivot, substantially as shown and described.

"(2) The hammers, J and J', acted upon by springs and cams, one preceding the other, in combination with the anvil frame and the punch stock and punch, substantially as described.

"(3) The anvil frame and pivoted punch stock, H', in combination with the two hammers, J and J', and means for operating the hammers so that one will deliver its blow before the other, substantially as described."

"(6) The punch stock, H', attached to rod, H, and the anvil frame, K, and means for moving the rod, H², and punch stock laterally, in combination with the hammers, means for operating them, the table, F, feed table, F', and means for moving the same, substantially as described."

"(10) The inclined table, F, the punch stock, means for operating the same, the hammers, and means for operating them, in combination with the feed table, F', held in the inclined table, F, and means for intermittently moving the same longitudinally, substantially as described."

It is not deemed to be necessary to go into a prolonged description of the complex organization of the machinery of this patent. A few details, however, particularly pertinent to the above-recited claims, may be noted profitably. A solid frame, E, extends across the machine above the inclined bed plate. An anvil frame, K, is mounted by dovetailed ways, so as to be free for vertical reciprocation with respect to frame, E. Within a recess in the lower portion of the anvil frame is pivotally mounted a punch stock, H', which carries a punch, H. The upper end of the pivoted punch stock is normally in contact with a plate, a', overhanging the recess in which the punch stock is mounted, the upper end of which is yieldingly retained against the face of the anvil frame by a spring encircling a headed stud, which stud is engaged in plate, a'. Two hammers, one of them tubular and inclosing the other, are employed. These hammers are each actuated by a downwardly pressing spring, and are adapted alternately to deliver, one a light blow, and the other a heavy blow, upon the top of the anvil frame, K. The rasp blank is mounted upon a feed table, F', which rests upon an inclined table, F.

Now, the defendants' machine has no anvil frame whatsoever. It has no pivoted punch stock, and it does not have two hammers, but a single hammer only. Therefore it does not embody the constituents of any of the five claims of this patent (No. 397,254) alleged to be infringed. The proofs are entirely convincing that the parts found in the defendants' machine are very materially different in form, function, mode of operation, and combination from those of this patent.

We have already seen that the earlier of the two patents in suit was not a pioneer. Much less can this later patent be regarded as covering a primary invention. The proofs clearly show that it does not. Any construction, then, which would bring the defend-

ants' device within the scope of any of the claims here in question is excluded, as well by the prior art as by the specific terms of the several claims. This view is abundantly sustained by the decisions in the above-cited cases, to which many others might be added. *Duff v. Pump Co.*, 107 U. S. 636, 2 Sup. Ct. 487, 27 L. Ed. 517; *Bragg v. Fitch*, 121 U. S. 478, 7 Sup. Ct. 978, 30 L. Ed. 1008; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.

The conclusion of the circuit court that no infringement of either of these patents was shown was right, and accordingly the decree dismissing the bill of complaint is affirmed.

ACME FLEXIBLE CLASP CO. v. CARY MFG. CO.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 129.

PATENTS—INFRINGEMENT—STAPLE FASTENERS.

The Swett patent, No. 314,204, for a staple fastener for wooden vessels, discloses invention, and is not void for anticipation or prior use; also, *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decree of the circuit court, Southern district of New York, holding that letters patent 314,204, of March 17, 1885, to W. O. Swett, for a staple fastener for wooden vessels, were valid, and infringed by defendant, and awarding an injunction and accounting. 96 Fed. 344, 99 Fed. 500.

John P. Bartlett, for appellant.

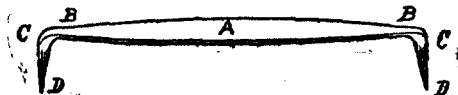
Douglas Dyrenforth, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The specification states that:

"The invention consists in a staple, whose pointed shanks are projections from a plate which is made so thin at its middle portion as practically to be nonelastic, whereby the shanks, which are driven into the wood, will not be drawn out by the spring of the metal, and at the same time the thickness of the connecting-plate shall not be such as to interfere when storing or handling fastened packages, or the shanks be removed by contact with other articles. A, B, C, D, represent the fastener ready for use. D, D, are the shanks, which are made pointed at their ends, and of heavy metal at C, C, where they are turned substantially at right angles to the plate, A, B, B. Those portions of this plate at B, B, are of thick metal to form sufficient heads for driving the shanks, D, D, into wood. The middle portion, however, from B to A, is formed gradually thinner, that it may be easily bent over the corner of a package."

FIG. 1.

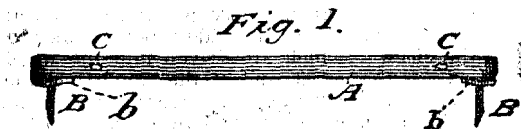


"In the manufacture of these fasteners I prefer, as the best means now known, to make the devices of a continuous wire of the proper size and strength, and cut it in the required length diagonally, as the wire is passing on ordinary dies for that purpose, when the metal is hot, and by a swage, before the metal is cold, flatten the central part, A, at the same time bending the shanks, D, D. * * * By this method of construction my invention is attained; that is, a fastener whose connecting plate or bar contains less metal in cross section than the shanks at C, C, or metal made so thin that where bent it has practically no spring to draw out the shanks, D. In practice, the thick parts, B, terminate so soon in the thin plate, A, that they will be so imbedded in the wood, where the shanks are properly driven, that for ordinary packages the fastener will not project from the wood only about the thickness of ordinary sheet tin. * * * I claim that a staple fastener with any form of reduced metal at the middle portion of the bar, A, would be my invention, providing the spring of the metal was reduced so as not to draw on the shanks, D, D, where applied to a package."

The single claim of the patent reads:

"A fastener for securing wooden-package covers, formed of a single piece of metal, with tapered shanks, D, and a thin metal plate, A, which is thick enough at its junction with bases, C, of shanks, D, to form heads, B, for driving the shanks, D, in the wood, as specified."

Various patents are cited in defense: Barney, 155,916, of October 13, 1874; Cary, 180,198, of April 11, 1876; Winne, 205,226, of June 25, 1878; Moore, 244,282, of July 12, 1881; Willard, 303,775, of 1884. All of these, except Cary, are for fastening wooden covers to wooden tubs, barrels, or boxes. Evidently a practical and efficient fastener had been sought for, for 10 years before the issue of the patent in suit. Subsequent to such issue the assignees of the patent began to manufacture and offer to the public. Their output of the new fasteners has increased until it is now nearly 60,000,000 a year, and for 13 years since the issue of the patent there appears to have been but one infringer, who desisted promptly when threatened with suit. None of the prior patents above cited anticipate. In Barney, Cary, Winne, and Willard, the fasteners are made of wire, which is not thinned at the place where it is intended to be bent so as to reduce the spring of the metal. The prior patent which comes nearest to the one in suit is Moore, 244,282, of July 12, 1881, for a tub-fastener. This device is shown in the following figure:



A is a strip of tin or other suitable sheet metal, into opposite ends of which are inserted headed nails or tacks, B, B. To prevent the tacks from falling out, the ends of the strip through which the tacks are inserted are doubled in, under the strip as shown in the drawing. The entire strip is so thin as to be substantially without spring when bent, but, composed as it is of three parts, it lacks rigidity, and the folded end portion, containing two lapped-over thicknesses of the metal besides the head of the tack or nail, will project above the surface of the wood, because its broad, flat base cannot well be driven in, whereas the shanks of complainant's patent can be driven in until

the bend itself is sunk so far into the wood that it will not project more above the surface to which it is applied than will the central, thinned portion of the staple. In view of the Moore patent and of the state of the art, the patent in suit is an extremely narrow one; but in view of the favor with which it has been received by the trade, and the long acquiescence shown, we are not prepared to hold that there was no invention in so reorganizing the fastener of the prior art as to produce for the first time a device which the expert describes as a "fastener having two tapered or pointed shanks at the ends of an integral thin connecting strip, the connecting strip being in such form and so proportioned as to bend readily in use, and without such elasticity as to tend to draw the shanks from the wood; the metal of the fastener, at the points of junction of the connecting strip with the shank, being sufficiently heavy to receive the force by which the shanks are driven into the wood of a package in use."

The conclusion above expressed as to invention renders it unnecessary to consider the effect of the rejection by the patent office of the other two original claims (the one allowed was not amended), which did not contain the feature of an integral structure.

An attempt has been made to show prior public use in this country; the alleged anticipating devices being used to hold together the strips of wood constituting a tea chest. A card, marked "Exhibit J" containing four samples, has been introduced. Three of these, although crudely made, present every feature of the patented fastener, as enumerated in the above quotation from the testimony of the expert. If there were satisfactory evidence in the case to show that they had been in public use here at a sufficiently early date, they would defeat the patent. The first witness (Hamilton) called by defendant has been connected with the tea business in New York since 1885; prior thereto, in Glasgow, London, and Yokohama. He produced two samples similar to Exhibit J, which he had taken from tea chests in his possession, when he testified (1898). How long the tea chests had been here, does not appear. He testified that, ever since he had known of China teas, they came in chests fastened together by such clamps or staples. His testimony as to public use outside of this country, and as to any public use here subsequent to his going into business in New York, is, of course, immaterial. He further testified that he made occasional visits here in 1874 or 1875, and subsequent thereto, and his entire testimony upon the point in question is comprised in an answer to a single leading question, as follows:

"Q. 18. Were or were not fasteners such as Exhibit F [the samples he produced] in use on tea chests in this country which had come from China at the time of your first visit here? A. Yes."

The only other witness on this branch of the case was Mead. He had been connected with the tea business in this city for 25 years, and produced the samples, Exhibit J, which on September 23, 1898, he removed from a tea chest that had been in his possession for over 17 years. So far as appears, his attention had never been called to the fastenings of that particular chest till he removed them. He testified that, although he had been more or less familiar with pack-

ages of tea, he had not, during the period since he went into the tea business, been well acquainted with the method of securing the parts of tea packages together. During his connection with the business he had known of this fastener (same style as Exhibit J), and added, "During the period of my connection with the tea business, I have seen tea coopers use fasteners of somewhat similar make in cooping teas in this country;" but he failed to state at what stage of his connection with the business he first noticed this use of the Chinese staples, or even whether it was anterior to the application for the patent. The brief and fragmentary testimony of these two witnesses is unpersuasive, especially in view of the circumstance that no one whose business made him familiar with the chest, rather than with its contents, was called. The evidence of Mead indicated where the best witnesses on this subject were to be sought for, and their non-production would seem to require greater caution in accepting the statements of others. The infringing device of defendant is almost a Chinese copy of the fastener of the patent. It has two tapered, pointed shanks, at the ends of an integral connecting strip, which has been thinned, but not to such an extent as complainant's, and then split longitudinally. The thinning and splitting make it possible to bend the connecting strip readily, without leaving in it such elasticity as would tend to draw the shanks from the wood. The metal of the fastener at the points of junction of the connecting strip with the shank are sufficiently heavy to receive the force by which the shanks are driven into the wood; and the structure of the staple admits of its being driven into the wood so far that the ends will not project further than the flat and split portion. Infringement seems plain.

Application was made, after decision, for a rehearing, upon what was alleged to be newly-discovered evidence. The application was denied by the circuit court, on the authority of *Baker v. Whiting*, 1 Story, 218, Fed. Cas. No. 786, in which denial we entirely concur. The decree of the circuit court is affirmed, with costs.

CEREALINE MFG. CO. v. BATES et al.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1900.)

No. 391.

1. PATENTS—CONSTRUCTION—PROCESS PATENTS.

The statement of a process by a patentee, to be sustainable, must not only clearly distinguish the old from the new, so that the novelty claimed is obvious, but must point out the new steps so definitely that one wishing to use that process for the production of the desired product will have a clear chart before his eye.

2. SAME—FOOD PRODUCTS.

The Gent product and process patent, No. 223,847, for improved alimentary products from corn, is void for lack of novelty and invention.

Appeal from the Circuit Court of the United States for the District of Indiana.

The bill filed in the Circuit Court for the District of Indiana was to restrain the appellees from infringing Letters Patent No. 223,847, issued January 27,

1880, to Joseph F. Gent, for Prepared Cereals; the application being filed September 1, 1879. The appellant is the assignee of Joseph F. Gent.

On the hearing in the Circuit Court the bill was dismissed for want of equity, and thereupon the case was brought on appeal to this court.

The patent as issued is as follows:

"Be it known that I, Joseph F. Gent, of Columbus, in the County of Bartholomew and State of Indiana, have invented certain new and useful Improved Alimentary Products from corn. * * *

"The object of my invention is to obtain from the cereal known by the several names of 'corn,' 'Indian corn,' 'maize,' a new alimentary product, and to manufacture this new product in such a manner that it shall possess the quality of keeping in any climate.

"To these ends the first part of my invention consists of the new product composed of dry flakes made from clipped and purified kernels of corn.

"The second part of my invention consists of a compound process, the first step of which consists of the separation of the hulls and impurities from the kernels of corn by subjecting the corn to a dry clipping and cracking operation, and by separating the hulls and impurities from the heavier coarser portions by sifting and winnowing, or either of these operations, to obtain a purified granular product.

"The second step of the process consists in the steaming of the granular product for the purposes of softening and toughening the granules [without cooking the same].

"The third step of the process consists of warm-rolling the soft and tough and wet granules for the purposes of rolling or pressing the granules into flakes and of drying and hardening the particles.

"In order that my invention may be clearly understood, I will proceed to describe the process which I have successfully practiced for the production of the new product from corn.

"The winnowed kernels of corn may be passed through a suitable mill to crack and hull them, and the cracked grits sifted or bolted to separate the hulls as effectually as practicable; or such kernels of corn may be passed through a cracking, hulling and separating mill of any known kind, to hull, clip, and crack the kernels, as well as to separate the hulls and clipped portions from the granular cracked portions, at one operation.

"The purified granular material is then subjected to a steaming action in any suitable vessel, the steaming being continued long enough to effect a softening and toughening of the granules.

"The damp material (which may first be drained and otherwise treated to free it from the greater part of the condensed water) is then pressed and dried, so that the particles shall assume the form and quality of dry hard flakes. This drying and pressing I have effected successfully by passing the damp material through between warm rollers; [but many other means for accomplishing this step of my compound process will readily suggest themselves to any one skilled in the art].

"I am aware that corn has heretofore been hulled and granulated and steamed, and therefore claim neither of those processes; nor do I claim, broadly, a process consisting of the hulling and granulating and subsequent steaming of corn. I claim this compound process only when combined with the step of pressing and drying, as hereinbefore set forth, by which step my process is distinguished from any heretofore known process for the treatment of corn, and the consequence of the practicing of which step in my new process is the production of the new article herein described.

"What I claim as my invention, and desire to secure by Letters Patent, is:

"1. As a new article of manufacture, the herein-described alimentary product from corn, which consists of hulled, dry, hard, uncooked flakes made from the kernels.

"2. The process substantially as herein set forth, of making dry hard flakes from hulled kernels of corn for the production of a new alimentary product, which process consists of the following steps, viz.: first, crushing the corn in the dry state and separating the hulls therefrom; second, steaming the granular material to soften and toughen the particles [without cooking the same]; third, pressing and drying the particles to reduce them to dry hard flakes."

In the original specification the words "without cooking the same," now appearing in the patent (being printed in brackets in the foregoing), were omitted; also the sentence, "but many other means for accomplishing this step of my compound process will readily suggest themselves to any one skilled in the art."

There was also inserted in the application, on suggestion of the Patent Office, the paragraph, now immediately appearing before the preamble, as follows: "I am aware that corn has heretofore been hulled and granulated and steamed, and therefore claim neither of those processes; nor do I claim, broadly, a process consisting of the hulling and granulating and subsequent steaming of corn. I claim this compound process only when combined with the step of pressing and drying, as hereinbefore set forth, by which step my process is distinguished from any heretofore known process for the treatment of corn, and the consequence of the practicing of which step in my new process is the production of the new article herein described."

This amendment was made after the rejection of the original application, on account of the process and product lacking novelty in view of American patent, No. 136,305, dated February 25, 1873, to Lewis S. Chichester, and No. 174,346, dated March 7, 1876, to Henry H. Beach. The last paragraph referred to above was inserted because the original application failed to set forth, as per rule (14,) a statement of what is old, and the new thing to be distinguished therefrom, and the object to be accomplished by the improvement set forth; attention by the examiner having been called to the fact that the steaming and rolling of cereals was old; that the grinding, cooking, hulling, and steaming was old; that the hulling, crushing, cooking and desiccating was old; and that crushing and flattening, in connection with softening by cooking, was old.

Letters Patent No. 215,313, issued May 13, 1879, to Henry H. Beach for improvement in preparation of peas contains the following paragraph: "My invention has for its object to obtain pease in a condition in which they will be better fitted for the after processes to which they may be subjected with a view to their preparation as food or drink."

"To accomplish the object I have in view I cook them by moist heat in the manner indicated in my Letters Patent No. 172,863, dated February 1, 1876—that is to say, I submit them to the action of hot vapor in a suitable vessel or vat until they are properly cooked. Inasmuch as this step is fully described in my Letters Patent above named, it need not be further described here. Instead, however, of then subjecting the pease to a crushing, disintegrating, or grinding operation, which was the operation to which I subjected grain under said Letters Patent, I take the pease while they are still moist and pass them between heavy compressing-rollers, where they are flattened, though preserving their individuality, without being broken up or comminuted, but having their shape changed from the globular to that of a flat disk."

Canadian Patent, No. 9341, issued to Peter Haulenbeck, contains the following clause: "The peas or beans are removed from this vessel after about twenty minutes cooking, and subjected to pressure by suitable means. I prefer to pass them between plain rollers placed at about an eighth of an inch apart, these flatten the peas or beans without crushing or grinding them; they are allowed to dry and are in a hard and uniform condition that renders them better adapted to withstand atmospheric influences than when simply cooked or in a crushed, ground, or disintegrated condition."

Many other patents were in evidence, the purpose of which was to treat grain, by hulling, granulating, and steaming it, to some extent as is claimed in appellant's patent.

Relative to the introduction into this country of roller mills, the following stipulation was entered into: "Defendants proposing to introduce further evidence to show the extensive introduction of roller mills in this country as a substitute for millstones during the years 1876, 1877, and the years immediately following, it is stipulated that it may be taken as admitted herein that three competent witnesses called by the defendants, having personal knowledge thereof, would have testified that roller mills composed of pairs of smooth rolls, driven at uniform speed, held in close contact with each other and crush-

ing wheat or middlings between their opposing surfaces, were put into practical, commercial, public use in various flour mills in this country as early as 1876, and more extensively in 1877 and 1878, and that such roller mills, together with others driven at differential speed and in some instances having corrugated surfaces, have, since 1878, generally superseded millstones in cereal milling where carried on upon an extensive scale; that their use in 1876 and 1877 was largely for the purpose of crushing middlings; that the smooth roller mills thus used have from 1876 to the present date been generally operated at sufficient speed to heat their surfaces so that they would feel hot to the hand, and that they have throughout this period been usually so adjustable as to vary the degree of pressure of one roll upon the other, or the closeness of adjustment or grinding distance, at the will of the operator; this stipulation to have the same effect as if these facts were proved by competent witnesses actually called and sworn."

In the "American Miller," published at Chicago, September 18, 1876, occur the following sentences: "The great advantage the rollers have over the stones for the reduction of semolina and middlings lies in the squeezing action of the former against the tearing action of the latter, and therefrom it results that semolina, middlings and sharps, not entirely purified, will give a far superior flour when ground through rollers, because the small branny particles mixed into them are only flattened, and not ground to powder, which would decidedly occur when ground by stones. But the advantages of the rollers are still greater—their squeezing action gives a perfectly cool meal, and the flour gained by it is stronger, as the baker testifies."

It appeared in evidence that, prior to the Gent application for a patent, crushed wheat was manufactured in the Atlantic Flour Mills of Brooklyn after something like the following method: The wheat having been scoured, so that the woody hull was removed, was moistened, either by the introduction of a fine jet of steam, or by water turned from a tank upon a stream of wheat moving through a conveyer, and thereupon the softened berries were passed through two rollers, coming out crushed and flattened, but each berry maintaining its individuality, being in its pressed state about as large as a finger nail, and perhaps a little thicker. The product thus manufactured was called "Crushed White Wheat," and was sold in quantities as large as seven thousand boxes per month. A pamphlet advertising this product contained the following: "CRUSHED WHITE WHEAT, the most perfect preparation of entire wheat product that has yet been produced. By our process the grain is *thoroughly softened in every part*. The *hard crust* containing the *gluten* or *nitrogenous elements* is put into proper condition to cook *quickly and uniformly* with the soft and crumbly portion of the center, being the *carbonaceous* portion. The wheat that we use is of the choicest raised in the best wheat-growing section of the United States. It is first thoroughly cleaned and purified from all extraneous admixture, by the most complete and severe mechanical contrivances, and prepared in such a manner that *all the elements of the grain are preserved*. The iron or silex are preserved in the outer or true bran; in this portion of the berry also lies the greatest amount of waste, which is a natural stimulant, and greatly assists nature in keeping the bowels and digestive organs in proper and healthful action. Our Crushed White Wheat will be found particularly desirable during warm weather, and in warm climates, being the most nourishing and the least heating of any other single article of food."

It was found that in the process of rolling the wheat the rollers would become warm, even to the degree of becoming overheated, and overheating was, of course, guarded against; but a proper degree of warmth was looked upon as beneficial, as it assisted in preserving the integrity of each berry.

It appears in evidence, also, that hulled rolled wheat was manufactured at the Golden Gate Mills of San Francisco prior to 1879. Josiah H. Locke, who had charge of the Golden Gate Mills for twenty-seven years, testified, in substance, respecting these operations as follows: After the wheat had been hulled and steamed, it was passed through porcelain rolls, set so close together that a sheet of paper would scarcely pass through; the berries thus pressed came out in flakes about as big as a thumb nail, or a five cent piece, or smaller, according to the size of the grain; the purpose was to roll

them, so they would not fall apart, but would retain a soft flaky shape; the porcelain rolls had come from Hungary; the rolled wheat thus produced was put up in five pound packages, and sold upon the market.

It appears that these rolls were introduced into the Golden Gate Mills about the time roller milling in general was being adopted by the millers of this country.

It also appears in evidence that prior to complainant's application the Empire Mills of Akron, Ohio, manufactured crushed barley, the process being substantially as follows: The hull and bran were first removed by a pearling machine. It then went to a cleaning machine; then to a heating machine, and then to the rolls. These rolls were of iron and steel with smooth surfaces driven at the same speed, and, moving in the same direction at the point of contact, were set about as far apart as the thickness of blotting paper. The barley was hot and moist when it went between the rolls, coming out in a flattened shape, and hanging together.

Certain exhibits were introduced in evidence which were said to be fair samples of the barley flakes produced by this process. These exhibits show a thin hard flake somewhat broken. The witnesses testified that the rolls used in this process became hot when in operation, and that a heat of about one hundred and fifty degrees Fahrenheit was considered the most advantageous one for the work in hand. Large quantities of this crushed barley were sold upon the market.

Other instances of the manufacture of wheat and oats by being moistened and steamed and then run through rollers, producing a flaky product, appear in the record.

In the brief of counsel referring to the crushed products of the prior art it is stated: "The art of making crushed wheat, and probably crushed oats and crushed barley, it is shown, has been practiced for a great number of years. Usually there has been no decortication, but there is proof in the case that pearled barley, by which is meant barley which has been decorticated, has been flattened by means of rolls.

"The treatment of the pearled barley is more nearly analogous to the process of the patent in suit than the customary treatment of wheat, oats and barley from which the husk or cuticle was not removed. If the process availed of in connection with the pearled barley is not an anticipation of the patent in suit, all the other processes of treating 'crushed' cereals are manifestly immaterial.

"The process availed of in connection with the pearled barley consists of three steps: (1) the separation of hulls and impurities from the kernels to obtain a purified granular product, (2) the heating of the purified berries by means of dry heat and (3) flattening the berries by means of rollers.

"That this process resembles the process of the patent is obvious. But there is as little doubt that it is essentially and distinctly different from the process of the patent in particulars which may be readily explained. * * *

"The crushed barley process contemplates the treatment of the whole berry. The purpose is not to rearrange the particles of starch so as to expose them. The process in all its parts contemplates the preservation of the individuality of each berry or kernel.

"The first step of the process of the patent involves 'Subjecting the corn to a dry clipping and cracking operation' (417,418). In the making of 'crushed cereals' the preservation of the individuality of the berry or kernel precludes the possibility of the production of the flake of the patent. The particles of starch can only be rearranged by lamination to form a flake by breaking the berry into a number of pieces. The crushed barley process, therefore, imposes at the outset conditions which prevent the formation of the flake.

"The second step in the crushed barley process consists in heating the berries. * * * During the whole period of the art the evidence is that the heat was invariably dry, the 'heaters' being always so constructed as to prevent the possibility of the steam coming in contact with the berry. * * *

"The third step of the crushed barley process was the rolling of the hot berries to give them a flattened shape. The evidence is that the rolls were usually heated, but the berry was not flattened and could not be flattened, by reason of its size, to form the flake of the patent in suit.

"The result of the process was a product differing both chemically and mechanically from that of the patent in suit and intended for and adapted to distinctly different uses."

Expert Brevoort, called for the appellant, compressed the purposes of the patent under discussion into the following statement:

"I understand from the patent that the first step of the process, which is to result in the production of dry, hard flakes, consists in the separation of the hulls and impurities from the kernels of corn by subjecting the corn to a dry clipping and cracking operation, and by separating the hulls and impurities from the heavier, coarser portions by sifting and winnowing, or either of these operations, for the purpose of obtaining a purified granular product. In other words, I understand that the first step of the process consists in the production of 'corn grits.'

"The second step of the process consists of steaming the granular product thus produced, for the purpose of both softening and at the same time toughening the grits or granules without cooking the same, that is, without, as I understand it, breaking up or disintegrating the individual starch cells, which are a large portion of the product.

"The third step of the process consists of warm-rolling the soft, tough and wet granules for the purpose of rolling or pressing the granules into flakes, and of drying and hardening the particles. The specification proceeds, after stating these steps, to describe at greater length the three steps first set forth as constituting the process of the second claim.

"I understand from the description that the granular product, after it is cracked and purified, is to be subjected to a steaming operation, which is only to be continued long enough to effect a softening and toughening of the granules, and that the softened and toughened granules are then to be passed, after being freed from any water of condensation, through warm rollers which will press the softened material into the form of flakes, and from which rollers these flakes will be delivered as hard, dry flakes.

"As to the drying, I understand that the flakes are to be delivered from the roll in such a condition of dryness that they may be handled without injury to their condition as flakes—that is, they are to be delivered from the rolls in a dry condition, as distinguished from a wet condition; and I also understand that the drying operation, which is conducted by the rolls, is not to be one which cooks the product in the sense that it completely or materially breaks up the starch granules of which the material is so largely composed."

The chemical ingredient of the product and process claimed is set forth in this paragraph from the brief of appellant's counsel: "Just what takes place when the process of the patent is practiced is obviously immaterial as affecting the claim for the result. We know to a certainty that this product which is the subject of the first claim is UNIQUE BY REASON OF THE FACT THAT IT IS A DEXTRINE PRODUCT, and we are equally certain that to do the things pointed out in the specification is to produce the product."

On the question of infringement of the process claim the testimony for the appellees may in substance be stated in the language of the opinion of the Circuit Court: "The defendants sprinkle their granules of corn with water at the temperature of from 80° to 120° Fahrenheit, and carry them through a system of conveyers to a bin, from which in about three hours they are elevated and passed between rolls having only such heat as is produced by the friction of the rolls." 77 Fed. 975.

There was much contradiction of this testimony offered by the appellant, so that counsel for the appellant are justified in saying: "The evidence concerning the infringement of the process claimed is voluminous and contradictory; either complainant's witnesses or defendant's witnesses were guilty of perjury."

The product produced by the appellees, as shown by the exhibits, is much the same as the products produced by the appellant, as shown in its exhibits. It is argued by counsel for the appellant from this fact (1) that the appellees made use of the same moisture, heat, and pressure that the patent describes; and (2) that the product of appellees contains soluble starch and dextrine, and is necessarily an infringement of the first claim of the Gent patent.

Rowland Cox, for appellant.

R. H. Parkinson and Charles Martindale, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of the facts, delivered the opinion of the court.

The most that can be said for the first claim of the Gent patent is that the hard, dry flake containing soluble starch and dextrine is a new article of manufacture or commerce. Before determining whether, as such, it is patentable, it is well to look into the second, or process claim of the Gent patent, and determine in what respects the process is new, and whether, as a process, it is patentable.

It is not our purpose to review, *in extenso*, the previous art; it is sufficient to point out in what respects the Gent process has been anticipated in the prior art. It is shown beyond question that a process that clips and hulls cereals, such as barley, wheat and oats, and then compresses the purified residue through rollers warmed by friction, so that there issues a perfectly cool meal, not ground to powder, but flattened, was used in roller mills previous to the Gent patent. The difference between this process and the process described in the Gent patent is two-fold: First, in the prior art the clipped and hulled cereals were barley and wheat; in the Gent process it is corn; and secondly, in the prior art, the cereal, after clipping and hulling, had not been moistened by steam before going through the rollers, so as to hold the particles together after passage through the rollers—a distinguishing feature of the Gent process.

It is also undeniable that prior to the Gent patent there were, in the special manufacture of cereal food products, a moistening and steaming prior to the passing of the crushed cereal through rollers. The cereals used in these manufactures were wheat, barley and oats, which, having been hulled so that the outer or woody shell was removed, and then moistened and steamed and thus softened, were passed through warm compressing rollers. The result of this process was a flake, preserving in its integrity the berry of the grain. Had the berry been previously clipped, the inner coating, as such, would have disappeared, and the kernel, properly moistened and toughened, would have doubtless taken on the form of a hard, dry flake. The difference between this product and the Gent product resides in the fact that in this product the integrity of the berry is, for the reasons named, preserved, while in the Gent product it is not; the cause of this difference being found in the clipping of the Gent process, whereby the inner sheath is broken up.

In the general manufacture of wheat flour prior to the Gent patent, the rollers were heated by friction. It is manifest that if the manufacturers of flour had clipped the berries of corn as they did the berries of wheat, and before passing the grits thus resulting through the rollers, had subjected them to a sufficient degree of steaming and moistening, the flour would have issued from the rollers (the rollers being sufficiently warmed) in the form of hard, dry flakes. The essen-

tial difference, therefore, between such general flour manufacture and the Gent patent is, that Gent, to some degree of heat, steamed and moistened the grits, and to some degree of heat, also, warmed the rollers,—a feature of manufacture not specially looked after by the general flour manufacturers.

It is also manifest that if the special manufacturers of food products from wheat, oats and barley, prior to the Gent patent had clipped the berries of the cereal, the product issuing from the warm rollers would have been a hard, dry flake, such as the Gent product. Whatever advance, therefore, Gent made over these special manufactures resides in the fact that the cereal hulled—an old step—, and softened and toughened—an old step—, has, before compression by the rollers, been likewise clipped—a step also old in general flour manufacture. At most, therefore, all that Gent has done to modify the previous general process of flour manufacture was to introduce the moistening and toughening, and, to some degree, warm rolling; all he has done to modify the previous special processes of manufacturing cereal foods was to clip the berry—a step that had been used in the general manufacture of flour.

It is doubtful indeed if Gent is entitled to credit for these modifications; but for the purposes of this decision they may be conceded. Do any of these modifications make his process patentable? First, then, in respect to the clipping: In the first application to the Patent Office the first step of the process was described as consisting of the separation of the hulls and impurities from the kernels of corn, by subjecting the corn to a dry clipping and cracking operation; the second step as consisting in the steaming of the granular particles for the purposes of softening and toughening; and the third step as the warm rolling of these soft, tough, and wet granules for the purposes of pressing them into flakes. The application, thus stated, was rejected, for the reason that all these steps appeared in the former art; and in this rejection Gent acquiesced, by amending, so that the second step consisted of softening and toughening the granules *without cooking the same*. This is a concession that a process, otherwise like his, including the clipping and hulling, but in which, the toughening is accompanied or brought about by cooking, would amount to no infringement upon his claim. In other words, the prior art is admitted by Gent to have included every step of his process, except as it is modified by the absence of cooking. There is, therefore, by his own concession, no novelty in the mere fact that the grain is clipped, though such process includes the softening and toughening necessary to produce a flake product.

Is there any moistening or steaming in the Gent process different from that in the manufacture of prior food products? If so, it is not pointed out in the description of the patent, unless the difference resides in an absence of cooking. But there is no serious claim anywhere in this case that the absence of cooking is a chemical or mechanical cause that brings about the hard, dry flake. It is conceded that the grit, either in the steaming or warm rolling, must be subjected to a heat in excess of one hundred and thirty-five degrees

Fahrenheit, in order to develop dextrine, and chemical authorities place the necessary heat at two hundred and eighty-four degrees Fahrenheit and upwards. It is nowhere claimed by appellant that a heat of less than two hundred and eighty-four degrees Fahrenheit will produce the dextrine found in the flakes. The appellant points to no place in the process where this heat is applied, and can, upon the state of the prior art, point to no step in the process distinctively different from the moistening and steaming, or the warm rolling that characterized the manufacture of previous cereal foods. Indeed, counsel for the appellant nowhere point out in the Gent process the efficient cause producing the hard, dry flake. They are contented with the insistence that because the hard, dry flake, in fact, contains soluble starch and dextrine, there is in hiding somewhere in the process the cause of such a result. We are asked to pronounce this process patentable, not because we can see wherein the novelty resides, or that the efficaciousness of the process is due to such novelty, but because the product is, in some respects, different from anything going before.

The statement of a process upon the part of a patentee, to be sustainable, must not only clearly distinguish the old from the new, so that the novelty claimed is obvious, but must point out the new steps so definitely, that one wishing to use that process for the production of the desired product, will have a clear chart before his eye. In this essential the Gent process utterly fails. An inspection of the description discloses its progressive steps—hulling and clipping; steaming and moistening; compression through warm rollers—but as we have shown, none of these are new. What degree of steaming or moistening is not made apparent; what should be the warmth of the rollers does not appear. The user would be obliged, with this chart before him, to experiment, just as Gent doubtless experimented, before he obtained a hard, dry flake. The patent would be no guide; it would not even facilitate the production of the hard, dry flake. It leaves the world, as would be manufacturers, just where it found Gent—with valuable general information on the subject, but with no definite formula. As a process patent, therefore, the Gent claim fails.

Is the hard, dry flake a new article of manufacture within the meaning of the patent law? New articles of manufacture must not be confounded with a new article of commerce. The latter may be novel and highly useful, even to the displacement in commerce of its predecessors, but is not, on that account, patentable. Powdered sugar succeeded to loaf sugar; ground coffee to coffee in the berry, and as articles of commerce largely supplanted sugar and coffee in their previous forms, but no one claims that, within the meaning of the patent law, such change, though new and useful, constituted a new article of manufacture.

Steel, on the other hand, when first made, as the result of the combination of carbon and iron, was an essentially new manufacture. It introduced a practically new metal into the uses of mankind. It differed so essentially from its ingredients in their former state,

that the change was not a mere modification, but was a creation. No one would classify steel with iron; it is a distinct species.

Is this true of the hard, dry flake of the Gent patent? The whole emphasis of appellant's contention is placed upon the fact that, unlike flour, the flake is not laminated, but through the presence of soluble starch and dextrine the granules cohere, and a flake results. The development of dextrine is urged as the efficacious novelty giving to this product its merit. But dextrine is inherent in every cereal containing starch which has been subjected to a certain degree of heating. It is found in breads that have been twice baked in a high degree of heat; it is the well known result of heat applied to soluble starch; it is doubtless present in the wheat and barley flake of previous cereal foods.

The Gent product may be brighter in color, more desirable in commerce, and more useful, than its predecessors, but is composed of no ingredients previously unknown, and is the result of no essentially new combination of old ingredients; nor is it, so far as we can see, the result of any new mechanical or chemical process. At most, it is an advance only upon the old art in the direction of perfection—a step merely in the mechanical evolution of cereal foods and general flour making.

There is no clear line of demarcation between what may be called new articles of commerce, not patentable though useful, and new articles of manufacture patentable as such. Each instance brought to the attention of the court must be determined more or less upon the situation peculiar to itself. We think it sufficient to say that no result of a machine or process is patentable independently, where it is apparent that such result is a degree only in advance, in the evolution of an art that is as wide as is the manufacture of cereal foods and flour. The Gent patent is, in our judgment, in no just sense, a new product; but only a modification or advance upon products already as widely known as the civilized breakfast table. Patents can not rightly be made to cover every change in the betterment of material conditions. The growth of the art of cereal foods, unless something distinctively new *in specie* is contributed, is the growth of common public thought, and, therefore, independently of the process (which may be protected) belongs to the public.

But, while this hard, dry flake is doubtless the output of appellant's mills, we are not at all satisfied that it is the result of the Gent process. It is manifest that starch will not be quickly converted into dextrine, except under a temperature of from two hundred and eighty-four degrees to three hundred and twenty degrees Fahrenheit. In what part of the patent is this provided? Not in the warm rolling, for no degree of temperature is there mentioned; not in the steaming and moistening, for that expressly must not proceed as far as cooking. We can put our finger on nothing in the patent directions that is responsible for the evolution of dextrine. Dextrine is doubtless present in the flake, but has it not been developed by cooking? If so, the process actually employed is different from the process pointed out in the patent; so different, that, as described in

the first Gent application, it was rejected, on account of the prior art. We are not satisfied that the appellant, in practice, is not following the directions of the first Gent application, while in theory, for the purposes of these suits, relies upon the amendment. This doubt exempts the defendant, both in the process employed, and the result produced, from a judgment of infringement.

The decree of the Circuit Court will be affirmed.

CAMPBELL PRINTING-PRESS & MFG. CO. v. DUPLEX PRINTING-PRESS CO.¹

(Circuit Court of Appeals, Sixth Circuit. March 15, 1900.)

No. 616

1. PATENTS—INVENTION.

The mere bringing together of elements selected from old machines, to perform the same functions which they severally performed in the machines from which they were taken, and producing the same result, is not invention.

2. SAME—CONSTRUCTION OF CLAIMS.

A patentee cannot broaden the claims of his patent to cover ground he yielded to meet objections of the patent office, and which was one of the terms on which he obtained the grant.

3. SAME—INFRINGEMENT—PRINTING MACHINES.

The Kidder patent, No. 291,521, for a printing machine, cannot be construed as embodying a pioneer invention; and his double-cylinder construction, in which the two type-beds were shown in a vertical position, and facing each other, cannot be held to cover a press having the type-beds horizontal, one above the other, and both facing upward, as described in the Cox patent, No. 478,503.

4. SAME.

The Stonemetz patent, No. 376,053, for a web printing machine, describes a machine which is in no sense a primary invention, in view of the prior art, but at most a bringing together of old elements, with a slight variation in respect to some of them, in which variation rests whatever of novelty there is in the invention; and, as so limited, the patent is not infringed by a press made in accordance with the Cox patent, No. 478,503.

5. APPEAL—TAXATION OF COSTS.

In order to lay the foundation for the review by the circuit court of appeals of an order of the circuit court affirming on appeal a taxation of costs by the clerk (if an appeal from such an order will lie), the specific items to which objection is made in the taxation by the clerk should be distinctly pointed out, and the reasons for the objections stated and filed, so as to be shown by the record.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

In Equity. The bill in this case was filed by the Campbell Printing-Press & Manufacturing Company, a corporation organized under the laws of the state of New York, to restrain the alleged infringement of certain letters patent by the Duplex Printing-Press Company, a Michigan corporation, and to recover profits and damages for past infringement. The patents on which the suit is founded are two, one of which is No. 291,521, and was granted to the Kidder Press Manufacturing Company, as the assignee of Wellington P. Kidder, on

¹ Rehearing denied.

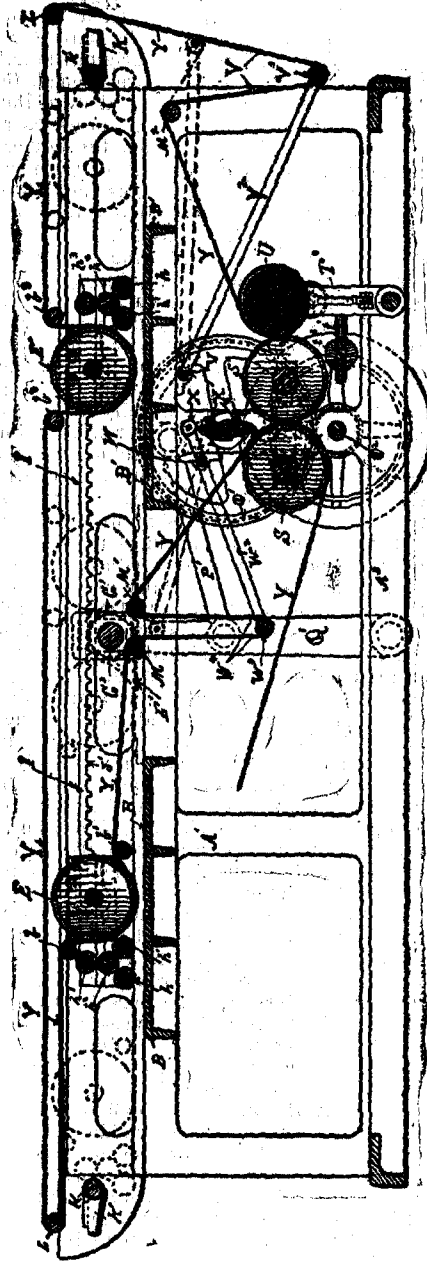
January 8, 1884. The other is No. 376,053, and was granted to the Stonemetz Printers' Machinery Company, as assignee of John H. Stonemetz, on January 23, 1888. The first of these patents was assigned to the complainant May 31, 1892, and the second was assigned to it June 25, 1892. Both of these patents were for improvements in printing presses. The answer denies that Kidder was the original inventor of the improvements patented to his assignees, and alleges anticipation by various prior patents granted in this country and in England, France, and Germany, enumerated in the answer, and by a number of prior uses in this country, which are specified, and denies infringement. The answer also denies that Stonemetz was the first inventor of the alleged improvements described in the second of the above patents, and alleges that he was anticipated by various prior United States, English, French, and German patents, which are set out, and by several prior uses in this country, the particulars of which are stated. The infringement of this patent is also denied. Kidder filed his application October 30, 1882. He had already taken out a patent (No. 224,440, dated February 10, 1880) for improvements in printing presses. In his application of October 30, 1882, Kidder describes his invention in two aspects,—one, when it is used with two "forms" in a perfecting press, and the second when only one "form" is used. His devices will be best understood by setting out that part of his specification in which he embodies the means with something of the method of operation, and by showing the first sheet of his drawings for illustration. He says: "The paper, *II*, is fed from a roll (not shown in the drawings), and is slacked off from this roll, as described in my patent No. 224,400, dated February 10, 1880. It passes between clamps, *h*, *h*¹, attached to the frame of the machine, the moving member, *h*¹, of which is actuated by the cam, *h*², and thence over shaft, *h*³, partially around impression-cylinder, *D*, thence partially around impression-cylinder, *D*¹, and thence over shafts, *h*⁵, and *h*⁶, and between the feed-rolls, *h*⁷ and *h*⁸. The shaft, *h*³, is mounted upon the carriage, *F*. On the impression or forward stroke of cylinder, *D*, the paper is first nipped between cylinder, *D*, and the form at the line marked 1 in the diagrams, Figs. 1 and 2, and that part of the paper between 1 and 2 receives the impression from form, *B*, so that at the end of the impression the paper near the line marked 2 is nipped between the form, *B*, and cylinder, *D*. Now, all that part of the paper from 1 to 2 would remain flat upon and sticking to form, *B*, at the end of the impression, were it not for the shaft, *h*³, and the clamps, *h*, *h*¹; but, as the paper is held by the clamps, it renders over shaft, *h*³, as that shaft rises, and is therefore stripped off the form with the least possible resistance from the stick of the ink, and at the end of the impression-stroke the paper between the line held by clamps, *h*, *h*¹, and the line, 2, is as shown in Fig. 2. The paper from 2 to 3 receives the impression from form, *B*¹, and is stripped off from form, *B*¹, by the motion of cylinder, *D*, over form, *B*. Fig. 1 is a diagram showing clearly the position of the paper at the beginning of the stroke to make the impression, when two forms are used,—that is, when my press is a perfecting press; and Fig. 2 is a like diagram, but showing the position of the paper after the impression has been taken. It will be clear from these diagrams that the function of shaft, *h*³, is to prevent the paper from bagging between it and the line where the paper is nipped between cylinder, *D*, and form, *B*, and that this function is performed for cylinder, *D*¹, by the cylinder, *D*. Cylinder, *D*¹, also performs an important duty in aid of cylinder, *D*; that is, it keeps the paper between 1 and 2 away from the form until the moment before it is nipped between the form and the impression-cylinder. This duty is performed for cylinder, *D*¹, by the shaft, *h*⁵. To prevent undue strain upon the paper lying between the line marked 2, where it is nipped by the cylinder, *D*¹, and form, *B*¹, and the line where it is nipped by the feed-rolls, *h*⁷, *h*⁸, the swinging shaft, *h*⁵, is swung inward gradually, thereby slacking the paper as required to relieve it from strain; or shaft, *h*⁵, may be mounted in the frame of the machine, and a shaft, *h*¹⁰, be mounted on carriage, *F*, as shown in Fig. 5; the shaft, *h*¹⁰, then performing the same office for the paper between 2 and 3 that cylinder, *D*¹, performs for the paper between 1 and 2. In the diagrams, Figs. 3 and 4, I have illustrated this, the main feature of my invention, where only one form is used, instead of two forms, as in my perfecting press. In these diagrams the shaft, *h*³, is a roll, which is pressed against the cylinder, *D*, during the impression, and

the type-bed, and the inking-rollers, are rolled over the web, impressing it upon the type. After passing over the form or type-bed, the cylinders are thrown back from the plane of the type by a device actuated by a cam, which brings the cylinders nearer together, and taken back by the movement of the carriage in which they are journaled to their original starting point. While this last operation is taking place, the clamps are opened, the feed rollers are put in motion, and the web is drawn through and over the types as before, the cylinders move to the plane of the type, the process is repeated, and thus the printing goes on. The mechanism by which the devices are operated is left to the contrivance and adjustment of the skill of the mechanic.

The main feature of Kidder's patent consists, as he tells us, in his manner of presenting the web for printing upon it. He refers to a former patent, granted to Royal Cummings in 1868, and disclaims what is shown by that; adding, "My mode of presenting the web differing radically from his, in that in his mode the feed is simultaneous with the printing, while in my mode the feed takes place while the impression is thrown off." The complainant relies upon claims 1, 2, and 7 of this patent. They are as follows: "What I claim as my invention is: (1) In combination with a stationary bed and an impression-cylinder traveling over it, guides for the web, one at each side of the impression-cylinder, and a feeding device, which feeds the proper length of web while the impression is thrown off, all substantially as described. (2) In combination, two stationary beds, two traveling impression-cylinders, and a feeding mechanism, substantially as described, combined together and with suitable guides, substantially as described, and operating to print both sides of a web, as set forth. (7) The web perfecting press, above described, consisting of the two stationary beds, the two traversing impression-cylinders, the two sets of inking apparatus, the web-guiding mechanism, substantially as described, and the intermittently-operating web-feeding mechanism, substantially as described, all operating together substantially as described."

The Stonemetz patent was applied for July 30, 1886, and relates to web printing machines; that is, to presses which print upon a continuous sheet, which is cut as it is delivered out, as distinguished from those which print upon sheets which are separated before they are fed in. It consisted of stationary type-beds located upon the same horizontal plane, a traveling carriage conveying impression-cylinders and inking-rollers and web-guiding rollers back and forth over the types, a vertically moving roller for taking up the slack of the web as it is unwound from the web-roll, and a vertically moving roller for drawing the web after the printing is done. The construction of his machine is indicated by his description of its operation, which is as follows: "In operation the web-roll is placed in the supports, T, T¹. The web is then drawn over the roller, M², and under the roller, V³, and from thence over the roller, L¹, from whence it is carried over the top of the machine to and over the roller, b³, and then under the impression-cylinder, E¹, and up over the roller, b², and from this roller over the top of the machine to and around the adjustable roller, L, and back to and over the roller, b, and under the impression-cylinder, E, and over the roller, b¹, and from thence to and over the roller, M, around under the roller, W³, and back up over the roller, M¹, from whence it passes to and between the cutting-cylinders, S, S¹, where it is cut into sheets. It is obvious that this arrangement of the web, Y, presents one of its sides to the type-bed, B¹, operated upon by the impression-cylinder, E¹, and the other side to the type-bed, B, operated upon by the impression-cylinder, E, so that when forms of type are placed upon the beds, B and B¹, one side of a newspaper will be printed upon the web, Y, by the impression-cylinder, E¹, and the other side of the newspaper will be printed upon the other side of the web, Y, at another point, by the impression-cylinder, E, both by the same movement of the cylinder-carriage, I, two sides of the newspaper being printed as the carriage, I, travels over the beds forward, and a like amount as the carriage, I, travels back (the web having been meanwhile moved ahead the length of the printed sheet by the oscillating roller, W³); the adjustment being such that the opposite side of each paper printed by the form on the bed, B¹, is in turn presented to and printed by the form on the bed, B, in its passage through the machine. In this manner a web of paper can be printed on both sides as it passes through the machine."

The diagram to which these references are made is here shown:



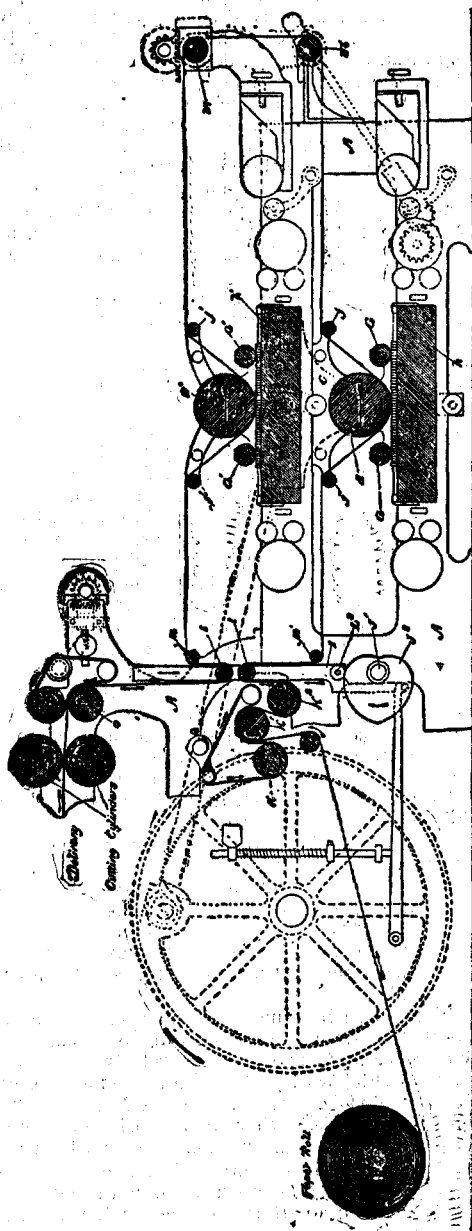
It needs further to be stated that this roller, V^s , which takes up the slack of the web after it is drawn from the web, is pivoted upon the frame of the carriage, and is actuated by gravity. When the web is drawn through the press, the loop of the web in which it hangs is taken up. When that operation is

suspended, the roller falls; thus renewing the loop and thereby storing a fresh part of the web, which is to be taken into the press by the next draught of the feeding rollers, at the other end of the machine. The roller, W^3 , rests in a loop of the web. It is raised and the loop taken up by the draught of the feeding rollers, and is then moved down by a cam operating upon the arm upon which the roller is suspended, thereby drawing the printed web towards its delivery, where it is cut into sheets. When the roller, W^3 , is pressed down, the roller, V^3 , is lifted, and the web is fed upon the forms. When W^3 reaches the bottom of the loop, the printing takes place; the web being held by the pull of the roller, W^3 , at one end, and of roller, V^3 , at the other end. This seems to be the only means of holding the web stationary over the type-beds while the impression-cylinders are moving over it. The feeding of the web over the type-beds takes place while the cylinders are passed beyond the type-beds, and so out of contact with them. The result of these operations is that the web is fed intermittently between V^3 and W^3 , and continuously between the web roll and V^3 , and between W^3 and the delivery-rolls, or approximately so. The adjustment for actuating the machinery adapted to the purpose is implied.

The claims which are alleged to be infringed are the fifth, seventh, tenth, twelfth, and seventeenth, as follows: "(5) In a printing machine, the combination of two stationary type-beds located on the same horizontal plane, and a traveling carriage carrying an impression-cylinder and inking-rollers for each of said beds, operating on said beds in their forward and backward movements, with means, substantially as described, for moving said carriage back and forth over said beds, and rollers adapted to convey a web of paper through said machine, whereby one side of the web may be printed on forms placed on one of said beds, and the other side of the web on forms placed on the other of said beds, substantially as and for the purpose set forth." "(7) The combination, in a printing machine, of stationary type-beds secured to the frame of the machine, and a traveling carriage carrying impression-cylinders and inking-rollers and web-carrying rollers thereon, a vertically-moving roller for taking up the slack of the web as it is unwound from the web-roll, and a vertically-moving roller for drawing the web forward, substantially as and for the purpose set forth." "(10) In a printing machine, the combination, with stationary type-beds located on substantially the same horizontal plane on the frame of the machine, and traveling impression-cylinders and inking-rollers adapted to travel back and forth over said type-beds and take impressions both ways, of web-carrying rollers on the frame of the machine, web-carrying rollers connected with the traveling impression-cylinder carriage, and means, substantially as shown and described, for taking up the slack of the web as it runs off of the web-roll while the impression-cylinders are passing over the type-beds, and means, substantially as shown and described, for drawing the web forward when the impression-cylinders are off of the type-forms, substantially as and for the purpose set forth." "(12) The combination, in a printing machine, of the side frames, A , A^1 , the stationary type-beds, B , B^1 , with the traveling cylinder-carriage, I , carrying the impression-cylinders, E , E^1 , which operate both forward and backward on said type-beds, substantially as and for the purpose set forth." "(17) The combination, in a printing machine, of the web-supporting rollers, M , M^1 , and the vertically-moving roller, W^3 , supported upon the arm, W^1 , W^2 , with the cutting-cylinders, S , S^1 , substantially as and for the purpose set forth."

The defendant is engaged in building printing presses constructed upon the specifications of patent No. 478,503, granted July 5, 1892, to Joseph L. Cox, who had also received several former patents relating to the construction of printing presses, some of which will be hereafter referred to, and many of the devices of which are embodied in 478,503. Patent No. 478,503 was for an improvement in web printing presses, whereby the printing is effected on a continuous web, either upon a single bed, or upon two, in which latter case it was a perfecting press. It consisted, in the latter form, of two type-beds arranged one above the other, the types facing upward on both beds, revolving impression-cylinders mounted in reciprocating bearings, whereby the cylinders are moved back and forth over the beds, each movement producing a fresh impression. It involved, also, for carrying the web through the press, a mechanism by which the web was stopped over the beds while the printing was done,

and then drawn forward for the next impression, while the cylinders were out of contact with the beds. This intermittent movement of the web was produced by looping-rollers, one on each side of the printing apparatus, operating alternately. The following diagram will illustrate the composition of this press:



In this press the looping-rollers, 1, 1, are both positively actuated by the machinery.

In the circuit court it was held that neither of the complainant's patents was infringed, and the bill was dismissed. The complainant brings the case here on appeal.

Louis W. Southgate, for appellant.

Alexander & Dowell (Dallas Boudeman and Arthur E. Dowell, of counsel), for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the foregoing facts, delivered the opinion of the court.

This case was brought here on a former appeal by the defendant from an order of the circuit court granting a preliminary injunction. Our opinion affirming that order is reported in 16 C. C. A. 220, 69 Fed. 250. We there held that in view of the fact that in a former litigation between this complainant and a vendee of the defendant, in the circuit court for the district of Massachusetts, a decree had been awarded in favor of the complainant upon a somewhat similar record, proper regard for that decision and the obligations of comity arising therefrom required that the preliminary injunction should issue as prayed; taking care, however, to state that our action then taken was not to be construed as a determination of the issues, either for the circuit court or this court, upon final hearing of the issues of law and fact. It now becomes our duty to re-examine the case upon its merits, and in doing this we are not constrained by the reasons which guided our former action.

The printing presses involved in the present suit are recent illustrations of an art which had its beginning with the invention of printing upon beds of movable type more than 400 years ago. The art being one of great and constant interest to the public, the inventive faculties of great numbers of ingenious men have been exercised in developing it, and bringing it to the almost marvelous state of perfection in which it now exists. For a long time presses were built upon the plan of making the printing impression by feeding the paper in sheets over the face of the type-bed, and thereupon causing pressure upon it of a flat plate of the same area as the type-beds. About 100 years ago the use of revolving cylinders was adopted; the type being transferred to the surface of the cylinder, and the impression produced by rolling them over the paper laid upon a flat bed. Later, about the year 1820, English inventors brought out forms of presses in which the types were set in beds or "forms," as in the old platen presses; the paper was fed over the type-beds, and the impression was made by revolving cylinders moving both forward and backward over the paper, pressing it against the face of the type. Some of these presses printed on both the forward and backward stroke. The first of these English patents, which is shown in this record, was issued in 1820 to Winch. But, as this was soon improved upon by another, we shall not stop to notice its details. The English patent, No. 4,690, issued to Bold in 1822, was for a printing press having stationary type-beds located on the same horizontal plane, a carriage traveling back and forth carrying impression-rollers over the type-beds, and printing at each forward

and backward motion, inking-rollers and guiding-rollers placed on each side of the cylinders for the purpose of holding the paper off the type, except at the moving point of contact on the instant of impression. With the foregoing description, the diagram here shown, and which accompanied the same, is easily understood:

Bold's Press of 1822.



A press of similar construction was patented to Smith in 1835 (English patent No. 6,793), except that this was automatic, and one of its forms contained a device for lowering the type-bed during the backward stroke of the cylinder, and while the paper was being fed in.

Prior to 1850, so far as the proof shows (except by a somewhat crude patent to Senefelder in 1801), the paper on which printing was done was fed in by hand in sheets. But in 1853 one Montague was granted a patent in this country (No. 9,993) for a web-fed press. In this press the web of paper was suspended in the frame upon a roll from which it was drawn through the press by feeding-rollers. It was provided, also, with a stationary cylinder with guiding-rollers to hold the web away from the type-bed except on the line of impression, inking-rollers, and a traveling type-bed; also, a looping-roller between the cylinder and the outward delivery-rolls to produce an intermittent movement of the web, feeding it in proper lengths while the impression was thrown off. This latter feature will be noticed hereafter in dealing with the Stonemetz patent.

In 1854 an English patent (No. 886) was issued to Tannahill for an automatic press printing a web of paper upon stationary type-beds by locomotive impression-cylinders, guiding-rollers in front of and behind the cylinders being dispensed with, the web-roller and the feeding-rollers, by reason of their location, performing the function of holding the web off the type except at the line of impression. It showed, also, feed and inking rollers, and means for taking in the unprinted web while the impression of the cylinders was off. In one of the forms of his invention, Tannahill drops the type-bed while the cylinder is making its reverse movement and the web is fed in. In another the type-bed remains stationary, and the cylinder is raised at the end of the printing movement, and is sustained during the reverse movement out of contact with the type, and while the web is being fed in. And he detains the web while the printing is being done by "tension put upon it."

In 1868 Royal Cummings obtained a patent (No. 83,471) for a web-fed platen press. This was a perfecting press; that is, one producing printing on both sides of the paper, with stationary cylinders and movable type-beds. It showed, also, guiding-rollers and inking-rollers, and means for feeding in the web at the proper time, all of which had for some time been well known in the art. Other

patents are exhibited in the record prior to Kidder's invention, involving the forms and operations of printing presses, which, with those already recited, showed substantially all the elements of the Kidder press. We say substantially, because there are one or two variations in the relation of parts by Kidder which will be referred to later on. Proper regard to the limitation of the space to be occupied in an opinion forbids our giving a detailed analysis of all such former patents. It is sufficient to say that they exhibited stationary type-beds (one or more), traveling impression-cylinders, stationary impression-cylinders, inking-rollers, traveling type-beds, guides for the web on each side of the cylinders, and feeding-rolls and devices for bringing the web between the types and the cylinders while the impression was thrown off, and means for holding the web stationary while the impression was being taken. Some were perfecting presses. Some printed on both the forward and backward movements of the cylinders. Others printed only with one movement. Kidder found all these things in the prior art. He varied the position of his double-cylinder press by making it vertical, bringing the type-beds face to face, and so locating his cylinders with reference to each other that they would subserve the purposes of guiding-rollers, each to the other; and he located a rigid clamp in front of the type-beds to grasp the unprinted web while the printing was done. In his single-cylinder horizontal press, he moved one of his guiding-rollers close to the cylinder, so that it should bind the paper upon it, and the contact thus produced should operate as a detent of the paper while the printing was being done. Assuming that such variations made his combinations patentable, it is clear that the defendant's press is no infringement of them. Cox, too, in his construction took his material from the prior art, and used nothing which was peculiar to Kidder. Neither of them can claim anything new beyond the specific forms of the elements combined by them. Their presses bear less resemblance to each other than the Cox press does to the older forms. Unfounded pretensions are made for the Kidder patent. In view of all that had been done before, it is useless to claim for him that he was a pioneer, and it would be necessary to establish such a claim in order to render it possible to give his patent so broad a scope as to include means varying thus widely from his own. In Kidder's double-cylinder construction he describes it as vertical, the two type-beds facing each other. The court below thought that he should be held to the vertical position described by him, and that his patent would not cover the same construction laid horizontally. We are not satisfied that this would be so upon the reason given by the learned judge, but for another reason we think his conclusion would follow, that there is no infringement. Kidder's press could not be constructed with type-beds one above the other, and having both type-beds facing upward as in the defendant's, without such an entire reconstruction of his press as would eliminate its peculiarities in the manner of "presenting the web," upon which he lays so much stress, and which he says is the main feature of his invention. In this manner of presenting the web, as before pointed out, the cylinders perform an important

function, relatively to each other, as guides for the web. And, in his horizontal single press, the friction upon the web, whereby it is held taut, produced by bringing the guide against the cylinder, with the web between, and which he says is an illustration of the substance of his invention, has no similitude in the defendant's press. Again, there is a wide dissimilarity between the clamp in front of the web-roll on the Kidder press, which closes and holds rigidly the paper while the cylinder is making the impression, and the defendant's looping-roller, which does not rigidly hold the paper, but holds it sufficiently taut for the printing, while it also feeds from the roll the requisite length of web for the next impression. We are satisfied that our view of the scope of his invention was that taken at the patent office; for it rejected his original broad claims by references to former patents, one of which was the Cummings patent, already referred to. The latter Kidder thereupon distinguished from his own by saying that it differed radically therefrom, in that in Cummings' patent the feed was simultaneous with the printing, while in his the feed took place while the impression was thrown off. Inasmuch as nearly all web printing presses, which had been patented, fed the paper while the impression was thrown off, the acquiescence of the patent office can be construed to mean only that Kidder's patent was allowed for its special means of feeding the web while the impression was thrown off, as disclosed by him. The circuit court for the district of Massachusetts, and counsel in their briefs in the present case, refer to the movement in the Kidder press as that of a cylinder "traveling in the moving fold of the web," as if it were a peculiarity. But it means no more than that the cylinder travels in a loop of the web which is made by the depression of the cylinder between the guiding-rollers,—a feature which was present in nearly, if not quite, all cylinder presses since they were first brought into use many years ago. In the Kidder patent a larger surface of the cylinder is in contact with the web than in former constructions, but this is a matter of degree only. Besides, the defendant's press is in this particular the same as that of presses long antecedent to both the Kidder and the defendant's presses. For the reasons stated, we conclude that there was no error in holding that the defendant did not infringe the Kidder patent. We have therefore not found it necessary to consider the prior use by Cox of the matter of Kidder's invention, upon which the defendant relied as one of the grounds of its defense.

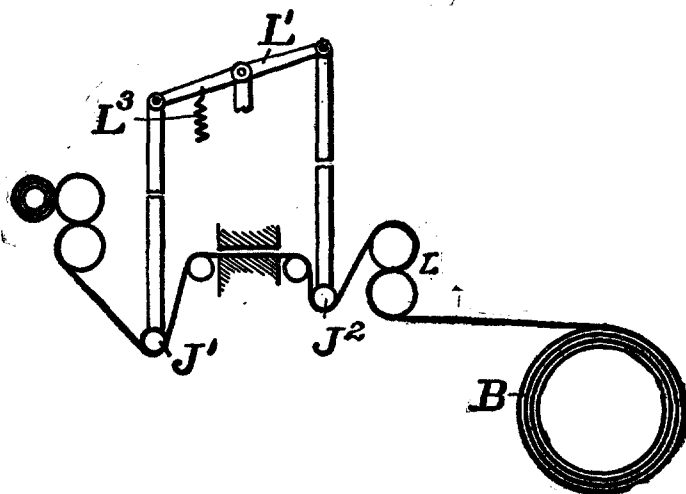
The application for the Stonemetz patent was filed July 30, 1886. The patent was issued January 3, 1888, and was for improvements in web printing machines. The press which he describes as containing his improvements involved the combination of two stationary type-beds, located on the same horizontal plane, a traveling carriage, conveying impression-cylinders with inking-rollers moving backward and forward over the beds, and guiding-rollers and rollers to turn the face of the web in opposite directions while the printing was being done. It also contained feeding-rollers to draw the web through the press, and a vertically-moving roller for taking up the slack of the web as it was unwound from the roll, and another

vertically-moving roller between the feeding-rollers and the printing parts to draw the web forward intermittently while the impression was off. This last feature (that of the looping-rollers to take up the slack and draw forward the web) is one much relied upon by the complainant. A description of this press, and a statement of the claims alleged to have been infringed, appear in the statement preceding this opinion.

Between the application for the Kidder patent and that of the Stonemetz, other inventions of improvements in printing presses became the subject of patents. We shall take space to describe only a few of them. In 1884 a patent (No. 305,469) was issued to J. G. Northrup, showing a perfecting press, wherein the type-beds travel under stationary cylinders, but the web is taken from one impression to the other in much the same way as the Stonemetz patent, though it must be conceded that there was nothing new of much substance in this respect, beyond what had long before been accomplished. The beds were on the same horizontal plane, end to end, as in the Stonemetz patent. We may at this point observe that, in our opinion, there was no invention in constructing a press with traveling cylinders over stationary type-beds, instead of stationary cylinders and traveling type-beds, if no other difference existed in the operation of the machine. The art was long ago full of both forms, and they may be regarded as substitutes, one for the other, so far as this feature is concerned.

In 1883 an English patent (No. 2,161) to Lake was issued, which involved all the features of the web-feeding devices of the Stonemetz patent. It was a platen press, but the mode of feeding was the same; and it did not require any invention to bring in the cylinders, instead of the plate, to make the impression, with the well-known incidental apparatus required for the change. This patent is illustrated in the following diagram:

Lake's Patent, 1883,



From the web-roll, B, the web is slacked off by the rolls, L, carried under the vertical looping-roller, J²; thence over the guiding-rollers before and behind the type-bed, located high enough to carry the paper clear of the type while the impression was off; thence under the vertical looping-roller, J¹; thence through the feeding-rollers to the delivery. The looping-rollers, J², and J¹, were positively actuated by the web through the arms pivoted on the ends of the reciprocating lever, L¹, the pressure on the outer end of which was reinforced by a spring, L³, to impel the roller, J¹, in forming the loop between the type-bed and the delivery rolls. The only material difference between the looping-rollers of the Lake patent and that of the Stonemetz was that both of them were positively actuated in Lake's, while in that of Stonemetz the roller in front of the web-roll floated in the loop, being actuated only by gravity, and the other near the feeding-rolls was actuated by a cam in the downward movement in forming the loop. In the defendant's press the looping-rollers are both positively actuated, and in this respect bear a much nearer resemblance to the Lake than they do to the Stonemetz patent.

In 1885 the defendant built, and put into use in the printing room of the Grand Rapids Democrat, a press designed by Cox, which has been in use ever since, composed of a pair of cylinders over traveling type-beds, located one above the other, and printing on both the forward and backward movements upon a web of paper fed automatically through the machine. It did not, as we understand, employ the looping-rollers, alternately supplying and delivering the web to and from the press, but these elements were supplied, as we have seen, by the Lake patent; and there was no invention, any more than there was in the Stonemetz patent, in bringing into the Cox machine old elements, known to the art, to perform the same duty they did in an earlier structure in the same art. It is, moreover, not to be lost sight of that Montague's patent, which was referred to in connection with the Kidder patent, showed a looping-roller for precisely the same purpose between the feeding-rollers and the type-bed. It did not have one between the web-roll and the type-bed, but, if there was need of it, it did not require invention to duplicate it in another place to perform the same function. Nor was it new, for, as we have stated, it was shown in the Lake patent, above mentioned. The mere bringing together of elements selected from old machines, to perform the same functions which they severally performed in the machines from which they were taken, and producing the same result, is not invention. *Hailes v. Van Wormer*, 20 Wall. 350, 22 L. Ed. 241; *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. 68, 33 L. Ed. 322; *Union Edge Setter Co. v. Keith*, 139 U. S. 530, 11 Sup. Ct. 621, 35 L. Ed. 261; *Wright v. Yuengling*, 155 U. S. 43, 15 Sup. Ct. 1, 39 L. Ed. 64.

From these considerations, it is manifest that, if the Stonemetz patent can be sustained at all, it must be limited to the specific elements described in his combinations. It is impossible that it should be so broadened as to cover all means for accomplishing the same results which others had already accomplished, or might thereafter accomplish. His was in no sense a primary invention, but, at most,

a bringing together of old elements, with a slight variation in respect to some of them; and upon this variation rests whatever of novelty there is in his invention. This also accords with what transpired in the patent office upon his application. He originally made claims for a somewhat generic invention. His seventh claim at first was of that character, and is given as an illustration:

"(7) In a printing machine, the combination of stationary type-beds with a traveling impression-cylinder carriage carrying impression-cylinders and inking-rollers, mechanism for operating said carriage, and means for conveying a web of paper between said impression-cylinders, and type forms, placed on said stationary beds, substantially as and for the purpose set forth."

Such claims were rejected upon references showing the state of the art substantially as we have here shown it. Thereupon his attorney addressed to the office the following letter:

"Sir: In presenting the inclosed amendment in case of John H. Stonemetz's application for improvement in web printing presses, filed July 30, 1886, serial No. 209,575, applicant desires to call the attention of the examiner to the fact that the impression-cylinders operate in contact with the type on the type-beds both in their forward and backward movements, and also to the fact that the type-beds are located on substantially the same horizontal plane, end to end. In this construction applicant is enabled to operate his press without lifting the type off their feet, as the upright Kidder press does, and he is enabled to print double the number of impressions that Kidder's press will do at the same speed, as Kidder's cylinders operate on the type-beds only one way, while applicant's operate both ways. I have endeavored to so amend applicant's claims as to limit him to his construction, and trust that they will prove satisfactory."

Upon this and some further limitation the patent was allowed. The patentee cannot now expand his claims to cover the ground he yielded in order to obtain the patent. What he conceded was accepted as one of the terms of the grant. *Roemer v. Peddie*, 132 U. S. 313, 10 Sup. Ct. 98, 33 L. Ed. 382; *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. 166, 36 L. Ed. 1073; *Thomas v. Rucker-Spring Co.*, 47 U. S. App. 125, 23 C. C. A. 211, 77 Fed. 420,—a case decided by this court. Neither the Kidder nor the Stonemetz patent is fortified by any inference of the novelty or utility of their inventions arising from general adoption and use. The first was granted in 1884, and the latter in 1888. This suit was commenced in 1895. In the interval only two of the Kidder presses were put into use. These were both installed in a single establishment, in Lockport, N. Y. The Stonemetz patent did not go into use at all. These facts would not of themselves establish that the inventions were not novel and useful, but such circumstances, unexplained, give additional ground for the belief that no very substantial improvement of the art was made. The explanation which is offered is not satisfactory. It is said the corporations organized for utilizing these patents were of limited capacity, but they were assumed to be sufficient for the purpose, and nothing appears to show that the patents were of a character to commend them to public favor. We have not found it necessary to deal with their respective claims, one by one, but have given to each all that could be claimed upon the descriptions therein of the inventions under the restrictions imposed by the state of the art and the limitations of the patent office.

Errors are assigned upon taxation of costs, a part of which, only, are referred to in the brief for the appellant. It appears that the costs were taxed by the clerk, in the ordinary manner, upon the bill of costs tendered, and affidavits. It also appears, inferentially, that the complainant appealed from the clerk's taxation to the court, where the taxation by the clerk was affirmed. The proper practice in order to lay the foundation for an appeal to this court (if, indeed, an appeal will lie on a mere matter of taxing costs, as distinguished from an adjudication for costs between the parties) was not observed in the court below. In order to bring the specific items to which the objection was intended to be made either on retaxation before the clerk, or before the court on appeal from the clerk, they should have been distinctly pointed out and the reasons for the objections duly filed. 2 Daniell, Ch. Prac. 1449, 1450. In the absence of any such specification of the objections or grounds relied upon, the court did not err in affirming the taxation of the clerk. However, it is proper to say that we have looked into the matters complained of, and do not see that any substantial injustice was done to the appellant. We think the court below did not err in its conclusion that no infringement of either patent is shown. Its decree is accordingly affirmed.

PATTERSON et al. v. BALTIMORE STEAM PACKET CO.

(District Court, D. Maryland. April 20, 1900.)

SHIPPING—CONTRACT FOR CARGO SPACE—CONNECTING LINES.

An engagement of cargo space on a steamship line for a shipment of cotton, made by a company operating a connecting line, constitutes a contract which binds the latter to furnish the cargo or respond in damages, although it was in fact made on behalf of a shipper intending to make a through shipment over both lines, where such fact was not disclosed.

In Admiralty. Libel in personam to recover damages for breach of contract engaging cargo space on steamer.

Brown & Brune, for libelants.

Lemmon & Clotworthy, for respondent.

MORRIS, District Judge (orally). The question for the court to determine is not what contract might have been made in the actual or supposed relations of the parties to each other, and as a result of such relations, but what contract the parties did in fact make. This was a commercial transaction, and commercial contracts, made by correspondence in the pressure of business, and not under advice of counsel, must receive a liberal construction to carry out the real intention of the parties; and in ascertaining this intention it is important to note, from their acts and declarations while the contract was in force and running, how the parties themselves treated it and acted under it. Here, after some preliminary correspondence as to the ocean

rate, a notification is sent by the Bay Line to the agents of the Johnston Line, reading as follows:

"Engagement No. 244.

"Baltimore Steam Packet Company (Bay Line).

"Norfolk, Va., May 19th, 1898.

"Dear Sirs: We have this day booked with you, via Johnston Line, from Baltimore to Liverpool, 1,000 bales of cotton, at ocean rates, 26 cents per 100 pounds, sailing about late June, 1898.

"Respectfully,

Wm. Randall, Agent.

"To Patterson, Ramsay & Co., Baltimore, Md."

That "engagement" was accepted by the agents of the Johnston Line, and the question here turns on its reasonable and fair interpretation. The contention of learned counsel for respondent, set up in the answer and forcibly presented in argument, is that this "engagement" did not, and was not intended to, constitute a contract, but that the situation of these carriers operating connecting lines, their course of dealing and traffic arrangements, associated them in a joint enterprise, for their joint benefit, in procuring and transporting through freight from Norfolk, or the interior, to Liverpool on through bills of lading; that, as a result of this relation, the Bay Line, or its general agent acting for all parties in their mutual interest, became thereby the agent of the Johnston Line in procuring such through freight from outside shippers for joint account, and that therefore, in event of failure on the part of such shipper to furnish the goods for carriage, each carrier should sustain its own loss. That there might have been such an arrangement as is here contended for goes without saying. But here the "engagement" by the Bay Line is in its own name, and the contract is between the parties as independent contractors. The correspondence is inconsistent with any other meaning than that they understood between themselves that on the one side the cotton was to be furnished, and on the other side as much of the ship's space as 1,000 bales of cotton required was to be reserved and bound. The agent of the Bay Line did not say, "We offer to place for you," or "We have secured for you," or "As your agent have contracted." There was no pro rata division of through freight. The Johnston Line rate was fixed, and was to be the basis of any rate offered shippers by the agents of the Bay Line and other carriers, who were to get all they could obtain consistent with the fixed ocean rate of 26 cents. If there had been a rise in freights, the Bay Line might have made an increased profit, but under no circumstances could the Johnston Line have made any profit by such rise, because it was bound to furnish the space at the rate agreed on. I can see nothing in the relation of the parties or in the way they have treated the "engagement" to lead to the conclusion that the agent of the Bay Line at Norfolk was acting for both parties in a common undertaking. The parties behind the Bay Line by whom the goods were to be shipped (the immediate contractor with the Bay Line being the Seaboard Air Line Railroad) were not disclosed, and the vessel space was secured and reserved by and for the Bay Line. On June 21, 1898, the respondent sent the following letter to the libelants, who thereupon obtained the best paying cargo they could to fill the space of 1,000 bales of cotton

on their steamer, but the rate obtainable was lower, and there was a considerable loss:

"Baltimore Steam Packet Company (Old Bay Line).

"Key Compton, General Agent.

"Norfolk, Va., June 21st, '98.

"Mess. Patterson, Ramsay & Co., Baltimore, Md.—Dear Sir: Your favor 20th, relative to our engagement 244-1,000 B/C Liverpool, the contents of which I have carefully noted, and I confirm wire to you to-day stating that the Seaboard Air Line say that it is impossible to secure cotton to fill this engagement. They therefore ask that you fill the room with such other freight as you may be able to secure, and charge us with whatever loss you may sustain. I am very much obliged to you, and trust that you will be as liberal with the S. A. L. as you can, and kindly forward me bill for whatever loss you sustain.

"Yours, truly,

Key Compton, General Agent."

The fact that the bill forwarded to the Bay Line by Patterson, Ramsay & Co. was made out against the Seaboard Air Line, the next connecting carrier, does not affect the situation, because that was evidently done, as was testified, in order to fortify the Bay Line in its demand on the Seaboard Air Line after the contract had been broken. The contract on the part of the Bay Line bound it to furnish goods to the Johnston Line to fill the required space reserved and at the rate agreed, and to indemnify the Johnston Line in event of failure to do so. There being no contradiction in the evidence as to the amount of the damage, I will sign a decree for the libelants for that amount.

THE ROANOKE.

(District Court, E. D. New York. April 27, 1900.)

1. MARITIME LIENS—REPAIRS—CONTRACT WITH OSTENSIBLE OWNER.

A corporation having its place of business in New York chartered a steamer in service on the Lakes with an option to purchase, stipulating to place and keep her in repair. It had the vessel taken to New York, where it delivered her to libelant for such alterations and repairs as would fit her for ocean service, stating that it had purchased her. After she had been placed in dry dock, and such removals made from her hull that she could not be floated without some restoration, and libelant had contracted for the materials for her repair, it was notified by the owner not to make any repairs on the credit of the vessel. *Held*, that libelant was justified in regarding the charterer as the owner, and that the notice from the owner did not affect its right to a lien, if such right existed, for the work it had previously done, or such as was necessary to be done before the vessel could again be safely floated.

2. SAME—CONTRACT WITH OWNER—PRESUMPTION.

Libelant, by direction of a corporation as owner, undertook the repairing of a vessel at New York, where the contract was made, and where the corporation had its office and transacted all of its business, although it was incorporated under the laws of another state, of which fact libelant had no knowledge. *Held*, that the presumption was under such circumstances that the contract was made upon the general credit of the corporation, and that the burden rested upon the libelant, in order to establish a maritime lien, to prove an agreement or a common understanding between the parties that the work was to be done on the credit of the vessel.

In Admiralty. Suit to enforce a maritime lien for repairs.

Peter S. Carter, for libellant.

Cowen, Wing, Putnam & Burlingham, for claimant.

THOMAS, District Judge. The Manhattan Steamship Company, deriving its franchise from, and hence technically resident of, the state of New Jersey, but having its headquarters and residence for the conduct of its business in the city of New York, chartered, with an option to purchase, the steamer Roanoke, from the owner, who was a resident of the state of Indiana. The charterer stipulated to make and to keep the vessel in repair, and for certain initial repairs the charter provided that \$4,000 might be deducted from the first installment of hire, and for the three weeks within which the repairs thus contemplated should be in progress no charter money was to accrue. The vessel was adapted to service on the Lakes, and required extensive alteration for the ocean service, for which it was chartered. The general manager of the Manhattan Company, at the offices of the company in the city of New York, had a conversation with the president of the libellant, a resident of the same city, with reference to repairs, and at such time stated to the latter that he had purchased three ships on the Lakes, and that the Roanoke had been ashore, and hence needed some repairs. About a week thereafter the vessel came to the libellant's dock, and the libellant undertook the work on her hull which was necessary to keep her usefully afloat. The vessel was delivered to the libellant on the 4th of January, and on that day some preparation was made to begin the work, and on January 5th the work was actually begun, with the vessel on the dry dock. While the libellant's workmen were engaged on the hull of the vessel, and at about 11 o'clock of January 5th, a representative of the owner appeared, and gave notice that the ship was under charter to the Manhattan Company, and forbade the libellant to continue the work on the credit of the ship; and a similar notice on the morning of the same day was mailed to the libellant from New York. Thereupon the libellant's president communicated with its counsel, and also with the general manager of the Manhattan Company, and he told the latter that he could not proceed with the work. The vessel at that time had been placed on the dry dock at the libellant's expense, and contracts for the material needed for the repairs had been made. The libellant continued and completed the work; and demanded payment of the bill from the Manhattan Company. However, payment was not made, and such company went into bankruptcy a few months thereafter. The conclusion is reached that the Manhattan Company was, as to the libellant, the owner of the ship, and that there was no fact or circumstance that required the libellant to use greater care than it did for the purpose of discovering whether the ship was owned by the Manhattan Company or whether it was under charter. It is also concluded that, if the work was undertaken on the credit of the ship, the libellant was privileged to continue the work to the extent that it did. It had received the vessel, placed her on the dry dock, and made such removals from her hull that she could not be floated without some restoration. The owner gave

his notice to stop the work on the credit of the ship, and departed. What could the libelant do? If it stopped, and left the vessel on the dry dock, the expense thereof, rapidly increasing, fell upon it, for it had engaged this service. If the libelant put the ship in the water, she would sink, and it would thereby perchance lose its compensation for services justly rendered, provided it had a lien on the vessel. A person rightfully undertaking work on the credit of a vessel may not be placed in this dilemma, and the law does not place him in such jeopardy. If the libelant did have the right to undertake the work, it also had the right at least to restore in a good workmanlike manner the vessel so that she could be taken on the dry dock, and floated with safety; and for the value of such work the libelant would have a maritime lien, if it were entitled to a lien at all. The libelant contends that it did this precise thing, and nothing more, and that the bill for repairs which is the subject of this action is for just that necessary work. Of this there was, on the trial, some doubt entertained and expressed by the court; but no evidence tending in a contrary direction has been given, and therefore the evidence of the libelant's witnesses is accepted. If the work was done on the credit of the ship, the libelant should have judgment for the bill of repairs as rendered by it. But was the work done on the credit of the ship? The charterer must be regarded as the owner of the vessel, nonresident of the state where the work was contracted and where the alleged lienor lived, but having its principal headquarters in the latter state. Thus the work was done upon a contract made directly between the owner and the libelant, at the place where the owner's chief place of business was, and to which place all its credit and property related, save its naked corporate franchise. There is no fact or circumstance tending to show that the work was done upon the credit of the vessel. Nor does there seem to be any fact or circumstance tending to show that it was not done upon the credit of the vessel. An order was given by the general manager of the company to repair the ship by day's work. The libelant accepted the order and proceeded with the work. After learning that the vessel was owned by the company, and had recently been purchased, with other vessels, on the Lakes, which statement the hailing name Chicago on the stern tended to confirm, the libelant went ahead with the work upon the receipt of the vessel. That was, in brief, the transaction. The simple question here is, where is the presumption, or upon whom is the burden to show, that the work was done upon the credit of the ship or otherwise?

In *The Aeronaut*, 36 Fed. 497, Judge Brown states as follows:

"But upon personal dealings with the general owners, or with charterers who are owners *pro hac vice*, for supplies to be furnished within the same port or state where the contract is made, the legal presumption is that the dealings are not with the ship, or upon her credit, but upon the ordinary personal responsibility of the owners, with whom the dealings are had; and no lien is, in such a case, sustained, unless a credit of the ship is proved to be within the intention of both parties, as was specially found by the court in the cases of *The James Guy*, 1 Ben. 112, Fed. Cas. No. 7,195; *Id.*, 5 Blatchf. 496, Fed. Cas. No. 7,196, and 9 Wall. 758, 19 L. Ed. 710; and *The Kalorama*, 10 Wall. 204, 19 L. Ed. 944. This subject, and the previous authorities bearing upon it,

were fully considered by this court in the cases of *Stephenson v. The Francis*, 21 Fed. 715, 719-723, and *Neill v. Same*, Id. 921. The same principles have been affirmed in numerous later cases in the courts of other circuits and districts. *The Norman*, 28 Fed. 383; *The Mary Morgan*, Id. 196; *The Cumberland*, 30 Fed. 449; *The Pirate*, 32 Fed. 486; *The Glenmont*, 34 Fed. 402, 404; *The Kingston*, 23 Fed. 200. The libelants' dealings in this case were all directly with the charterers in person. There is no legal presumption that aids the libelants in making out a maritime lien. They must stand upon the facts as they existed; and upon these facts not only had the charterers, under the circumstances of this case, no authority to charge the ship for these supplies, but there is no evidence that they had the slightest intention of doing so. Nothing in the negotiations or in the ordering of the supplies points to the ship as an intended source of credit within the common intention, and the charterers could not have contracted on that basis in this case without fraud on the general owners."

In what manner shall the case at bar be differentiated from *The Aeronaut*, and in what respect is the language of the learned judge in that case inapplicable to the facts in this case?

In *The Stromia*, 3 C. C. A. 530, 532, 53 Fed. 281, 283, Judge Shipman states as follows:

"It is, perhaps, unnecessary to say that the same presumptions by virtue of which a lien is placed upon a vessel for the payment of necessary supplies furnished to her in a foreign port upon the sole order of the master are not applicable to the case of supplies furnished in a foreign port to a vessel upon the express direction of the known general owner. In the latter case, there is not, *prima facie*, a presumption that there was a necessity for the credit of the ship. The known general owner may, however, expressly pledge the credit of his vessel in a foreign port for supplies, and there often are circumstances and facts which show that the credit of the vessel was pledged in fact, though not in words, and that such security was within the common intent of both parties."

In *The Valencia v. Ziegler*, 165 U. S. 264, 270, 17 Sup. Ct. 323, 325, 41 L. Ed. 710, 713, it is stated in the opinion as follows:

"It is true that libelants delivered the coal in the belief that the vessel, whether a foreign or a domestic one, or by whomsoever owned, would be responsible for the value of such coal. But such a belief is not sufficient in itself to give a maritime lien. If that belief was founded upon the supposition that the steamship company owned the vessel, no lien would exist, because, in the absence of an agreement, express or implied, for a lien, a contract for supplies, made directly with the owner in person, is to be taken as made 'on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived.' *The St. Jago de Cuba*, 9 Wheat. 409, 416, 417, 9 L. Ed. 122, 124. And if the belief that the vessel would be responsible for the supplies was founded on the supposition that it was run under a charter party, then the libelants are to be taken as having furnished the coal at the request of the owner *pro hac vice* (*Stephenson v. The Francis*, 21 Fed. 715, 717; *The Samuel Marshall*, 4 C. C. A. 385, 54 Fed. 397, 399), without any express agreement for a lien, and in the absence of any circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred. In the present case we are informed by the record that there was no express agreement for a lien, and that nothing occurred to warrant the inference that either the master or the charterer agreed to pledge the credit of the vessel for the coal."

In *The Rapid Transit*, 11 Fed. 322, 329, the learned judge states:

"The real question is whether the supplies have been furnished in a 'foreign port' (that is, in a place where there is no owner to supply her on his own credit), on the credit of the vessel. Even there, if the owner be present, and have sufficient credit, no lien arises. His mere presence would not, perhaps,

avoid the lien; but if he buy the supplies, and be of credit, and have the opportunity to give his own security by making contract liens or otherwise, there is no implied lien. The maritime lien would arise or not, according to circumstances."

This court is constrained by the above authorities, and considers that they embody the proper principles. Liens are implied upon the theory that the ship's necessities could only be relieved by pledging her, and that the owner, who has and controls the capital which supports her operation, is not present to furnish his personal credit, and that, in his absence, the person in charge of the vessel is entitled to pledge the ship, and does impliedly pledge the ship, for whatever is necessary to aid the undertaking; and, in the absence of notice or knowledge of the lack of such necessity, the person furnishing supplies, acting in good faith, is justified in parting with his property upon the order of the person in charge of the vessel. But if the owner be present, with full power to make his own terms, with full power to make a special pledge of the ship, with full power to pledge his other property, with full power to make any and all arrangements to which the opposite party may consent, the reason for a lien by implication fails. In the case at bar all that the apparent owner had to offer in the way of financial inducement, save the franchise of the corporation, was within the jurisdiction of the alleged lienor's residence. The order for the repairs was made under no coercion of circumstances, either in the selection of the person who was to do the work or otherwise; and the person undertaking the repairs obviously was not aware that the Manhattan Company was other than a resident of the state of New York at the time of the making of the contract, and certainly not upon the trial, for he testified that he "knew that the Manhattan Steamship Company was a corporation of New York"; at least he gives no evidence that he was aware that it was a foreign corporation at the time the engagement was made. If a person undertaking repairs did not know at the time the contract was made that the owner of the vessel was a nonresident, he could not have either known or believed at such time that he was entitled to a lien for such repairs. If one of the navigation companies—for instance, the Cunard Company—having a principal place of business in the city of New York should order repairs upon one of its vessels at the port of New York, and there was nothing more than that, upon what theory could it be contended that the repairer was entitled to a maritime lien? It is upon the ground that the burden of showing a lien is upon the libellant, and that it has not discharged its duty in this regard, although it has otherwise brought itself within the rule permitting a lien, that a decree dismissing the libel must be entered.

MAGDALA S. S. CO. v. H. BAARS CO.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 134.

1. CHARTER PARTY—STRANDING—NEGLIGENCE OF OWNER—GENERAL AVERAGE.

A ship in good condition, and in every way fit for the proposed voyage, started from Pensacola with a cargo of timber. She drew 23 feet, 6 inches less than her full laden draft. When she reached the bar 9 miles below Pensacola the water was 24 feet deep. The channel was narrow and tortuous,—shaped like the letter "S." A cross current struck her. She was near the bottom, did not follow the helm, and grounded. Similar accidents often happened at the same place, and were not preventable. *Held*, that the stranding was not caused by negligence of owner or unseaworthiness of ship, so as to relieve the owner of the cargo from liability, under a general average adjustment, for proportion of expenses incurred in getting the vessel afloat.

2. SAME—REASONABLENESS OF EXPENSES.

A vessel was stranded in an exposed position at 7 p. m., and the captain engaged two tugs, which unsuccessfully pulled upon the ship until midnight; and the next morning he made a contract, dependent upon success, with a tugboat syndicate to get the vessel off for \$3,000. Five tugboats then pulled ineffectually at intervals till midnight. The next morning the captain engaged lighters, and the deck load was taken off, and the same day the vessel was pulled from the bar. She was reloaded, and proceeded on her voyage. *Held*, that the employment of tugs and lighters was necessary, and that the expenses incurred by the captain were not unreasonable, so as to relieve the owner of the cargo from liability, under a general average adjustment, for its proportion of the expenses.

Appeal from the District Court of the United States for the Southern District of New York.

The libellant, a corporation, and owner of the steamship *Magdala*, brought a libel in the district court for the Southern district of New York against the defendant, also a corporation, and the charterer of the steamship, to recover its proportion, in accordance with a general average adjustment, of the expenses incurred by the vessel in getting her afloat after she had been grounded upon the bar nine miles below Pensacola. A decree for the amount as adjusted was entered. The respondent appealed to this court.

Lawrence Kneeland, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The charter party provided that damages caused by stranding, even when occasioned by the pilot or master, not resulting from want of due diligence by the owners of the ship, should always be excepted, and that general average was to be in accordance with the York-Antwerp rules. The defenses were that the *Magdala* was unseaworthy; that her owners failed to exercise due diligence, in that she was loaded too deeply to cross the bar in safety; and that the stranding was caused by the negligence of the persons in charge of the navigation. The sums paid for expenses

were alleged to be unreasonable in amount. We agree with the conclusions of the district court that there was no adequate evidence to justify a finding that negligence in the navigation of the steamship was the cause of the stranding, or a finding of any unseaworthiness, and that the expenses were not unreasonable. The Magdala, a new ship, of about 2,300 tons net register, in good condition, and in every way fit for the proposed voyage, took on board at Pensacola a cargo of pine timber and plank for voyage to Rio de Janeiro, and got under way in the afternoon of December 1, 1895. She was under her own steam and had a tugboat ahead to assist her, and drew 23 feet, 6 inches less than her full laden draft. The water on the bar when the Magdala reached it was 24 feet. The existing channel at that point was narrow and tortuous,—shaped like the letter "S." When the vessel reached the bar a cross current struck her. She was near the bottom, did not follow the helm, and grounded about 7:30 in the evening. This accident often happened at the same place from the same cause, and was not preventable. The captain engaged two additional tugs, which unsuccessfully pulled upon the ship until midnight. On the next morning he made a contract, dependent upon success, with a tugboat syndicate to get the vessel off for \$3,000. Five tugboats then pulled ineffectually at intervals during the day till midnight. It was apparent that the vessel must be relieved of a part of her cargo, and on the next morning, December 3d, the captain properly engaged lighters to take off the deck load, which was done; and at 10 p. m. of the same day the vessel was pulled from the bar, and went outside in the early morning of December 4th. She was reloaded on that day, and on December 5th proceeded on her voyage, as soon as a survey had been taken. The employment of tugs and lighters was necessary, for the ship lay in an exposed position; and had the wind increased, and bad weather occurred, the vessel and cargo would have been injured, and the deck cargo might have been lost. The contracts which the captain made were reasonable in their character,—neither corruptly, recklessly, nor fraudulently entered into. The total value of the property at risk is stated in the adjustment at £34,920, of which the value of the ship was £28,850. The rules in regard to salvage contracts upon which the courts of this country act have been recently carefully and thoroughly stated in *The Elfrida*, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413, and it is unnecessary to enlarge upon this branch of the subject. The decree of the district court is affirmed, with costs.

BETANCOURT v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, S. D. New York. May 7, 1900.)

COURTS—JURISDICTION—ACTION BY CITIZEN OF CUBA AGAINST A DOMESTIC CORPORATION.

Congress having declared by resolution that the people of the Island of Cuba "are and of right ought to be free and independent," and the status of the island in this regard not having been changed by the treaty with Spain of December 10, 1898, a citizen of Cuba is a citizen of a foreign state, within the act of congress of 1887 giving the circuit court of the United States jurisdiction of controversies "between citizens of a state and foreign states, citizens or subjects."

Motion for Judgment upon Demurrer as Frivolous.

Arthur J. Baldwin, for the motion.

W. T. B. Milliken, opposed.

LACOMBE, Circuit Judge. The action is upon an insurance policy, and is brought in the federal court by reason of diversity of citizenship. The act of 1887 gives the circuit court jurisdiction of a controversy "between citizens of a state and foreign states, citizens or subjects." The complaint avers that the defendant is a domestic corporation organized under, and existing by virtue of, the laws of the state of New York, and having its principal office in the city of New York. This is a sufficient averment that the defendant is a "citizen of a state," to wit, New York. The complaint further alleges that the plaintiff is, and at all the times hereinafter mentioned has been, a resident and inhabitant of the city of Matanzas, in the Island of Cuba, and a subject and citizen of Cuba. The demurrer asserts that the court has no jurisdiction of the subject of the action, and that the complaint does not state facts sufficient to constitute a cause of action. Upon the hearing no argument was made or proposition advanced in support of the second ground of demurrer. The entire reliance of the demurrant appears to be upon the proposition that there is not the diversity of citizenship which the statute requires, by reason of the fact that the plaintiff is a citizen of Cuba. Counsel does not maintain that plaintiff was not a foreign citizen before the breaking out of the war with Spain, nor that he ceased to be a foreign citizen when the joint resolution of April 20, 1898, was passed, declaring that the people of the Island of Cuba "are and of right ought to be free and independent," nor that the military occupation of Cuba by the forces of the United States in any way changed his status. It is contended, however, that in some way or other the treaty with Spain of December 10, 1898, did, from the date of its ratification, remove him from the category of "foreign citizens or subjects." By the first article of the treaty, Spain relinquishes all claim of sovereignty over and title to Cuba, and as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property. The fourteenth article further states that it is understood that any obligations assumed in this treaty

by the United States with respect to Cuba are limited to the time of its occupancy thereof. The ninth article provides for Spanish subjects, natives of the peninsula, who remain in the territory covered by the treaty. If they make a certain declaration within a limited time, they may preserve their allegiance to the crown of Spain, and in default of such declaration they are to be held to have renounced such allegiance, and to have adopted "the nationality of the territory in which they may reside." There is certainly nothing in all this which lends any color to the proposition that the plaintiff is not a foreign citizen. Even the brief memorandum of opinion in *Stuart v. City of Easton*, 156 U. S. 46, 15 Sup. Ct. 268, 39 L. Ed. 341, gives no support to demurrant's contention. One may be puzzled to determine upon what theory it was held in that case that a "citizen of London, England," is not a "foreign citizen"; but assuming, as suggested, that it is because London is not a free and independent community, but owes allegiance to the British crown, the decision has no application to the case at bar, since the political branch of this government has found, as a political fact, that the people of the Island of Cuba "are free and independent." The demurrer is therefore overruled, and plaintiff may take judgment, unless defendant file an answer within 10 days after the entry of the order disposing of this motion.

INTERNATIONAL TOOTH-CROWN CO. v. HANKS' DENTAL ASS'N.

(Circuit Court, S. D. New York. May 1, 1900.)

FEDERAL COURTS—ADOPTION OF STATE PRACTICE.

Act March 9, 1892, authorizes federal courts to avail of all modes of taking testimony prescribed by the laws of the state in which they sit.¹

On Motion to Require Witness to Answer Questions.

This is an action at law for the infringement of a patent. Pursuant to section 870 et seq. of the Code of Civil Procedure of the state of New York, plaintiff procured an order directing the examination of the defendant's officers before trial, and the production at the examination of such books and papers as related to the issues of the action. The order also directed such examination to be held before a master of the court, who was named therein. The president of the defendant, Dr. Edmund F. Hanks, appeared before the master, in obedience to a master's summons duly served upon him, and also produced the books and papers mentioned in the said order. At the hearing the witness Hanks refused to answer questions asked by plaintiff's counsel, acting under the advice of his counsel, on the ground that such examination was illegal, unauthorized, and beyond the power of the master or the jurisdiction of this court or the judge granting the order for such examination. Upon the record, a motion was made to require the witness to answer.

Walter D. Edmonds, for the motion.

C. K. Offield, opposed.

LACOMBE, Circuit Judge (after stating the facts). Ever since the passage of the act of March 9, 1892, it has been uniformly construed

¹ As to conformity of federal practice, pleading, and procedure to that of the state courts, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Griffin v. Wheel Co.*, 9 C. C. A. 548; and *Insurance Co. v. Hall*, 27 C. C. A. 392.

in this court as providing additional modes for taking testimony, so as to enable the federal courts to avail of all modes prescribed by the laws of the different states and adapted to the several communities where the courts sit. It is supplementary to section 914, Rev. St. U. S., securing a uniformity in the mode of taking proof, which that section was no doubt intended to secure, but which it failed to secure under the interpretation of the supreme court in *Ex parte Fisk*, 113 U. S. 724, 5 Sup. Ct. 724, 28 L. Ed. 1117. I do not find in *Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 505, sufficient reason for reversing former decisions of this court, nor for declining to avail of any mode of taking proof which the state laws provide. The practice of examination before trial under the New York practice is a most wholesome one. It tends to simplification of the trial, and frequently leads to settlement out of court. The examination should proceed.

PLANT v. HARRISON et al.

(Circuit Court, S. D. New York. February 3, 1900.)

1. JURISDICTION OF FEDERAL COURTS—SUIT TO ESTABLISH WILL.

Whether a federal court has original jurisdiction to entertain a suit in which it is sought to establish a certain document as a will, *quære*.¹

2. REMOVAL OF CAUSES—REMAND.

Where doubt exists as to the jurisdiction of a federal court to entertain a suit removed from a state court, it will be remanded.

On Motion to Remand to State Court.

John E. Parsons and William D. Guthrie, for the motion.

Louis Cass Ledyard and Maxwell Evarts, opposed.

LACOMBE, Circuit Judge. Under the Acts of 1887 and 1888 there can be no removal where the controversy is not one of which the circuit court would have original jurisdiction. The suit or action now under consideration seeks, among other things, the establishment of a certain document as a will. Whether this court would have jurisdiction to entertain such a suit, and administer so much of the relief prayed for, seems to be a question not altogether free from doubt upon the authorities. Where doubt exists, the practice in this district is to remand. *Farmers' Loan & Trust Co. v. Hoffman House* (Jan. 16, 1894, unreported), where the opinion of Judge Caldwell in *Fitzgerald v. Railway Co.* (C. C.) 45 Fed. 812, was concurred in and followed. The motion to remand is granted.

¹As to probate jurisdiction of federal court, see note to *Bedford Quarries Co. v. Thomlinson*, 38 C. C. A. 276.

TURNER et al. v. SOUTHERN HOME BUILDING & LOAN ASS'N

(Circuit Court of Appeals, Fifth Circuit. April 16, 1900.)

No. 886.

1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

The bond given by a borrowing stockholder in a building and loan association was conditioned for the payment by such borrower of monthly installments of dues on his stock, and premium and interest on the loan of \$2,000; and the mortgage securing the loan provided for the sale of the mortgaged property in case of default, and the application of the proceeds, after paying costs and attorney's fees, to the payment of the principal of the loan, with all interest and arrears thereon, together with the monthly dues upon the stock, and the unpaid premiums on the same. *Held*, that in a suit brought by the association to foreclose the mortgage, at a time when the stock dues in arrears amounted to over \$200, the amount in dispute exceeded \$2,000, exclusive of interest and costs, and was sufficient to give a federal court jurisdiction. There being no requirement in the contract that on such foreclosure the borrower should surrender his stock, the fact that in his answer he asked that this be done, as permitted by the by-laws, and the value of the stock credited on his loan, by which the amount remaining due was reduced below \$2,000, could not affect the jurisdiction of the court.¹

2. EQUITY PLEADING—GRANTING AFFIRMATIVE RELIEF TO DEFENDANT.

In a suit by a building and loan association to foreclose a mortgage given by a borrowing stockholder, in which the bill did not ask an accounting between the parties, nor seek to terminate the relationship of defendant as a stockholder, such accounting and the cancellation of defendant's stock can properly be decreed only where a cross bill praying such relief is filed and regularly served by the defendant.

3. PARTIES—SUIT TO FORECLOSE MORTGAGE GIVEN BY DECEDENT.

To a suit for the foreclosure of a mortgage given to a building and loan association by a borrowing stockholder, since deceased, and in which it is sought to cancel the stock of such deceased stockholder and adjust the equities between him and the association, his heirs and legal representatives are necessary parties.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

The appellee, the Southern Home Building & Loan Association, filed its bill in the circuit court on the 14th day of October, 1898, against the appellants, B. D. Turner and his wife, Emily R. Turner, and S. C. Paine, a feme sole, to recover an indebtedness which was secured by a deed of trust executed by the appellants and C. F. Paine, and for foreclosure of the trust deed. The material allegations of the bill are the following: "(2) Thereupon your orator complains and says that, to wit, on the 2d day of March, 1891, defendant B. D. Turner and one C. F. Paine executed and delivered to your orator their certain obligation in writing, called a 'bond,' in the sum of \$2,000, bearing said last-named date, wherein and whereby the said Paine and said Turner severally promised to pay your orator the sum of \$2,000 on the maturity of twenty shares of the capital stock in plaintiff company, subscribed for prior to said time by said Paine and Turner, to be paid for, by the terms of the certificate evidencing said stock, and also by the terms of said bond, in monthly installments of \$12 each and every month from the date thereof; also, said Paine and Turner, by the terms of said bond, severally promised to pay your orator, as interest on said bond, the sum of \$10 per month, and the further sum of \$10 as premium on said bond, and

¹As to jurisdiction of circuit court, as determined by amount in controversy, see note to *Auer v. Lombard*, 19 O. C. A. 75, and, supplementary thereto, note to *Shoe Co. v. Roper*, 36 C. C. A. 459.

said installments of interest and premium were to be paid monthly each and every month from and after the date of said obligation until the same were fully paid. (3) That on said date, to wit, the 2d day of March, 1891, said defendants, B. D. Turner and his wife, Emily R. Turner, the said C. F. Paine and his wife, S. C. Paine, for the purpose of securing said sums of money specified in said bond, according to its tenor and effect, also executed and delivered to your orator their certain deed of trust in writing, bearing said date, wherein and whereby they conveyed to Samuel S. Atkinson, as trustee for your orator, as collateral security as aforesaid, the following described premises, situated and being in the town of Comanche, county of Comanche, state of Texas, to wit: Thirty-three feet off the east end of lots one (1), two (2), and three (3) in block six (6) in the town of Comanche, in said county and state. * * * That said deed of trust also contains the same provisions as said bond in regard to the payment of the moneys specified in said bond according to the legal tenor and effect thereof; also, in regard to the payment of the dues on said stock; also, said deed of trust provides, in case of foreclosure of the same, then in such event the makers of said bond should pay your orator a reasonable attorney's fee. (4) That after the execution of said bond and deed of trust as aforesaid on, to wit, the — day of —, 1894, the said C. F. Paine died. (5) It is especially provided in said deed of trust that if said C. F. Paine and B. D. Turner should fail or neglect for the space of three months to fulfill, keep, and comply with the conditions, provisions, and agreements, or any part thereof, contained in said bond and deed of trust, according to their said terms, tenor, and effect, then said bond should mature at once, and your orator should proceed to sell said property, as required by the terms of said deed of trust, for the satisfaction of the moneys specified in said bond and the monthly dues upon said stock; also, a reasonable sum for the attorney's fees for foreclosing said deed of trust. That the makers of said obligation and deed of trust have wholly failed to pay any installment of interest or premium on said bond or stock dues upon said stock since the 1st day of May, 1897, and by reason of the premises said bond has long since become due and payable, and said defendant B. D. Turner became liable and promised to pay your orator the principal sum of said bond, to wit, the sum of \$2,000, together with reasonable attorney's fees for foreclosing said deed of trust, which your orator alleges to be \$200; also, interest and premium on said bond from said 1st day of May, 1897; also, the monthly dues on said stock from the 1st day of May, 1897, at the rate of \$12 for each and every month from said dates, in accordance with the provisions of said bond and deed of trust, now amounting to the sum of, to wit, \$204; but to pay the same, or any part thereof, said defendant has wholly refused. (6) Your orator therefore prays that the said defendants may be compelled to answer, all and singular, the premises in this bill, but not under oath; answering under oath being hereby expressly waived. Your orator further prays that a writ of subpoena may issue in due form of law, directed to the aforesaid defendants, B. D. Turner, Emily R. Turner, and S. C. Paine, all of whom reside in the town of Comanche, county of Comanche, state of Texas, requiring them, and each of them, to appear and to answer, all and singular, the premises in said bill as aforesaid. Your orator further prays upon final hearing hereof for a decree for its debts, interests, premiums, attorney's fees, stock dues, and costs, and that its said lien be established upon said premises, and be declared superior to the claim of any and all of said defendants, and the same be foreclosed against each and every one of said defendants, and said premises be ordered sold, and the proceeds thereof applied to the satisfaction of said decree, and for a writ of assistance to place the purchaser of said premises at such sale in possession thereof, and for all general and equitable relief."

In the answer of the defendants, filed January 7, 1899, they first object to the jurisdiction of the court, for the following reasons: "(1) That the matter in controversy, as alleged in the plaintiff's petition, is exclusive of interest, and, after deducting all payments and offsets, less than the sum of two thousand dollars, and the same is not cognizable by this court, and that the plaintiff has falsely and fraudulently alleged the matter in controversy to

amount to more than the sum of two thousand dollars, as mentioned in his said petition, for the purpose of giving this court jurisdiction, and this they are ready to verify. Wherefore they pray judgment whether this court can or will take further cognizance of this suit."

On behalf of the defendant S. C. Paine it is next averred: "(2) That she, before and at the time of the making of the said several supposed bond and deed of trust mentioned in plaintiff's petition, was, as alleged in the plaintiff's petition, the wife of the said C. F. Paine, and was then under the disability of coverture, and not liable for said debt or any part thereof; and this she is ready to verify."

In the third clause of the answer the defendants deny that the bond and deed of trust as set forth in the bill of complaint were executed by them, and the answer thereafter proceeds as follows: "But these defendants aver and say that the real transaction between the plaintiff and said B. D. Turner and C. F. Paine was as follows: That the said B. D. Turner and said C. F. Paine on the 1st day of March, 1890, subscribed for twenty shares of the capital stock of the plaintiff's association, for \$100 each, upon which the said Turner and Paine were to pay the plaintiff sixty cents per share per month until said stock should mature, and that the by-laws, rules, and regulations of the plaintiff association provided that its 'stock matures when the payments made upon it and the quarterly dividends amount to the par value of \$100 per share,' and it was then estimated by the plaintiff that said stock should mature 'in seven years, or less time, allowing the association to make only an ordinary profit.' That in pursuance thereof the said Turner and Paine paid to the plaintiff thereafter monthly in advance the sum of \$12 for thirteen successive months, amounting in the aggregate to the sum of \$156, and being the monthly payments due on said stock up to the 2d day of March, 1891. That on said 2d day of March, 1891, plaintiff advanced to the said Turner and Paine on said twenty shares of stock the sum of \$2,000, to bear interest at the rate of six per cent. per annum, payable monthly, and secured by pledge and delivery of the said twenty shares of stock by said Turner and Paine to the plaintiff; said sum of \$2,000 to be paid off and discharged at the maturity of said stock by the surrender of said twenty shares of stock by the said Turner and Paine to the plaintiff, and by a cancellation thereof by the plaintiff. These defendants aver that from and after the said 2d day of March, 1891, to the 1st day of May, 1897, inclusive, there was paid by the said Turner and the said Paine to the plaintiff the following sums of money, to wit: The sum of \$888 on said stock dues, which, together with the said \$156, aggregated the sum of \$1,044 on said stock dues, and the sum of \$750 interest, being the interest due on said advance of \$2,000 from the said 2d day of March, 1891, to the 1st day of May, 1897, inclusive; and the said Turner and the said Paine also paid to the plaintiff monthly payments of \$10 each, amounting in the aggregate to the sum of \$750, which was paid to the plaintiff and received by it on said advance of \$2,000. * * * The defendants aver and charge that the said twenty shares of stock so owned by the said Turner and Paine, and now in the possession of the plaintiff as a pledge for the advance of said two thousand dollars, has been and is matured, and that said Turner and the estate of the said C. F. Paine is entitled to a credit of two thousand dollars in money due from said association, which, by the terms of the said agreement so entered into between the plaintiff and said Paine as aforesaid, should be applied to the payment of the said sum of two thousand dollars so advanced by the plaintiff to the said Turner and Paine, which sum, together with the payments made by said Turner and Paine, and which was to be credited on said sum of two thousand dollars so advanced, is sufficient to pay off and discharge said sum of two thousand dollars, and will leave a large sum of money in the hands of the plaintiff, to which, in equity and good conscience, the defendant Turner and the said Paine are justly entitled. These defendants further aver and say that it is provided in the by-laws, rules, and regulations of said association that 'members may withdraw from the association at any time after one year from date of subscription, by giving sixty days' notice, and shall be entitled to receive the money paid into the loan fund, with not less than six per cent. interest for the average time.' And

It is provided, also, that the loan fund referred to in said by-laws 'consists of fifty cents per share per month, and all interest, fines, premiums, and profits of all kinds, and no part of this fund can be used for expenses of any kind whatever unless taxes have to be paid thereon.' And the defendants say that if said stock has not in fact matured, and if any part of said sum of two thousand dollars so advanced has not been paid off, they now here give notice to the plaintiff of the desire and intention of the defendant Turner and estate of said Paine to withdraw from said association, and to apply the amount of the withdrawal to which they are entitled under the said provisions of the by-laws and rules and regulations of said association to the payment of the said advance of two thousand dollars, and any interest or other moneys justly due from the defendants to the plaintiff; and these defendants offer to account with the plaintiff concerning said matters, and to do and perform such things as in good conscience and equity should be done, and to do and perform all things required of them by this honorable court. And they pray that the court shall order and direct an accounting with, by, and between the plaintiff and defendants, and that by its decree these defendants may be fully protected in all of their just rights and equities, and for such other and further relief as may seem to the court fit and proper, the premises considered."

The record discloses that on the 1st day of March, 1890, the appellant B. D. Turner and C. F. Paine, respectively, became the owners of 10 shares of stock, each for the sum of \$100, in the Southern Home Building & Loan Association, and separate certificates were duly issued to them to that effect by the treasurer of the association. Thereafter Turner and Paine applied to the appellee for a loan of \$2,000. The loan was made, and to secure its payment a bond and deed of trust were executed on the 2d day of March, 1891,—the former by B. D. Turner and C. F. Paine, and the latter by them and their wives, Emily R. Turner and S. C. Paine. The 20 shares of stock were also transferred to the appellee to further secure the payment of the money borrowed. The deed of trust, of which the bond forms a part, is in the following form, irrelevant portions being pretermitted:

"Whereas the said C. F. Paine and B. D. Turner, parties of the first part, have made and entered into on this day a certain obligation or bond in writing, which is in words and figures as follows:

"State of Texas, County of Comanche.

"Know all men by these presents that we, C. F. Paine and B. D. Turner, of said state and county, am held and firmly bound unto the Southern Home Building and Loan Association of Atlanta, Georgia, and its assigns, in the just and full sum of four thousand (\$4,000.00) dollars, for the just and full payment of which I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated the 2nd day of March, one thousand eight hundred and ninety-one. The condition of the above obligation is such that whereas we, the said C. F. Paine and B. D. Turner, have this day procured an advance of two thousand (\$2,000.00) dollars on twenty (20) shares of stock, which I hold in said association, from the Southern Home Building and Loan Association of Atlanta, Georgia, under the by-laws, rules, and regulations thereof: Now, should we, the said C. F. Paine and B. D. Turner, or any one for us, well and truly pay to the said association, so long as it shall continue to exist, or as may be provided in its by-laws, rules, and regulations, the sum of twelve (\$12.00) dollars monthly on the last day of each month (being installments due on said stock, on which an advance was procured as aforesaid), and the further sum of ten (\$10.00) dollars monthly as aforesaid, on the same day, as interest on said advance, and the further sum of ten (\$10.00) dollars as premium or redemption money on said advance, and keep the buildings on the property given to secure advance insured to the amount of ——— dollars for the benefit of said association, and pay all taxes and assessments against the same at maturity thereof, and comply with, all and singular, the requirements of said by-laws, rules, and regulations, then this obligation to be void; otherwise, of full effect.

C. F. Paine. [L. S.]

"B. D. Turner. [L. S.]

"Now, if the conditions, provisions, and agreements contained in said bond or obligation shall be well and truly fulfilled, kept, and complied with according to the terms, tenor, and effect thereof, then this deed shall be null and void. But should the said C. F. Paine and B. D. Turner, parties of the first part, fail or neglect for the space of three months to fulfill, keep, and comply with the conditions, provisions, and agreements, or any part thereof, according to its said terms, tenor, and effect, then this deed shall remain in full force, and the said party of the second part, or in case of his death, or absence from the state, or refusal or inability to act, the sheriff of Comanche county for the time being, may proceed to sell the property hereinbefore described at public vendue, at the court-house door of said county, for cash, * * * and out of the proceeds of such sale, first, the costs and expenses connected with the execution of this trust shall be paid, the same to include a reasonable sum for attorneys' fees, and next the amount of the principal debt secured hereby, with all interest and arrears thereon, together with the monthly dues upon said stock, and the unpaid premiums upon the same, and all assessments and fines remaining due and unpaid upon said shares of stock of said association, and also all sums of money paid by said association for taxes, repairs, and insurance premiums, and interest thereon, and all other sums of money intended to be secured hereby shall be paid, and the residue, if any, shall be paid to the said parties of the first part, or his legal representatives."

The cause came on for hearing upon the pleadings (consisting of the bill, answer, and replication) and proofs. The following final decree resulted: "The court is of the opinion that said loan obligation became due prior to the institution of this suit, by the reason of the failure of the respondents to pay the monthly installments of interest and premium specified therein, and the monthly installments due on the certificates of stock, as specified in said loan obligation and in the deed of trust sued upon; that the two stock certificates, for ten shares each, of the capital stock in complainant association, bearing date the 1st day of March, 1890, and evidenced by certificates Nos. 4,589 and 4,590, respectively, and issued to the said B. D. Turner and C. F. Paine, deceased, ought to be, and the same are hereby, canceled and held for naught, and that the withdrawal value thereof, to wit, \$1,351.80, be allowed as a credit on the said indebtedness of respondent B. D. Turner, evidenced by the contracts sued upon; and after allowing such credit the court finds there is justly due the complainant the sum of \$1,307, the same being the principal sum of \$2,000, with interest thereon at the rate of 12 per cent. per annum, from the 1st day of March, 1897, to this day, after deducting therefrom the said stock credit of \$1,351.80, leaving the sum of \$1,180.20, balance due, and adding thereto the sum of \$118.20, being ten per centum attorneys' fees on said balance. It is therefore ordered, adjudged, and decreed by the court that the complainant, the Southern Home Building and Loan Association of Atlanta, Georgia, a corporation, do have and recover of and from the respondent B. D. Turner the said sum of \$1,307.00, with interest thereon from date at the rate of 6% per annum, and all costs of suit. It is further ordered and decreed by the court that complainant's deed of trust lien, executed by all of said three respondents and by C. F. Paine, deceased, the former husband of S. C. Paine, on, to wit, the 2d day of March, 1891, to secure said obligation on the following piece or parcel of land, situated in the town of Comanche and county of Comanche, state of Texas, * * * be, and the same is hereby, foreclosed, as against any interest, right, or claim in and to said property of any and all of said respondents herein." After ordering a sale of the property, the decree concludes: "And upon confirmation of such sale by this court the proceeds of such sale shall be applied first to the satisfaction of the decree herein rendered, interest and costs, in favor of complainant, as aforesaid, and, if there is a balance over after the satisfaction of said decree, the same shall be paid to the respondents B. D. Turner and S. C. Paine, the surviving widow of the said C. F. Paine, deceased; and, if such property shall fail to sell for sufficient to pay off said decree, then it is ordered that after the confirmation of such sale an execution shall issue against said B. D. Turner for the balance due complainant on said decree. And after confirmation of such sale the said commissioner shall convey said property by warranty deed to the purchaser

thereof, and such purchaser shall have his writ of assistance at once to gain possession thereof."

From the decree thus rendered, B. D. Turner, Emily R. Turner, and S. C. Paine have appealed.

A. M. Carter, for appellants.

L. A. Smith and Drew Pruitt, for appellees.

Before PARDEE, Circuit Judge, and NEWMAN and MAXEY, District Judges.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

The first point to be considered is the error assigned which challenges the jurisdiction of the circuit court on the ground that the amount in dispute does not exceed, exclusive of interest and costs, the sum of \$2,000. By the act of August 13, 1888, it is provided "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid" (that is, \$2,000). 25 Stat. 434, § 1. "By the matter in dispute," it was said by the supreme court in *Lee v. Watson*, 1 Wall. 339, 17 L. Ed. 558, "is meant the subject of litigation,—the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called and witnesses examined. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered." *Gray v. Blanchard*, 97 U. S. 564, 24 L. Ed. 1108; *Schacker v. Insurance Co.*, 93 U. S. 241, 23 L. Ed. 862. In the present case suit was brought to recover, in addition to interest and costs, the sum of \$2,000, as the principal of the loan advanced; \$204, as stock dues; and \$200, as attorney's fees. The \$2,000 advanced by the appellee to the appellant B. D. Turner and C. F. Paine, deceased, on their 20 shares of stock, was evidenced by a bond executed by Turner and Paine, by the terms of which they agreed to pay to the appellee, so long as it should continue to exist, or as might be provided in its by-laws, rules, and regulations, the sum of \$12 monthly as installments on the stock, and the further sum of \$10 monthly as interest on the advance of the principal sum, and the additional sum of \$10 as premium or redemption money on the advance. And they further agreed to comply with all the requirements of the by-laws, rules, and regulations of the appellee. The deed of trust, which was executed by Turner and Paine and their wives to further secure the appellee in the ultimate payment of the money loaned, provided for a sale by the trustee of the property mortgaged, in the event that Turner and Paine should fail or neglect for the space of three months to fulfill, keep, and comply with the conditions, provisions, and agreements, or any part thereof, contained in the bond. The proceeds of

the sale were directed by the trust deed to be distributed as follows: First, to the payment of the costs and expenses connected with the execution of the trust, including a reasonable attorney's fee; and, second, to the payment of the amount of the principal debt, with all interest and arrears thereon, together with the monthly dues upon the stock, and the unpaid premiums upon the same, etc.; and the residue was directed to be paid to Turner and Paine, or their legal representatives. The bill of complaint alleged that Turner and Paine had failed to pay any installment of interest or premium on the bond, or stock dues upon the stock, since the 1st day of May, 1897, and that therefore the bond had become due and payable. It is, however, insisted by the appellants that it was only in the event of a sale by the trustee that the principal sum matured. We think this contention cannot be sustained. By the terms of the deed of trust, as already explained, the trustee was authorized to sell the property, and apply the proceeds of the sale to the payment of the principal debt, the unpaid interest, premiums, and stock dues, in the event that the obligors in the bond should fail or neglect for the space of three months to comply with the conditions of the bond. That the parties did fail to comply with the conditions of their bond, and that such failure had continued for a much longer period than three months when the appellee filed its bill, is clearly shown by the testimony. The loan of \$2,000 thus became due, and that sum, added to the \$204 due on stock installments which was recoverable by suit (End. Bldg. Ass'ns, § 451), exceeded the jurisdictional amount, and it rested with the appellee to say whether, in order to enforce the payment of its claim, it would proceed summarily to sell the property, or invoke the aid of a court of equity. *Morrison v. Bean*, 15 Tex. 267; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116; 2 *Jones, Mortg.* § 1443. In computing the amount in dispute between the parties, it is not material to consider the item of attorney's fees (*Fowler v. Trust Co.*, 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786), as the aggregate of the other two items is sufficient for jurisdictional purposes.

It is further insisted by the appellants that, although the \$2,000 advanced should be regarded as due upon the failure to pay the monthly installments as they matured, still the amount in controversy, after deducting credits due them as shown by the decree and by the appellee's own evidence, is only \$1,307. It is true that, upon a consideration of the entire case, the court decreed the sum of \$1,307 to be due to the appellee; but it must be borne in mind that it is the amount in dispute between the parties, and not the amount ultimately adjudged to the plaintiff, that determines the question of jurisdiction. The appellant sought by its bill simply to enforce the payment of a claim which it alleged was due by Turner and Paine as borrowing stockholders. It was not the purpose of the bill to affect their status or relationship to the association as investing stockholders. If the appellants desired to withdraw their

stock, and cancel the certificates issued to them as investing stockholders, and thus obtain credit for moneys paid into the loan fund, it could only be done by complying with the by-laws of the association. *Andruss v. Association*, 36 C. C. A. 336, 94 Fed. 575; *Loan Co. v. Everheart* (Tex. Civ. App.) 44 S. W. 885; *Synnott v. Association* (C. C.) 89 Fed. 292. Article 3 of the by-laws permits a non-borrowing member to withdraw his stock upon 60 days' notice, except in case of the death of a member, whose personal representatives may withdraw his shares at any time. But by the same article the withdrawal of shares upon which loans have been made is prohibited unless the loan has been paid. Turner and Paine had the unquestioned right to pay off the loan and withdraw their stock,—a right of which they failed to avail themselves. But, to authorize a withdrawal of stock in any case, the notice required by the by-laws was a prerequisite; and the first notice, so far as the record discloses, of any intention on the part of the parties to withdraw their stock and terminate their relations with the association, was given in the answer of the appellants. Up to that time the amount for which a recovery was sought by the appellee appeared to be due, and whether the appellants would seek to put an end to their relationship as stockholders, by praying for an accounting and by the withdrawal of their stock, was purely defensive matter, which the appellee will not be presumed to have anticipated when its bill was filed. Hence the amount sought to be recovered by the appellee was the matter in dispute between the parties, of which the court had jurisdiction,—i. e. the right to hear and determine,—regardless of a defense which may have been subsequently interposed by the appellants. In *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 505, 13 Sup. Ct. 417, 37 L. Ed. 258, it was said:

"In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court? We do not mean that a claim evidently fictitious, and alleged simply to create a jurisdictional amount, is sufficient to give jurisdiction."

See, also, *Association v. Price*, 169 U. S. 45, 18 Sup. Ct. 251, 42 L. Ed. 655; *Pickham v. Manufacturing Co.*, 23 C. C. A. 391, 77 Fed. 663; *Association v. Cunningham*, 92 Tex. 155, 47 S. W. 714.

There is nothing in the record to disclose that the claim of the appellee is fictitious, nor that it was alleged to create a jurisdictional amount, and we are of opinion that the circuit court had jurisdiction of the suit.

The appellants also assign errors affecting the merits of the controversy, which we are not disposed to consider upon the present appeal, as, in the view we take of the case, the decree must be reversed for the want of necessary parties to the suit. It may be also observed that the bill of complaint was not framed with the view of terminating the relationship of the appellants as stockholders in the association, nor did the prayer for relief either seek or justify an adjustment of the equities and an accounting between the parties. Yet such was the effect of the decree, notwithstanding the

absence of a cross bill, one of the principal offices of which is to obtain full and complete relief to all parties as to the matters charged in the original bill. *Ayres v. Carver*, 17 How. 592, 15 L. Ed. 179. Affirmative relief sought by a defendant in an equity suit should be by cross bill, and is not grantable upon facts stated in the answer. "The rule appears to be well established," said Presiding Judge Pardee, speaking for the court, in *Wood v. Collins*, 8 C. C. A. 525, 60 Fed. 142, "that, in order to entitle a defendant in equity to affirmative relief, he should file a cross bill, which should be regularly served, put at issue, and heard as an original bill." *Railroad Co. v. Bradleys*, 10 Wall. 299, 19 L. Ed. 894; *Hill v. Grocery Co.*, 24 C. C. A. 624, 78 Fed. 21, and authorities cited. Hence it would seem that in this case a cross bill would be eminently proper, if not necessary, to enable the parties to obtain complete relief.

In reference to the question of parties, it is disclosed by the record that C. F. Paine was one of the obligors in the bond upon which the suit was brought; that he owned 10 shares of stock in the association, for which a certificate had been issued to him; and that he was one of the grantors in the deed of trust. He died in 1894, and neither his heirs nor legal representatives were made parties to the suit; nor are any facts alleged, or otherwise shown by the record, which would dispense with the necessity of making them parties. The suit being in this condition, with the appellants only before it as defendants, the court adjusted the equities between the parties, adjudged upon an accounting, without the usual reference to a master, the sum of \$1,307 to be due to the appellee on the bond, canceled the certificate of stock issued to the deceased, Paine, and ordered a foreclosure of the deed of trust. In this we think manifest error was committed. *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634; *Hall v. Hall*, 11 Tex. 526; *Templeman v. Gresham*, 61 Tex. 50.

As the case must be reheard in the trial court, the propriety of making Atkinson, the trustee named in the deed of trust, a party to the suit, is suggested for the consideration of counsel. *Gardner v. Brown*, 21 Wall. 36, 22 L. Ed. 527; *Shipp v. Williams*, 10 C. C. A. 247, 62 Fed. 4; *Hammond v. Tarver* (Tex. Sup.) 34 S. W. 729; *Shelby v. Burtis*, 18 Tex. 645. The decree of the circuit court is reversed, and the cause remanded, with directions to proceed in conformity with the views above expressed. The costs of this appeal will be divided equally between the parties. Reversed and remanded.

UNITED STATES v. OREGON & C. R. CO. (eight cases).

(Circuit Court, D. Oregon. April 27, 1900.)

Nos. 2,272, 2,273, 2,388, 2,405, 2,422, 2,501, 2,560, 2,561.

1. PUBLIC LANDS—RAILROAD GRANTS—VESTING OF TITLE TO INDEMNITY LANDS.

Under the land grants to the Oregon & California Railroad Company of July 25, 1866 (14 Stat. 239), and May 4, 1870 (16 Stat. 94), the former of which contains a provision that "when any of said alternate sections or parts of sections [within the boundaries of the primary grant] shall be

found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated as aforesaid shall be selected by said companies in lieu thereof under the direction of the secretary of the interior," within certain limits, and the latter of which contains an equivalent provision, the title to all lands in the indemnity class, notwithstanding the fact that it required all such lands to make up the deficiency in the primary grant, remained in the United States, subject to disposition and to rights acquired by settlers under the homestead and pre-emption laws, until the fact of a deficiency in the primary grant had been ascertained, and the indemnity lands in lieu thereof selected, and such selections approved by the secretary.

2. SAME—ERRONEOUS ISSUANCE OF PATENTS—SUIT BY UNITED STATES FOR CANCELLATION.

Where the land department has issued patents to a railroad company for lands to which settlers had acquired a prior right under the homestead and pre-emption laws, the United States is under an obligation to convey the lands to the rightful claimants, which gives it the right to maintain a suit in equity for the cancellation of such patents.

In Equity. Suits for the cancellation of patents to lands.

John H. Hall, U. S. Dist. Atty.

Wm. D. Fenton and Wm. Singer, Jr. (Wm. F. Herrin, of counsel),
for defendant.

Thayer, St. Rayner & Schnabel, for homestead and pre-emption claimants.

BELLINGER, District Judge. These are suits to cancel patents issued by the United States to the defendant company, conveying the title to certain odd sections of land within the indemnity limits of the land grants made by congress to aid in the construction of the defendant's railroad from Portland to the southern boundary of Oregon, and of its road from Portland, on the west side of the Willamette river, to the town of McMinnville, in this state. The questions to be determined arise under two acts of congress granting the land to aid in the construction of said railroads,—one of July 25, 1866 (14 Stat. 239), known as the "East Side Grant," and the other of May 4, 1870 (16 Stat. 94), known as the "West Side Grant."

Section 2 of the act of July 25, 1866, provides:

"That there be, and hereby is, granted * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line, and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated as aforesaid shall be selected by said companies in lieu thereof, under the direction of the secretary of the interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections, and as soon as said companies, or either of them, shall file in the office of the secretary of the interior a map of the survey of said railroad or any portion thereof, not less than sixty continuous miles from either terminus, the secretary of the interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located, and within the limits before specified."

The act of May 4, 1870, after making grant of lands within the primary limits of the road, provides as follows:

"And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands des-

ignated as aforesaid, shall be selected under the direction of the secretary of the interior on either side of any part of said road nearest to and not more than 25 miles from the track of said road to make up such deficiency."

The suit is brought by the United States for the benefit of some 30 pre-emption and homestead claimants who settled upon the lands in question after the defendant's map of survey or definite location of its railroad was filed with and accepted by the secretary of the interior, and after the railroad had been constructed, and accepted by the United States, but before the company filed its lists of selections in the local land office. Those who had thus made settlement upon these lands were in actual occupation of the same at the time the defendant's selections thereof were filed and approved for patenting; and after such selections had been filed and approved for patenting by the land office, but within 90 days of the filing of the official plat of survey of the lands, the settlers applied to file pre-emption and homestead claims therefor. But, regardless of these claims, the government issued its patents to the railroad company. Some of these settlements were begun as early as 1853, and nearly one-half of the claimants have been in possession of their respective tracts more than 20 years. All have made improvements, the amount of which in some cases is of the agreed value of \$3,000.

There is a well established distinction between "granted lands" and "indemnity lands" in the construction of land grants in aid of railroads; and the principle is firmly established that the title to lands in the indemnity class does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the secretary of the interior, specifically for indemnity purposes. Until such time the title remains in the government, subject to its disposal at its pleasure. *Grinnell v. Railroad Co.*, 103 U. S. 739, 26 L. Ed. 456; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. 334, 28 L. Ed. 872; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794; *Railroad Co. v. Herring*, 110 U. S. 27, 3 Sup. Ct. 485, 28 L. Ed. 56; *Barney v. Railroad Co.*, 117 U. S. 228, 6 Sup. Ct. 654, 29 L. Ed. 858; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 6 Sup. Ct. 790, 29 L. Ed. 928; *U. S. v. Missouri, K. & T. Ry. Co.*, 141 U. S. 374, 12 Sup. Ct. 13, 35 L. Ed. 766. The defendant undertakes to distinguish this case from those cited, upon the authority of the case of *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, 35 L. Ed. 77. That was a case of contest between two railroad companies, and it was held that the exception in the grant to the Northern Pacific Railroad Company of all subsequent grants prior to the definite location of its road was not intended to cover other grants for the construction of roads of a similar character. And in that connection the court say there was no occasion for the exercise of the judgment of the secretary of the interior in selecting indemnity lands, as all the lands within the indemnity limits only made up in part for the deficiency. The distinction which is sought to be established is based upon this conclusion of the court,—that there was no occasion in that case for the exercise

of the judgment of the secretary of the interior in selecting indemnity lands,—and upon the application made of this case in the late case of *Railroad Co. v. Groeck*, 31 C. C. A. 334, 87 Fed. 970. In the case last referred to, the company had accepted the terms of the grant, and fixed the general route of its road as contemplated by the act, and filed a map thereof in the office of the commissioner of the general land office, which had been approved, and in pursuance of which the secretary of the interior withdrew the odd sections of land, including the land in controversy, from sale or location, pre-emption, or homestead entry. Thereafter the secretary revoked the order of withdrawal, which order of revocation was subsequently suspended. The defendant's title was initiated and was procured at the time the lands had been restored by the setting aside of the order of withdrawal. The court was of the opinion that the subsequent cancellation of the order of withdrawal did not authorize the defendant's pre-emption, which was nevertheless in violation of law and right. But the court further held that in the case of such a grant as that under consideration the terms of the grant itself operated to withdraw the indemnity lands from settlement from the moment when a map of the general route of the road was made and filed. In support of the conclusion reached the court also cited the case of *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. 334, 28 L. Ed. 872. That was also a case of conflict between two railroad grants which overlapped, and it was held, as in the cases above cited, that, in case of *lieu* lands, neither priority of grant nor priority of location nor priority of construction gives priority of right, but that this is determined by priority of selection, when the selection is made according to law. I do not think that the court intended, in the case of *Railroad Co. v. Groeck*, to establish a new rule for cases of this kind, based upon a distinction between cases where all the lands within the indemnity limits do not more than make up for the deficiency in the primary grant, and cases where the lands within the indemnity limits are more than enough for such deficiency. It has been the uniform policy of the government to permit settlement upon indemnity lands,—lands contingently granted to aid in the construction of railroads; and this policy has been extended to lands within the primary limits of such grants, by an act passed in 1876 (19 Stat. 35), which provides for confirmation of all homestead and pre-emption entries made in good faith by actual settlers, upon tracts of not more than 160 acres within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in the grant is received at the local land office. It can make no difference in any case that it turns out that all the odd-numbered sections within the indemnity limits are not more than are required to make up the deficiency in the primary grant. How is the fact to be known? It must be ascertained in some manner. Some action by the secretary of the interior is necessary in order to determine it, and there must be public information of the fact when it is determined, so that the interested public may be advised. The only means provided for is that of selections to be made by the secretary. In this connection the opinion of the court in *Wisconsin Cent. R.*

Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687, has direct application:

"He [the secretary] was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. * * * Until the selections were approved there were no selections in fact,—only preliminary proceedings taken for that purpose,—and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts."

The words employed in the two granting acts in the cases in question remove all doubt, if there is otherwise room for doubt:

"And when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the secretary of the interior," etc.

Such is the language employed in the act of 1866. That employed in the act of 1870 is of like effect:

"And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid, shall be selected under the direction of the secretary of the interior," etc.

There is no room to argue that the secretary is not required by the circumstances of the case to make selections, when he is so required by the mandate of the two granting acts. And these "selections" are indispensable to the operation of the grant within the indemnity limits. It does not otherwise attach to any lands within these limits, and had not so attached at the date of the homestead and pre-emption settlements made by the settlers for whose benefit this suit is brought.

I am of the opinion that these suits are properly brought by the United States; that the contention that, when an equitable title is claimed by the homesteader and pre-emptor, the government has no actionable interest, cannot be sustained. The case of U. S. v. Missouri, K. & T. Ry. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766, is decisive of the question. That was a case in which the decision of the court was based upon the conclusion that the patents held for cancellation included lands which equitably belonged to bona fide settlers, whose rights had been acquired under the homestead and pre-emption laws. As to some of the interests in that case the jurisdiction was maintained on the ground that the United States was under an obligation to claimants under the homestead and pre-emption laws to undo the wrong alleged to have been done by its officers in issuing patents to the company, and thereby enable

it to properly administer these lands, and give clear title to those whose rights were superior to those of the railway company. It is true that as to some of the lands it appeared from the averments of the bill that the United States had a direct interest, but, as just stated, this was true as to only a part of the lands in question. The jurisdiction was maintained in that case, as it must be in this, upon the ground that there existed on the part of the United States an obligation to issue patents to the rightful owners of the lands in question, and that they could not perform this obligation until the patents complained of were annulled. The court further says that these principles equally apply where patents have been issued by mistake, and they are specially applicable where a multiplicity of suits, each one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice. These considerations have application in the case on trial. There must be a decree as prayed for in the bill in cases Nos. 2,272, 2,273. In cases Nos. 2,405, 2,422, 2,560, 2,561, the pleas to the bill are overruled. In cases Nos. 2,388 and 2,501, the demurrers are overruled.

CALLANAN v. FRIEDMAN.

(Circuit Court, S. D. New York. April 24, 1900.)

1. INJUNCTION—DEFAULT DECREE—OBEDIENCE TO WRIT.

If there is any sufficient ground for relieving a defendant from the operation of a decree for an injunction, taken by default, by opening his default, and allowing him to litigate the questions of law and fact arising in the cause, he should apply for such relief, and meanwhile obey the injunction, unless he can induce the court to suspend its operation.

2. SAME—CONTEMPT—PENALTY.

A writ of injunction personally served on defendant commanded him to desist from making, using, or vending, in violation of a patent, any hat fasteners made substantially as described in said patent and claimed in the claim thereof. Thereafter defendant sold a dozen hat fasteners of the kind described in the writ. *Held*, that in view of the straitened circumstances of defendant, and of the fact that he was misled by his counsel, he should be fined the sum of \$300, and, in default of payment within 10 days, be committed.

On Motion to Punish for Contempt.

Walter D. Edmonds, for the motion.

Jarvis H. Miller, opposed.

LACOMBE, Circuit Judge. Defendant seems to have treated the injunction of this court with open and absolute contempt, and he cannot shield himself from all punishment therefor by laying the blame on his counsel. If in the various proceedings prior to the entry of decree pro confesso there was any sufficient ground for relieving defendant from the operation of such decree, opening his default, and allowing him to litigate the questions of law and fact arising in the cause, his proper course was to apply for such relief, and meanwhile to obey the injunction, unless he could induce the

court to suspend its operation. Instead of respecting the decree of the court, and applying in an orderly way for its modification, defendant has acted as if such decree were mere blank paper, and the commands of the court entitled to no consideration whatever. The writ of injunction was duly served upon defendant personally prior to April 1, 1900. It commanded him to desist from making, using, or vending, in violation of said patent, any hat fasteners made substantially as described in said patent and claimed in the claim thereof. Nevertheless, on April 2, 1900, defendant sold a dozen hat fasteners of the kind represented by sample filed with the moving papers. That hat fasteners such as this sample are "made according to and employing and containing the inventions and improvements described in said letters patent and claimed in the first claim thereof" is established by the decree (which so holds as to the fasteners sold prior to suit brought), it appearing that all the fasteners which defendant has sold, whether before or after decree, are substantially identical in all their parts. Disobedience of the injunction is flagrant. Nevertheless the court will give due consideration to the circumstance that defendant was misled by his counsel, and to the further fact that he is in straitened circumstances. A fine of \$300 (one-third to the United States, two-thirds to complainant) is imposed, to be paid within 10 days, or, in default of payment, defendant will be committed.

WILLIAMSON et al. v. MONROE et al.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. March 21, 1900.)

1. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—SUIT TO SETTLE PARTNERSHIP.

Where a suit in equity has been made necessary to settle the affairs of a partnership, the court will retain jurisdiction therein to administer complete relief between the partners, although as to some of the matters involved adequate relief might have been afforded by an action at law.

2. SAME.

Where it is competent for a court of equity to grant the relief sought, and it has jurisdiction of the subject-matter of the suit, the objection that there is an adequate remedy at law to defeat the jurisdiction must be taken at the earliest opportunity, and before the defendant enters a full defense.

3. EQUITY—LACHES.

A suit in equity will not be stayed for laches before the time fixed by the analogous statute of limitations at law has run, unless unusual conditions or circumstances are shown by defendant, which make it inequitable to permit the suit to be maintained after the lapse of a briefer time.

4. PARTNERSHIP—DUTY OF PARTNERS TO FIRM—FRAUDULENT CONDUCT OF PARTNERS.

Complainants and defendants were partners in a firm which obtained a contract for the construction of 50 miles of a railroad. By agreement between them one of defendants was to take personal charge of the work, receiving a salary therefor from the firm, and was to endeavor to complete it with such expedition and in such manner as to enable the firm, if possible, to secure a further contract upon the same road. Defendants received some assurances from the company that a second contract would be given them, but concealed such fact from complainants, and, acting

In concert, wrote complainants dissolving the partnership, after which they together secured a second contract for the construction of 70 miles of road additional, in which they refused to permit complainants to share. *Held*, that their action was a breach of the duty imposed on them by the law to act in the utmost good faith towards their partners, and that they would be charged with relation to the second contract as trustees of the firm, or, conceding their action in dissolving the partnership to have been effective, would be held to respond in damages to complainants, such damages to be measured by the profits realized on such contract.

5. **EQUITABLE ASSIGNMENT—NONNEGOTIABLE NOTE.**

A nonnegotiable note given by a partner to a third party, payable when final settlement shall be made on a contract between the firm of which he is a member and a construction company for work, does not operate as an equitable assignment of any part of the money due the firm on such contract, and cannot be used by the construction company in part payment of such amount, since such use would preclude the maker from making any defense which he might have as against the payee.

In Equity. Suit for settlement and accounting between partners.

Ira D. Oglesby and Hugh R. Garden, for complainants.

Hill & Brizzolara, S. R. Cockrill, and D. S. Alford, for defendants.

ROGERS, District Judge. The record in this case is so voluminous as to forbid a discussion of the evidence in detail. If time and other pressing work permitted, an effort to do so could prove of no valuable service. I must content myself by stating such ultimate findings of fact as are essential to a determination of the case, and by declaring the law applicable thereto. At the hearing the argument of both facts and law was unusually elaborate, showing not only great care and intense labor, but a wide research. The abstracts of the evidence and the printed and typewritten briefs cover several hundred pages, and the oral arguments consumed several days. The eminent counsel who presented the case have given the court great assistance, and it has since examined the evidence of the important witnesses, that it might the better weigh and determine their credibility, made necessary by reason of the fact that the testimony on every vital point is irreconcilably in conflict. The bill was filed for the settlement of a partnership, and all that is necessary to be said of the facts will be found in the opinion to follow.

In the spring of 1894 the plaintiffs and defendants Monroe and Lee entered into a partnership as contractors for the construction of railroads, canals, streets, and other rock, gravel, and earth works, under the firm name of Monroe, Strang, Lee & Co., and opened an office in the city of New York. On September 15, 1894, the firm made a contract with the Arkansas Construction Company, a Missouri corporation, domiciled at Kansas City, Mo., for the construction of 230 miles of the Kansas City, Pittsburg & Gulf Railroad. In that contract the plaintiff Williamson does not appear as a party, but one Marion Ford, a mere dummy for Williamson, appears in his stead as constituting the company. This contract covered the entire Kansas City, Pittsburg & Gulf line of railroad from Shreveport, La., to Ft. Smith, Ark., except 40 miles, beginning at Texarkana, Ark., and extending north, which part of the road was then

constructed and in operation. In December, 1894, a controversy arose between the Arkansas Construction Company and Monroe, Strang, Lee & Co. as to the validity of the contract; the construction company refusing to be bound by it for alleged irregularities in its execution, and asserting its invalidity; while the firm of Monroe, Strang, Lee & Co. urged its validity, and insisted upon the right to carry it out. In the meantime, the name of Marion Ford, who had no interest in the contract (even if he had an existence at all), and whose name was, it appears, inserted as representing plaintiff Williamson,—who, for reasons satisfactory to himself, did not care to be known as one of the partners at that time,—dropped out and disappeared. The result of the controversy over this contract, as is usual in such cases, was an effort to compromise their differences by executing a new contract. This was accomplished at Kansas City, Mo., on January 14, 1895, and a contract was entered into by which the firm of Monroe, Strang, Lee & Co. were to construct 50 miles of the Texarkana & Ft. Smith Railway (which is a part of the Kansas City, Pittsburg & Gulf System), beginning at the north end of W. C. Merritt's work, about 14½ miles north of Little river, to a point 50 miles north of the place of beginning, all in Arkansas. This 50-mile contract covered a part of the road embraced in the 230-mile contract, as was also a subsequent 70-mile contract; which latter, as we shall see hereafter, became the principal cause of controversy in this litigation. The consideration, in part, for this 50-mile contract, was the surrender of the 230-mile contract, and the Texarkana & Ft. Smith Railroad also made itself primarily liable to the said Arkansas Construction Company for the payment of all sums of money provided for in the 50-mile contract to Monroe, Strang, Lee & Co., according to the terms of the contract, and also made itself liable for all covenants therein contained. The fact is, however, that the controlling spirits—the chief officers—in the Kansas City, Pittsburg & Gulf Railroad Company, the Arkansas Construction Company, and the Missouri, Kansas & Texas Trust Company (the latter being a Missouri corporation, organized to finance the road, and the Arkansas Construction Company, organized to build it) were one and the same; that is to say, the management of each of these corporations was practically, and to all intents and purposes, the same.

This new 50-mile contract, made at Kansas City on January 14, 1895, after much bickering between Monroe, Strang, and Lee on the one side (Williamson being at that time in New York), and the officers of the Arkansas Construction Company on the other, was finally made by Monroe and Lee, in the absence and without the knowledge or consent of the plaintiffs, although Strang was then in Kansas City. The bone of contention between the contending parties to the contract was an effort on the part of Monroe, Strang, and Lee to induce the Arkansas Construction Company to agree to give them more than 50 miles of work, or, if not, then, at least, a written guaranty that they should have additional work if they completed the 50-mile contract to their satisfaction. This the construction company refused. There is much evidence, pro and con, as to whether Martin, the president of the Arkansas Construction Company, and Gentry, its

chief engineer, did not make an oral promise to give additional work before the 50-mile contract was entered into. It is not important whether they did or not. At the time Monroe and Lee made the 50-mile contract, Strang, as stated, was in Kansas City, and had been in daily conference with them for several days, but he was not present when that contract was made, and did not ascertain, until after he had left Kansas City for New York, that any contract had been made. Williamson was in New York, and took no part in the negotiations for the new contract. While en route to New York, Lee informed Strang of the new contract, and told him that Martin, the president of the Arkansas Construction Company, had taken umbrage at something Strang had said or done pending the negotiations for the contract, and had expressed a desire that, in the execution of the work under the contract, he should not be brought in contact with Strang. At this Strang became offended, and refused to surrender the contract or execute the bond required, and, on reaching New York, at once began negotiations by wire to Monroe, at his home in Lawrence, Kan., to sell his interest in the contract to Monroe and Lee. Monroe objected to this, and insisted that Strang should remain in the firm and assist in the execution of the contract. In the meantime, Lee, who had imparted this information to Strang, and who, the proof shows, was authorized to represent Monroe when he was not present, in all such matters as affected his interests in the partnership, urged Strang to execute the bond to the construction company, and, among other things, represented, in substance, that the officers of the construction company had promised the firm additional work, and he felt sure that they could be trusted, and that the firm would get it. He also represented that he (Lee) stood well with Gentry, the chief engineer of the construction company, and that if he (Lee) was put in charge of the work, and Monroe left to look after matters with the company, he was satisfied they would get the additional work. He also agreed with his partners to go on the work in person, and promised Strang and Williamson to do all he could to get the additional work, and if there was objection to Strang and Williamson because of the old contract, or the stand they had taken in not delivering it up, that he would take the work in the name of Monroe and Lee for the benefit of the firm. Upon these assurances Strang yielded, and he and Williamson signed the bond, and agreed to close the 50-mile contract, and to surrender the 230-mile contract, both of which were accordingly done. By agreement between the partners, Monroe, Strang, and Lee met at Texarkana, Ark., about the middle of February, 1895, and there sublet the work. The weight of the evidence shows that in letting the work an effort was made to get the best class of contractors on the line, in order to expedite the work so that the firm would stand a better show for the additional work, and to accomplish that end agreed to pay better prices to the subcontractors than the work could have been sublet for to other responsible contractors. Steps were at once taken to get the subcontractors, with their outfits, on the line, and commence work. After one or more had reached the line, and others were getting their outfits ready, the construction company, on the 2d of March, sus-

pended the work on the road indefinitely. When this occurred, Monroe was at his home in Lawrence, Kan., and Lee was at Texarkana. Williamson and Strang were in New York. The object in suspending the work was to relocate the line, and secure a better and cheaper route. Gentry called Monroe to Kansas City by wire on March 2d, and there advised him of the situation, and Monroe at once wired Lee at Texarkana: "Work suspended on account of route. Notify all contractors. We are promised work on the north end while waiting. Come here at once." On the same day he wrote Strang, then in New York, of the situation, and among other things said: "He [Gentry] says while we are waiting he will give us 25 or 30 miles of work running towards Shreveport from Ft. Smith. Twelve miles of the 25 will be the line up to Ft. Smith. Any of this he could not give under 30 days. This is the situation at present." Two days later—possibly three—Lee reached Kansas City, and accompanied Monroe to his home in Lawrence, Kan., and there, on the 6th of March, both Lee and Monroe wrote letters to Strang and Williamson dissolving the firm, but retaining their interest in the 50-mile contract. When Strang and Williamson, a few days later, inquired by wire and letter about the 25 or 30 miles of work referred to in the above telegram and letter, both Lee and Monroe represented that Monroe had misunderstood Gentry, whom they then said had offered to recommend an exchange of work on the north end for a part of the 50-mile contract, which offer they promptly declined, and that nothing else had been said about work on the north end. This interview, in which the exchange of work was offered, as they say, occurred either on the 4th or 5th of March. This account of what had taken place is corroborated by Gentry, who denies ever having promised the firm any additional work on the north end of the line. But, after a very careful and tedious and painstaking investigation of the record, I am constrained to find to the contrary. The letter to Strang, quoted above, is too definite, and goes too much into detail, to admit of the misunderstanding now claimed by Monroe. The intimate relation subsisting between Monroe and Lee, both before and after the dissolution; the fact that the dissolution notices were prepared the same day at Monroe's home, and under the advice of his counsel; and the circumstances under which they were prepared and sent out; the Marvin letter; the McIntyre letters; the evasions in their testimony; their fruitless efforts to explain away the effects of their letters; Lee's admissions to Fergerson and others; his letters to subcontractors; their secret arrangement to exchange answers to letters of Williamson and Strang, so that they might tell the same story; and many other established circumstances, all consistent with themselves,—conspire to show that Monroe and Lee were co-operating to conceal the true conditions from their partners, and to keep from them facts important for them to know, and which it was their duty to disclose. I conclude that the dissolution was made in bad faith; that the firm had been promised, after the suspension of the work, additional work while it was waiting for the new location of the road to be made; and that the firm was dissolved in order that Monroe and Lee might get this work to the exclusion of their partners.

This finding is sustained by the letter of Gentry of March 2d, addressed to his resident engineer, Rust. Moreover, for the construction company to have given Monroe, Strang, Lee & Co. additional work pending the suspension was, under the circumstances, the reasonable, the natural, the right, and the honorable thing to do, and that, too, in the interest of all parties, in order to avoid all questions of damages between the construction company and the firm of Monroe, Strang, Lee & Co., and the latter firm and their subcontractors; and that this additional work was offered, or that Gentry promised to recommend to the construction company to give it to that firm, and that it was sanctioned by Martin, the president of the company, little doubt can be entertained.

The court is satisfied, from the Marvin letter, that Gentry promised Lee and Monroe, on the 4th of March, to give the firm additional work, and that they thereupon informed him that it was their purpose to dissolve the firm, and that they did not want the work for it, but for themselves. It is also certain that this suggestion met with the approval of Gentry, and that they then received assurances that, after the firm was dissolved, Monroe and Lee should have additional work. This is shown by the testimony of Fergerson in the interview with Lee on the train, on the 10th of March, and it is also, in a measure, confirmed by the Marvin letter. That this scheme to defraud their partners out of promised work on the north end of the line, and to get it for themselves, was conceived after the Lee telegram and the Strang letter, quoted above, were mailed by Monroe on the 2d of March, and that the plan for its execution was consummated at Lawrence, Kan., before the 8th of March, there can scarcely be a reasonable doubt. That from that time forward Lee and Monroe co-operated to conceal the facts, their correspondence and conduct conclusively show, and their evasive and ineffectual efforts to explain their letters and conduct disclose a painful consciousness of injustice and wrong towards their partners, while Lee, who seems to have been the moving and controlling spirit, is contradicted by numerous witnesses, and his credibility broken down by his own letters, and by the destruction of his letter books containing his correspondence with Monroe between the suspension of the work on the 50-mile contract and the execution of the 70-mile contract. That Lee would deliberately destroy his letter books, or carelessly burn them with other worthless letters, cannot be accepted as either probable, reasonable, or truthful, since such action is wholly inconsistent with the conduct of men engaged in large business enterprises. Their destruction, if true, must be accepted as evidence that they contained inculpatory matter he could not afford to disclose. When Strang and Williamson, in the early part of June, 1895, ascertained that Monroe and Lee had the 70-mile contract, and claimed it to the exclusion of them, Strang went to Kansas City, and in his own behalf, and in that of Williamson, made demand that they be allowed to share in the contract, and offered to share its burdens and contribute their proportionate share of its performance. It was refused. This finding is denied by both Monroe and Lee, but in view of their conduct and their evi-

dence, and the circumstances preceding and following this interview, as disclosed in part by correspondence, their denials should not prevail.

The road covered by the 70-mile contract of Monroe and Lee was constructed first, and immediately thereafter the road under the 50-mile contract of the firm of Monroe, Strang, Lee & Co. was constructed, and, upon its completion, this suit was instituted. Before work was begun on the 50-mile contract, differences had arisen between the plaintiffs and the defendants Monroe and Lee, and, mainly, as the court finds, because of the dissolution of the firm, and the taking by Monroe and Lee of the 70-mile contract in their names, and to the exclusion of the plaintiffs. Plaintiffs doubtless suspected bad faith, and had lost confidence in Monroe and Lee, and the latter, conscious of their own wrongdoing, naturally anticipated litigation when a settlement took place. To preserve the rights of all parties in the execution of the 50-mile contract, Creech was brought in, under a written contract, and given a share in the 50-mile contract, with the right to superintend the work in person and make settlement with the construction company. The money received under the contract was to be deposited in the Merchants' Bank of Ft. Smith, Ark., and could not be drawn out except by the written consent of all the parties. Checks in payment of the expenses of the construction were to be drawn by Mitchell, and countersigned by Creech. Creech made the settlement after he had done the work, but refused to deposit about \$80,000 of the profits, and finally sought to bring about a settlement among the partners without complying with his agreement to deposit the funds. For a time the effort to get this money in the bank, or in the hands of a receiver appointed by this court, and the further question as to whether the court had jurisdiction of the parties and the subject-matter, were subjects of contention both in the court and in negotiations outside. Creech sided with Monroe and Lee, and finally turned the money over to Monroe. This struggle was ended when injunctive proceedings were resorted to by the plaintiffs in the United States circuit court at Kansas City, and, by written stipulation, the funds were deposited in the Merchants' Bank of Ft. Smith, Ark., and the receiver discharged, all parties submitting to the jurisdiction of this court. The bill was filed to secure a settlement of the partnership business on the theory that the partnership extended not only to the 50-mile contract, but also to the 70-mile contract. There is no dispute as to the 50-mile contract, so far as the distributive share to which all the parties, including Creech, are concerned. It is only a matter of stating the account between them. There is an additional matter of the acceptance by Creech of an \$8,000 instrument of writing, executed by Williamson to the Missouri, Kansas & Texas Trust Company, which will be referred to hereafter, and still another matter as to a construction outfit owned by Strang, which will also be referred to later.

On the above facts the question arises as to whether Monroe and Lee must be held to an accounting to the firm of Monroe, Strang, Lee & Co. for the profits on the 70-mile contract, taken in their own names. A preliminary question is whether Strang and Wil-

Williamson are barred by laches from maintaining their suit as to the 70-mile contract. In stating the principles of law applicable on these points, it is not considered necessary, even if time and other pressing duties admitted, to go into an analysis of the cases cited in the elaborate briefs of counsel. Indeed, it is well-nigh impracticable, and, if done, altogether unprofitable.

It was insisted that the court was without jurisdiction as to the 70-mile contract because the law afforded an adequate remedy. If this were true (which is not the case), the necessity for a bill in equity to settle the partnership as to the 50-mile contract, and the other expenses of the firm, was made necessary by reason of the action of Creech, acting in concert, and in the interest of Monroe and Lee, in refusing to deposit the money of the firm in the Merchants' Bank, according to the contract; and the court, having jurisdiction of the case and the parties for the purpose of settling the partnership for the 50-mile contract, will retain it for the purpose of administering complete relief between all the parties. *Hopkins v. Grimshaw*, 165 U. S. 358, 17 Sup. Ct. 401, 41 L. Ed. 739. Moreover, it is the settled law, in the federal courts, that where it is competent for a court to grant the relief sought, and it has jurisdiction of the subject-matter, the objection that there is an adequate remedy at law should be taken at the earliest opportunity, and before defendants enter upon a full defense. *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 514, 9 Sup. Ct. 594, 32 L. Ed. 1005. The jurisdiction of the court in this case is believed to be beyond dispute.

The rule governing laches in the institution of bills in equity for fraud is admirably stated and abundantly supported by authority in *Kelley v. Boettcher* (decided by the Eighth circuit court of appeals) 29 C. C. A. 14, 85 Fed. 55. Judge Sanborn, delivering the opinion of the court, said:

"In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. *Rugan v. Sabin*, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, 53 Fed. 415, 420; *Billings v. Smelting Co.*, 10 U. S. App. 1, 62, 2 C. C. A. 252, 262, 263, 51 Fed. 338, 349; *Bogan v. Mortgage Co.*, 27 U. S. App. 346, 357, 11 C. C. A. 128, 135, 63 Fed. 192, 199; *Kinne v. Webb*, 12 U. S. App. 137, 148, 4 C. C. A. 170, 177, 54 Fed. 34, 40; *Scheffel v. Hays*, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 58 Fed. 457, 460; *Wagner v. Baird*, 7 How. 234, 258, 12 L. Ed. 681; *Godden v. Kimmell*, 99 U. S. 301, 310, 25 L. Ed. 431; *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. Ed. 807. The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. The practical result is that a suit in equity for relief on the ground of fraud would not be barred by laches in the state of Colorado in less than three years after the discovery of the fraud, unless unusual circumstances made it inequitable to allow its prosecution. Some of the circumstances which will induce a court of equity to apply the doctrine of laches in a shorter time than that fixed by the statute are the destruction of the muniments of title, the

death or removal of parties, the number of innocent purchasers who may be affected, radical changes in the condition and value of the property, and its speculative character. *Lemoine v. Dunklin Co.*, 10 U. S. App. 227, 239, 2 C. C. A. 343, 348, 51 Fed. 487, 492. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case. The cases of *Wagner v. Baird*, 7 How. 234, 12 L. Ed. 681; *Godden v. Kimmell*, 99 U. S. 201, 25 L. Ed. 431; *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. Ed. 807; and *Rugan v. Sabin*, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, 53 Fed. 415, 420,—belong to the class of cases in which the doctrine of laches was applied after the statute of limitations had run. The cases of *Billings v. Smelting Co.*, 10 U. S. App. 1, 62, 2 C. C. A. 252, 262, 363, 51 Fed. 338, 349, and *Bogan v. Mortgage Co.*, 27 U. S. App. 347, 357, 11 C. C. A. 128, 135, 63 Fed. 192, 199, belong to the class of cases in which the court refused to apply the doctrine of laches within the time fixed by the statute. In the latter case this court declared that this doctrine was applied by analogy to the statute of limitations, to promote, not to defeat, justice, and refused to invoke it after a delay of 30 months. It is a familiar maxim of the courts of chancery, long since embodied in our statutes, that no time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it. *Scheffel v. Hays*, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 53 Fed. 457, 460; *Alden v. Gregory*, 2 Eden, 285; *Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311; *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Badger v. Badger*, 2 Wall. 87, 92, 17 L. Ed. 836."

This suit is not barred by any statute of limitations applicable to such cases in Arkansas. *Wilson v. Anthony*, 19 Ark. 16; *Taylor v. Adams*, 14 Ark. 62; *Sullivan v. Railroad Co.*, 94 U. S. 811, 812, 24 L. Ed. 324. Nor is there anything shown to take the case out of the rule laid down in the case of *Kelley v. Boettcher*, supra, to the effect "that under ordinary circumstances a suit in equity will not be stayed for laches before the statute of limitations runs," and imposing upon the defendants, where the statute has not run, the burden of showing such unusual conditions or extraordinary circumstances as make it inequitable to allow the suit to be prosecuted, or to justify the application of the doctrine of laches.

A number of cases—chiefly mining cases (a class of property subject to great fluctuations of value)—have been cited by defendants to support the doctrine for which they contend, and in some of them the doctrine of laches has been applied after a briefer time has elapsed than in this case, but it is not believed they are applicable to the case at bar. In fact, *Kelley v. Boettcher*, supra, is itself a mining case. In this case there has been no destruction of evidence, except defendant Lee's letter book, which was destroyed by himself, if at all; no death or removal of parties; no innocent parties to suffer; no death or removal of witnesses; and no such lapse of time as that witnesses would be likely to forget important facts; no property to fluctuate in value; no loss; nothing, except the fact that Monroe and Lee assumed the risk and burden of the work over the protest of Williamson and Strang. Moreover, laches should never be applied to defeat justice, nor should it be applied when it appears, as in this case, that, while plaintiffs felt they had been wronged, yet were without evidence to show it, and when the evidence now shows that no amount of inquiry made of persons

likely to know the facts, at the time the plaintiffs first learned that they were excluded from the 70-mile contract, would, with any reasonable degree of certainty, or even probability, have unlocked the salient facts and writings by which the positive denials of both defendants are now overturned; for, even on the witness stand, those who knew the facts denied them, and the truth was disclosed over their most persistent and earnest efforts to conceal it. The doctrine of laches ought not to be applied under the circumstances of this case, and especially since the institution of a suit at the time the 70-mile contract was executed would most likely, under all the circumstances then surrounding the firm, the construction company, and the railroad company, have resulted disastrously to the firm, not only as to that contract, but as to the 50-mile contract also, while delay could harm no one, and conduce to the benefit of all the firm. It cannot, therefore, be fairly said that the plaintiffs delayed suit that they might speculate on the chances which the future would give them of avoiding the risk if the venture proved unprofitable, and asserting their claim if the contract resulted in gain, since the defendants had the full opportunity to defeat such contingency by recognizing plaintiffs' rights when the claim was made for an interest in the contract, accompanied by an offer to share its burdens; indeed, they elected to take all the risk when they determined to fraudulently exclude their partners, and should not now be allowed, in a court of equity, to profit by their wrong.

The questions of laches and jurisdiction out of the way, the next inquiry is whether the defendants must be held to an accounting as to the 70-mile contract. Much was said pro and con, at the hearing, as to whether the partnership was one at will, and, if so, whether a partnership at will can be dissolved at any time or not. The question, in the opinion of the court, is not vital,—indeed, unimportant. In view of the peculiar facts in this case, it might well be questioned whether there was not an implied agreement that the partnership should not be dissolved until the work on the Kansas City, Pittsburg & Gulf Railroad was completed. In 2 Bates, Partn. p. 572, the author says:

"But merely that the partnership contract specifies no duration in express terms is not conclusive that it is at will; and, if an intention appears in the articles to continue the partnership until certain objects are accomplished, it will not be considered a partnership at will, but one to continue until its purpose is completed, or the impracticability thereof demonstrated. Thus, a partnership formed to erect a building or construct a railroad is not a partnership at will, but for the completion of the enterprise."

—Citing *Pearce v. Ham*, 113 U. S. 585, 5 Sup. Ct. 676, 28 L. Ed. 1067; *Holladay v. Elliott*, 8 Or. 85, 88; *Richards v. Baurman*, 65 N. C. 162.

That the original contract contemplated this is, I think, quite clear. That the circumstances under which the new contract was executed, coupled with the agreement between the parties that Lee should go on the work and superintend it and try to get the additional work, contemplated a continuance of the partnership until

the work on that road was done, or they had failed to get the additional work, may, with much force, be contended. But, as stated, the question is not vital, because it is distinctly held in *Karrick v. Hannaman*, 168 U. S. 335, 18 Sup. Ct. 138, 42 L. Ed. 489, that:

"According to the authorities just cited, the only difference, so far as concerns the right of dissolution by one partner, between a partnership for an indefinite period and one for a specified term, is this: In the former case, the dissolution is no breach of the partnership agreement, and affords the other partner no ground of complaint. In the latter case, such a dissolution before the expiration of the time stipulated is a breach of the agreement, and as such to be compensated in damages. But in either case the action of one partner does actually dissolve the partnership."

It may be conceded, then, that the partnership was dissolved immediately upon the receipt of the dissolution notices mailed on the 7th of March, 1895.

The question still remains as to whether the 70-mile contract, under the circumstances it was obtained, became an asset or a right of the old firm. The correct determination of this question brings us to consider the nature of the relation of partners. In this case Lee had accepted the position of superintendent of this work for the firm (receiving a salary therefor), ostensibly because he thought it would aid the firm in getting the additional work. He had represented that Martin did not want Strang to be brought in contact with him; that he was on good terms with Gentry, the chief engineer of the construction company; that Monroe was friendly with Martin. It may be doubted whether Lee did not magnify the bad feeling of Martin towards Strang, so as to get to go on the work himself. However that may be, his representations as to that do not accord with Monroe's letter of January 22, 1895. At all events, Lee, by his position of trust, was more than a mere partner. He was charged, by his own solicitation, with the special duty of looking after the 50-mile contract, and to so conduct the work as to commend the firm for the additional work which he had promised, if possible, to obtain for the firm. What is the rule governing partners under such circumstances?

In 1 *Bates, Partn.* § 303, the author says:

"The partners owe to each other the most scrupulous good faith. Each one has a right to know all that the others know, and their connection is one of great confidence, and the uberrima fides of a fiduciary relation will be the standard of fidelity exacted from them."

See, also, *Miller v. O'Boyle* (C. C.) 89 Fed. 140.

In *Karrick v. Hannaman*, 168 U. S. 336, 18 Sup. Ct. 139, 42 L. Ed. 490, the court said:

"Even if the partnership should be considered as having been actually dissolved at that date, yet the dissolution did not put an end to the plaintiff's right to his share in the property and the profits of the partnership. In a case in which both parties, in their pleadings, assumed the partnership to have been dissolved, this court, speaking by Mr. Justice Miller, held that drunkenness and dishonesty on the part of one partner, and his consequent exclusion from the business, did not authorize his co-partner, 'of his own motion, to treat the partnership as ended, and to take himself all the benefits of their joint labors and joint property,' or exempt him from responsibility

to account to the excluded partner. *Ambler v. Whipple*, 20 Wall. 546, 555, 557, 22 L. Ed. 403. And in a later case the court, speaking by Mr. Justice Woods, said: 'However the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another, with whom he proposes to form a new partnership.' *Pearce v. Ham*, 113 U. S. 585, 593, 5 Sup. Ct. 676, 28 L. Ed. 1070."

Under such circumstances, when Monroe and Lee determined to dissolve the partnership, they owed it as a duty to their partners to disclose every fact concerning the partnership business which could affect their rights. It is just to Monroe to say that on March 2d, before brought under the influence of Lee, he did advise Strang, by letter, of the promise of additional work. Monroe and Lee had not then determined on a dissolution. If that work was not promised, both Monroe and Lee knew it before the dissolution notices were mailed, for they both so testify. They did not correct Monroe's mistake of March 2d, contained in his letter to Strang, nor did they impart, in their notice of dissolution, anything else pertaining to the firm's business with the Arkansas Construction Company. From that time forward, as stated, the proof shows that Monroe and Lee studiously avoided giving any definite information to Williamson and Strang about the prospect of new work, and manifestly schemed to keep them in the dark in regard thereto until the 70-mile contract was obtained. Lee, in the meantime, as early as March 10th,—three days after the dissolution notices were mailed (if Ferguson is to be believed),—began arranging to contract for the performance of the new work which had been promised them; and Monroe, one day later (March 11th), in writing to Marvin a confidential letter, refers to the promise of Gentry of March 2d in regard to the new work, and of the dissolution of the firm, and says: "Of course, we will keep this matter confidential, because we have notified the firm of Monroe, Strang, Lee & Co. of our intention to withdraw from the firm, and if the Pittsburg & Gulf feel like giving myself and Lee any work they would undertake it." Monroe now testifies that, when Lee came to Kansas City on March 4th, they saw Gentry, and found out what he understood to be a promise of the new work was a mere proposition to exchange work, which they then promptly declined; and yet, as stated above, he was writing to Marvin, on March 11th, seven days later, of the same promise, and requesting him to keep it confidential. A careful scrutiny of this record shows that, notwithstanding the dissolution notices, so skillfully had the secret and underhanded contrivances been executed, when they got the 70-mile contract their partners still thought it was gotten for the firm, and even then inquiries in regard thereto met with an evasive reply, and further inquiry with none at all. Such conduct cannot commend itself to the mind of a chancellor, and it is at war with the doctrine of the law governing the duties and relations of partners.

A wide range of research, by both counsel and court, has not disclosed precisely such a case as this, nor any case precisely in point; but it cannot be that the principles governing it are involved in serious doubt.

In *Mitchell v. Reed*, 61 N. Y. 129, the court said:

"It has long been settled by adjudications that generally when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm, in the renewed lease, and, when the rule is otherwise applicable, it matters not that the new lease is upon different terms from the old one, or for a larger rent, or that the lessor would not have leased to the firm. The law recognizes the renewal of a lease as a reasonable expectancy of the tenants in possession, and in many cases protects this expectancy as a thing of value. I will briefly notice a few of the cases upon this subject. In *Holdridge v. Gillespie*, 2 Johns. Ch. 30, Chancellor Kent says: 'It is a general principle pervading the cases that if a mortgagee, executor, trustee, tenant for life, etc., who has a limited interest, gets an advantage by being in possession, or "behind the back" of the party interested in the subject, or by some contrivance or fraud, he shall not retain the same for his own benefit, but hold it in trust.'"

In *Latta v. Kilbourn*, 150 U. S. 541, 14 Sup. Ct. 207, 37 L. Ed. 1169, the court say:

"The general principles on which the court proceeded admit of no question, it being well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his co-partners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business."

In the same case, at page 549, 150 U. S., page 211, 14 Sup. Ct., and page 1178, 37 L. Ed., the court say:

"It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, and, without going into the authorities, it is sufficient to cite the thoroughly considered case of *Aas v. Benham* [1891] 2 Ch. 244, 255, in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection with the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice Lindley that if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information, but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits."

It is clear in this case that it was the duty, as it had been the promise, of Lee to procure the 70-mile contract for the firm, and this contract was a "reasonable expectancy"; and the fact, if it was a fact, that the construction company would not have given the contract to the firm, does not alter the case or relieve him from his obligations. *Mitchell v. Reed*, 61 N. Y. 129; *Miller v. O'Boyle*, supra.

The procurement of the 70-mile contract was clearly within the scope of the partnership of Monroe, Strang, Lee & Co., and infor-

mation of the prospect and offer of this work came to Lee and Monroe while the partnership lasted. Independent of Lee's peculiar and especial trust relation, created by the fact that he had sought and obtained a place as superintendent of the work on the 50-mile contract, and with the distinct agreement with his partners that he would, if possible, get the additional work, his simple relation as a partner made it his duty to earn the good will of the construction company and the public for his firm, and to get any contract for work he could for the firm which was of a character within the scope of the partnership. If he found that the construction company had, for any reasons, good or bad, determined not to contract with his firm because Strang and Williamson were members of it, good faith, common honesty, required of him, if he could, to remove by proper explanations any objections the construction company might entertain to them, and, if he could not, to advise Strang and Williamson so that they might have an opportunity to do so; and, finally, upon their failure to explain or remove the objections, if he could throw off his trust relation to them, and acquire the contract for himself to their exclusion, "he could only do so after the frankest disclosures to the plaintiffs of all the circumstances, and distinct notice of his intention to act in that regard in his own behalf, to the exclusion of the plaintiffs." *Miller v. O'Boyle* (C. C.) 89 Fed. 142. He failed to do this, and that he did so designedly, secretly, selfishly, and to the injury of the plaintiffs, and with the specific object of getting the 70-mile contract for Monroe and himself, after it was promised to the firm, is morally certain. He not only did not notify them that the work had been offered or promised, but he denied that it had been, and so testifies; while it is shown that on the 10th of March, only three days after he mailed the dissolution notices, he was arranging to have Ferguson bid on parts of the new work, and, the very next day, sending out letters to contractors advising them that the 50-mile contract was let, but they would soon have additional work to let. Every principle here stated is distinctly recognized in *Miller v. O'Boyle*, supra, and is amply sustained by authority and reason. It is true, upon the authority of that case, plaintiffs might well, at any time after the execution of the 70-mile contract, have applied, by injunctive proceedings, to have declared their rights under the contract, because they had a right to participate in the management of the work; the letting of the sub-contracts; to know, as the work progressed, the cost and expense; to inspect the books; in short, to exercise all the rights of partners. They waived these rights. Their waiver is not a matter of which defendants can complain, and that the defendants were relieved of their assistance and aid is the fault of Monroe and Lee, of which no advantage can now be had by them. As stated in *Miller v. O'Boyle*, supra, if plaintiffs had instituted injunctive proceedings to have their rights declared as soon as the 70-mile contract was made, no final decree could have been entered until the work under the contract was completed and the business wound up. In *Miller v. O'Boyle*, Circuit Judge Acheson used this language:

"Now, O'Boyle went to Guadalajara as the representative of the partnership of Miller & O'Boyle, to consummate the municipal sewerage contract. In this matter he was the trusted agent of the plaintiff. If it was open to him at all to throw off his agency, and acquire the contract for himself, he could only do so after the frankest disclosures to the plaintiff of all the circumstances, and distinct notice of his intention to act in his own behalf, to the exclusion of the plaintiff. The observations of Chief Justice Gibson, in *Bartholemew v. Leech*, 7 Watts, 472, 473, in respect to the incapacity of a confidential agent to acquire title in hostility to his principal, are very pertinent here: 'To capacitate him as a purchaser on his own account, he must have explicitly resigned his trust. The most open, ingenuous, and disinterested dealing is required of a confidential agent while he consents to act as such, and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. To leave a doubt of his position in this respect is to turn himself into a trustee. It is unnecessary to recur to authority for a principle so familiar or so accordant with common honesty.' O'Boyle's partnership relation to the plaintiff precludes him from holding this contract for his own benefit, or appropriating its advantages to himself and his co-defendant, to the exclusion of the plaintiff."

The principles announced in that case are sustained by *Howell v. Harvey*, 5 Ark. 271; *Mitchell v. Reed*, 61 N. Y. 123; *Roby v. Colehour*, 135 Ill. 338, 25 N. E. 777.

The language quoted from *Miller v. O'Boyle*, *supra*, is apposite to the facts in this case. *Monroe and Lee* held the 70-mile contract in trust for the firm; or, if they cannot be held as trustees, the court, having acquired jurisdiction of the parties and the subject-matter for the settlement of the accounts under the 50-mile contract, will retain the case to assess the damages for the breach of their contract in taking and holding the 70-mile contract in their own name, and the damages should be assessed under the rule laid down in *Howell v. Harvey*, *supra*.

Williamson's eight thousand dollar note: It was not contended at the hearing that the Williamson note for \$8,000 was negotiable, and it is not. *Pars. Notes & B.* 30. It was contended that the note was an equitable assignment, of an amount equal to the face of the note and interest, of Williamson's share in the net profits of the contract between the Arkansas Construction Company and *Monroe, Strang, Lee & Co.*, and that as such Creech had the right to treat it and accept it from the Arkansas Construction Company in settlement of that contract. But the contract between *Monroe, Strang, Lee & Co.* and Creech did not authorize Creech to accept it in settlement, and the position is not tenable. The effect of admitting this contention would be to cut off the right by Williamson to contest with the Missouri, Kansas & Texas Trust Company his liability on the note. It would be, in effect, without his consent to compel him to pay the trust company the \$8,000, and then resort to a proper action to compel the trust company to pay any claim he might have against it, and take the chances of insolvency and defeat; and this, too, in an action to which neither the Missouri, Kansas & Texas Trust Company nor its assignee, the Arkansas Construction Company, are parties. Moreover, the instrument itself is not an equitable assignment. *Six-killer v. Rogers* (Ark.) 55 S. W. 135; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Hatch v. Hutchinson*, 64 Ark. 119, 40 S. W. 578; *Hamilton v. Downer*, 152 Ill. 651, 38 N. E. 733. Instead of the in-

strument being an equitable assignment, it was a mere promise to pay the note when a final settlement was made with the construction company. But his obligation to make the payments at that time is a very different thing from that of authorizing Creech to accept this obligation as so much money on account of that contract. Creech was bound by the terms of the instrument under which he was acting, and he had no authority to violate it because out of the proceeds of the settlement Williamson had agreed to pay a note concerning which Creech had nothing to do. The acceptance of the note was therefore unauthorized.

The Strang construction outfit: As to the sale of the Strang construction outfit, the testimony fails to convince the mind of the court that a sale was ever made. There was no inventory of the property ever made, no value fixed upon it, and the court does not think there was ever any delivery. The property was subsequently sold by Strang before it had been determined that the contract with the Arkansas Construction Company would finally result in any profits to Monroe, Strang, Lee & Co. It is true that doubtless the 50-mile contract had been sublet, so that if the subcontractors carried out their contracts it was reasonably certain there would be a net profit; but there were other and varied contingencies before any positive result could be reached in that respect. Neither does the testimony convince the mind of the court that the outfit at any time bore such contract relation to the firm of Monroe, Strang, Lee & Co. as that the latter became entitled to any part of its earnings, or responsible for any part of the expense of maintaining it. It may be, and it is probably true, that the firm profited by the fact that Strang owned the outfit. It may have tended to give the firm standing, and to contribute to the procurement of business. This is disputed, however, and the court is not prepared to say that, if it were vital to the case, Strang's owning the outfit did, in point of fact, contribute in any way to the benefit of the firm. Courts cannot make contracts, and they should not undertake to enforce them unless reasonably certain of their existence. If the court should rest the case upon the testimony of the plaintiffs alone, it is not prepared to say that they would be entitled to the relief sought, but, when taken in the light of the testimony on both sides, the matter is left in so much doubt that the court is of opinion that plaintiffs should not have relief in regard thereto. Strang may have thought he had made a sale, and the circumstances tend to show that he may have suffered losses by reason of his understandings and dealings with the firm, but the evidence falls short of showing a sale or any such contract as ought to be enforced, and upon this issue the plaintiffs must fail.

It is ordered that the case be referred to the Honorable C. B. Moore, the standing master in chancery of this court, with instructions to state an account by and between the plaintiffs and the defendants. In stating the account on the 50-mile contract, he will observe the terms of the written agreement by and between Monroe, Strang, Lee & Co. and the defendant Creech; and in stating the account with reference to the 70-mile contract he will state it upon the basis that each of the partners, Williamson, Monroe, Strang, and Lee, were

equal partners therein, giving to each one-fourth of the net proceeds thereof. Counsel will prepare the decree, and submit it to opposing counsel, and then to the court for its approval, conforming the same to this opinion.

ARENTS et al. v. BLACKWELL'S DURHAM TOBACCO CO. et al.

(Circuit Court, E. D. North Carolina. April 27, 1900.)

No. 225.

1. CORPORATIONS—DISSOLUTION—JURISDICTION OF COURT OF EQUITY.

While it is the general rule that, in the absence of statutory authority, a court of equity is without jurisdiction to decree the dissolution of a private corporation which is a solvent and going concern, and to that end sequester its property, and appoint a receiver therefor, yet such court may always grant equitable relief against such a corporation whenever a sufficient case for such relief is shown, upon the ordinary principles of equity jurisprudence; and such a case authorizing dissolution and the appointment of a receiver is made where it is shown that the affairs of the corporation are not satisfactory, that it is in the midst of, or threatened with, disaster, or when further prosecution of its business will lead to loss and insolvency, and a large majority of its stockholders desire its dissolution.

2. SAME—THREATENED HOSTILE ACTION BY STOCKHOLDER—APPOINTMENT OF RECEIVER.

Complainants were the owners of more than 99 per cent. of the \$4,000,000 of capital stock of the Blackwell's Durham Tobacco Company, a corporation engaged in the manufacture and sale of tobacco, the value of the property of which consisted largely in its good will and in the brand it owned and used upon its product. It was alleged and admitted that one of the defendants, who was a politician of prominence in the state, and had recently purchased a single share of stock in the corporation, publicly announced and published his intention to secure the passage of a bill at the next session of the legislature forfeiting the charter of the corporation, and providing for the winding up of its affairs by trustees therein named, and, failing to secure the passage of such bill, to make the question a political issue in the state. It was further alleged that a fair offer had been made for the property and good will of the company, which complainants desired to accept, but that such defendant refused to consent to the sale, or to sell his own stock at any price. *Held*, that upon the facts admitted it was apparent that the threatened action of the defendant, whether successful or not, would practically destroy the business of the company, and greatly depreciate the value of its property, and that under such circumstances the court was authorized to appoint a receiver, with a view to its dissolution, and the sale of its property for the protection of all the stockholders.

In Equity. Suit by stockholders for dissolution of a corporation. On motion for appointment of receiver.

W. W. Fuller and J. Parker, for complainants.

J. S. Manning, H. A. Foushee, and W. B. Guthrie, for defendant
W. A. Guthrie.

SIMONTON, Circuit Judge. This cause comes up on the return to a rule to show cause why a permanent receiver should not be appointed for the Blackwell's Durham Tobacco Company, a corporation incorporated under the laws of North Carolina. The bill is filed by George Arents and others, stockholders in the Blackwell's

Durham Tobacco Company, against a number of other stockholders in the same company, among whom are W. A. Guthrie and Kate A. Watkins, who are the only residents and citizens of North Carolina, the complainants being citizens and residents of other states. The bill sets out the incorporation of the company first under an act of the legislature January 24, 1883, ratified by an act of January 11, 1887, and then under chapter 103 of the Acts of 1891; that the company is engaged in the business of manufacturing tobacco, and selling its products throughout the United States and foreign countries, its principal place of business being in Durham, N. C.; that the total authorized capital of the corporation is \$4,000,000, divided into 160,000 shares of par value of \$25 each, and that complainants hold 159,309 shares. By amendment to the bill they aver: That they now hold 460 shares more, in all 159,769 shares; and that the defendant W. A. Guthrie holds 1 share, and Mrs. Kate A. Watkins 36 shares; the other shares being held by other stockholders, whose residences are not known. That the American Tobacco Company has offered to purchase the entire property of the said Blackwell's Durham Tobacco Company as a going concern for the sum of \$2,800,000, leaving the offer open for acceptance for 90 days from February 28, 1900, provided that in the meantime the good will and business of the Blackwell's Durham Tobacco Company be then unimpaired; and that the American Tobacco Company is a perfectly solvent corporation, able to keep and make good this offer. That it is impracticable for the Blackwell's Durham Tobacco Company to accept this offer and to make this sale, for several reasons stated. It is impossible to reach all the outstanding stockholders, and secure their assent and approval to such sale. The complainants hold such relations to the American Tobacco Company, being officers and employes thereof, that their action in this regard would be subject to criticism and suspicion. That one stockholder—W. A. Guthrie—has expressed his determined opposition to such a sale, and so a cloud would be thrown upon any title which the American Tobacco Company would obtain. That in this condition of things, the approval and order of this court is essentially necessary to carry out such a sale. The bill then states the reasons why this court should intervene and grant the relief prayed for. These are that the price offered was a fair one, for the reason that a late president of the company and many large stockholders had sold their shares therein at a price the equivalent of that offered; that, in any event, this offer could be used as an upset price if the court preferred a public to a private sale; that holding, as complainants do, 99½ per cent. of the whole stock, and desiring to withdraw from their business, the remaining stockholders could not conduct it profitably; that the stock of the company having no fixed marketable value, and not being listed on any stock exchange, the complainants, if put to the alternative of a sale of their stock, would be compelled to sell it at a great sacrifice, whereas, the present offer would furnish sale at full value. The last reason for the filing of the bill is this: W. A. Guthrie, a stockholder, holding one share, purchased after complainants had become holders of more than 95 per cent. of the stock, purchased this one

share for the purpose of doing all in his power to harass, annoy, vex, and destroy the corporation, and make the management of its business impossible; that Mr. Guthrie is a lawyer and politician of prominence in North Carolina; and that he has published in its newspapers his purpose of introducing a bill in the legislature of North Carolina, at its approaching session in June next, to repeal the charter of the said corporation, and to put it in the hands of trustees to wind it up; that he also threatens, if this attempt should fail, to carry the question into the politics of the state, and to agitate it until he succeeds. The bill is accompanied by an exhibit containing a copy of the proposed bill and an interview with Mr. Guthrie, in which he expresses sentiments hostile to this corporation and his determination to destroy it. The bill then proceeds:

"(6) That in view of the allegations hereinbefore made, and particularly said offer to buy the good will, business, and property of said Blackwell's Durham Tobacco Company, and in view of the subsequent allegations of this paragraph of the bill, it is to the interest of all the stockholders of Blackwell's Durham Tobacco Company that the affairs of said company be wound up, and its property be sold, because: First. There is an offer by a solvent party to pay a fair price in cash for said property, and as to this your orators would show to this honorable court that in December, 1898, one J. S. Carr, who had been the president of said Blackwell's Durham Tobacco Company, and owner of about one-half of its stock, ever since the organization of said corporation, and one S. H. Austin, who, since the organization of said corporation, had been its vice president, and all the other large and managing stockholders, including every director and officer of the company, and many other stockholders, sold their entire stock holdings in the said Blackwell's Durham Tobacco Company at the price of \$17 per share; that said principal and managing stockholders, officers, and directors had full and adequate information to form a correct and accurate judgment of the actual value of their property, judged by the then earning power, and the reasonable prospects of the business of the said corporation; that the offer of the American Tobacco Company is equivalent to \$17 per share for all the stock of the said Blackwell's Durham Tobacco Company, and, if it is accepted, and the sale consummated at that figure, the other smaller and uninformed stockholders would suffer no injustice or loss, since they, and each of them, would receive the same price for his stock as the larger and managing stockholders regarded as a fair and sufficient price for theirs. Second. The sale of the business and property of Blackwell's Durham Tobacco Company could do no harm to any stockholder if conducted as herein prayed, for, under the sale as herein prayed, there would be a guaranteed bid assuring to each stockholder the actual value of his stock according to the estimate put on such stock by the large and managing stockholders of said company when valuing and selling their own; and even this price would not be binding on this court, but the said property would be put up and sold at the highest obtainable price, with \$2,800,000—or, at the rate of \$17 per share—as the upset price and bid. Third. Your orators, owning and holding more than ninety-nine and one-half per cent. of the stock of said Blackwell's Durham Tobacco Company, desire the business of said company stopped and wound up, and that their investment be taken out of the said corporation, and the one-half of one per cent. left after withdrawal of the said ninety-nine and one-half per cent. represented by your orators, to wit, the stock owned and held by the defendants, and all other stockholders in Blackwell's Durham Tobacco Company, would be inadequate to the conduct of the business of said corporation, and incompetent of conducting it; that it is, therefore, impracticable for said business to be properly and profitably conducted. In this connection your orators would show to the court that at the time of the sale of stock by J. S. Carr and others in December, 1898, as hereinbefore alleged, all of the stockholders having a practical knowledge of the tobacco business, and of the past business of said corporation, ceased their connection therewith, and that the only stockholders in said

corporation at present with any practical knowledge of the tobacco business, or capable of making a success of said business, are among your orators; that your orators therefore allege that the less than one-half of one per cent. of the stockholders of Blackwell's Durham Tobacco Company besides your orators are not only incapable of conducting the business of said corporation because of their inadequacy of investment or interest, but your orators would further show that there is no one among the remaining stockholders of said company with the ability and experience in the tobacco business to properly or profitably conduct the business of the said Blackwell's Durham Tobacco Company, which it was chartered to conduct, and without which the investment of all the stockholders of the said Blackwell's Durham Tobacco Company would be absolutely destroyed. Fourth. Said stock in said Blackwell's Durham Tobacco Company is not listed on any stock exchange, and has no well-defined market value, nor, so far as your orators can ascertain, any market value at all; that on this account your orators cannot withdraw from said corporation by a sale of their stock without very great loss; that by a sale of the property of said Blackwell's Durham Tobacco Company, even at the price offered by the American Tobacco Company, and if there is no other bid, your orators would receive for their aggregate holdings in said company the sum of \$2,708,253, less their proportionate part of the costs of this proceeding, whereas by a sale of their stock on the market your orators verily believe that they would not realize more than \$200,000 for the same, and a proportionate reduction would result to the stock of other stockholders of Blackwell's Durham Tobacco Company; that in stating the estimated selling value of their stock as aforesaid your orators are merely giving an estimate, and do not mean to say that they could realize even the sum of \$200,000 for said stock, for, indeed, they do not know that they could sell the same at all, but they do know that they could not, by any attempted sale of said stock, realize anything like as much therefor, and on account of their investment, as they would by a winding up of said corporation, and the sale of its assets, as prayed herein; that the condition herein alleged as to your orators applies equally to all other stockholders, and in truth your orators believe that an attempted sale by them of their stock in said corporation would so depress the best obtainable price for said stock that the other stockholders would hardly be able to sell their holdings at all. Fifth. The interest and investment of your orators and all other stockholders in said Blackwell's Durham Tobacco Company are menaced by a threat on the part of the holder of one share of stock of said company, as follows: The defendant W. A. Guthrie is a stockholder of said Blackwell's Durham Tobacco Company, holding one share of its stock, purchased by him after your orators had acquired more than ninety-five per cent. of all the stock of said company, and when he, the said Guthrie, had no interest in the said corporation, and purchased by him for the purpose of doing all in his power to harass, annoy, vex, and perhaps make impossible the management of the business of the said Blackwell's Durham Tobacco Company. The said Guthrie is a lawyer and politician of more or less prominence in North Carolina, and he has caused to be published in newspapers in North Carolina an advertisement of his purpose to cause the introduction into the legislature, at its session beginning June, 1900, of a bill to repeal the charter of the said Blackwell's Durham Tobacco Company, and to appoint trustees to wind up the affairs of said corporation. In order that this honorable court may know the effect and purpose of said proposed legislation, your orators annex to this bill as 'Exhibit A' a copy of the repealing statute proposed and purposed to be introduced by, or at the request of, the said W. A. Guthrie, together with what purports to be an interview between the said Guthrie and a reporter of the News and Observer, a newspaper of general circulation in North Carolina, published at Raleigh, N. C., which purported interview your orators verily believe to be a true report, and to present truthfully and accurately the purpose and effect of the conduct of the said Guthrie; that, as will be seen by inspection of said Exhibit A, the danger menacing your orators and all other stockholders of said Blackwell's Durham Tobacco Company arises from the avowed purpose and intent of the said Guthrie, a stockholder in said company, to render valueless the stock of the said company; that this stock, the investment of your orators and the other stockholders, would be rendered comparatively valueless, or at least

much less valuable than at present, by the proposed legislation, for the reason that a great deal of the value of said stock comes from the value of the brand 'Durham Bull' owned and controlled by said Blackwell's Durham Tobacco Company, and the good will of said business, and, while the said brand and good will are now of very great value, they would not be so after the business had been run and conducted, for even a little while, by trustees such as are mentioned in said bill proposed by said Guthrie,—trustees entirely incompetent for the conduct of the business, unfriendly to the interests of the stockholders of said company, and owing their appointment, and therefore allegiance, to one who desires, and publicly and ostentatiously desires, the depletion and destruction, instead of the enhancement and protection, of the property of said Blackwell's Durham Tobacco Company, the investment of your orators and the other stockholders; that your orators hesitate to believe that the legislature would pass a statute so unjust as that mentioned in Exhibit A hereto, especially when its introduction and promotion are induced by such unworthy motives as those avowed by the said Guthrie, the promoter thereof, as shown in said Exhibit A, but your orators nevertheless desire to call to the attention of the court that the said Guthrie is, as heretofore said, a politician of more or less prominence, with his present affiliations, perhaps, with that political party at present dominant in the legislature of North Carolina; that there exists in North Carolina at present a prejudice against the Blackwell's Durham Tobacco Company and against the said the American Tobacco Company, and against, indeed, all corporations, and especially all large corporations, which prejudice has been created and so strengthened by partisan newspapers and other political influences as to make the passage of the bill mentioned in said Exhibit A not altogether unlikely; that on account of the extreme sensitiveness to injury of a great deal of the property belonging to said Blackwell's Durham Tobacco Company, to wit, the trade-mark and good will of said business, the said menace is a serious one, and, as your orators are advised, believe, and insist to this court, this menace alone would authorize this court to the exercise of its equitable jurisdiction, to the end that the property of the said corporation should be sold at the highest possible price, and that its affairs pending such sale should be run and conducted so as to enhance as much as possible the value of the property of the said corporation, and the consequent value to your orators and the other stockholders of their investment in the stock of the said corporation. Sixth. Said threats and menaces to the interests of your orators and all other stockholders of said Blackwell's Durham Tobacco Company shown or indicated in Exhibit A hereto are made by W. A. Guthrie, who is a stockholder in said company, and therefore entitled to a voice in the conduct of its affairs. As shown in said Exhibit A hereto, the said Guthrie has indicated that he will never, as a stockholder, consent to a sale of the assets of said Blackwell's Durham Tobacco Company, nor admit that the same can be sold without his consent, nor agree to any other policy desired by the holders of the majority of the stock of said Blackwell's Durham Tobacco Company, nor will he sell his one share of stock, even if he were offered \$15,000,000 for it, he having already, as he says, received an offer of an amount in excess of the actual value of said share; that, as further indicated by the said Guthrie, and as shown in Exhibit A, he, the said Guthrie, has definitely concluded to harass, vex, threaten, and attempt to destroy the business in which he is a stockholder, as aforesaid, at least as often as the legislature of North Carolina meets; that this purpose and animus revealed in the said Exhibit A makes clear the continued danger the said business is in so long as it is conducted as at present, and it also makes clear the irreconcilable difference and antipathy existing between the said Guthrie on the one part, and the interests of all the other stockholders on the other, which danger, and irreconcilable difference and antipathy make it utterly impossible to carry on either properly or profitably the business of said Blackwell's Durham Tobacco Company as at present constituted; that is, as a business in which your orators and the said Guthrie are jointly interested. Wherefore your orators verily believe, and on said belief allege, that the best interests of the said Blackwell's Durham Tobacco Company and all of its stockholders would be served by the sale of the property of the said corporation, and its winding up and dissolution, and that the preservation of the property of your orators and of the other stockholders of

the said Blackwell's Durham Tobacco Company from irreparable injury demands and makes necessary such sale, and the aid and protection of this court in making such sale, and in the preservation and maintenance of said business in the meantime."

The prayer of the bill is:

"(7) That as your orators are advised, and verily believe, the said winding up, sale, and dissolution of the said Blackwell's Durham Tobacco Company can be better, and ought to be, done by a receiver appointed by this court, for that: First. The said property would thus be sold with an indefeasible title to the purchaser, and, being thus sold free from any cloud or danger of vexatious litigation, the said property would bring the highest possible price. Second. This court would protect the interests of the stockholders other than your orators, and in the exercise of its equitable jurisdiction would see to it that the said stockholders receive the highest possible price for their investment. Third. By the appointment of a receiver, and the taking into the custody of this court of the property of the said Blackwell's Durham Tobacco Company, the threatened destruction of the property of your orators and all other stockholders of Blackwell's Durham Tobacco Company through the appointment of incompetent or unfriendly receivers or trustees would be avoided and escaped. Fourth. The receiver of this court, appointed by it, and under bond to it, would be more competent to receive and distribute that part of the purchase money arising from said sale that is going to the stockholders other than your orators than would the corporation itself, or liquidators of its appointment."

Upon the filing of this bill a temporary receiver was appointed with the usual form of an injunction and rule issued requiring all the defendants on a day certain to show cause why the receivership be not made permanent. Only one of the defendant stockholders—W. A. Guthrie—has made return. He has filed an answer, and uses that as his return. The corporation has answered, concurring in the averments and prayer of the bill. The answer of W. A. Guthrie admits the corporate character of the Blackwell's Durham Tobacco Company; admits that complainants are legal holders of stock therein; avers that they are officers and employes of the American Tobacco Company, and that the company is the real owner of the stock standing in the name of complainants; that under its charter the American Tobacco Company cannot purchase or hold stock in any other corporation; admits that he is the owner and absolute holder of one share in the corporation; denies that the bid of the American Tobacco Company is binding upon it, or that it can be enforced in this suit, to which it is not a party; admits that it is a solvent company, but avers that purchasing, as he alleges, the stock in the Blackwell's Durham Tobacco Company, through and in the name of its agent, it gave much more than \$2,800,000, to wit, \$6,000,000; denies the right of the complainants, a majority of stockholders, to direct a conveyance and sale of the property and assets of the Blackwell's Durham Tobacco Company. He denies the jurisdiction of this court to render the relief asked, for any of the causes stated, inasmuch as the Blackwell's Durham Tobacco Company is a solvent going corporation, whose charter has not expired and has not been forfeited; that no corporation in North Carolina can be dissolved by proceedings at the instance of the company, or a corporator, or a creditor, except for one or more of four causes,—abuse of its powers, nonuse of its powers for two years, insolvency, convic-

tion of a criminal offense (if such offense be persistent); and that with these exceptions the only authority to dissolve a corporation, distribute its assets, and repeal its charter lies in the legislature. He avers that no meeting of the corporation has been held to consider the plan proposed by complainants, and, if such meeting were held, he would oppose it, for the following reasons, which he addresses to the conscience of the court sitting in equity: (1) The American Tobacco Company had no authority to buy this stock, held for it by complainants. (2) That this attempt to purchase the property, assets, and good will of the Blackwell's Durham Tobacco Company is with the design of discontinuing its operations, dissolving the company, and destroying the stock of the minority stockholders,—a scheme never contemplated in the formation and conduct of the said Blackwell's Durham Company. (3) That complainants do not come in with clean hands, but seek to procure a sale with unseemly haste, before the legislature of North Carolina can meet and consider the propriety of repealing the charter of the Blackwell's Durham Tobacco Company. He admits his purpose to petition the legislature as averred, and he claims this as his right as a citizen, with no previous knowledge of the action which will be taken thereon, well knowing, however, that the majority of the citizens of the state are opposed to trusts and monopolies. (4) The answer then goes into a minute account of the acts of the American Tobacco Company, averring that they are with the design to secure a monopoly in the manufacture of tobacco, to control the purchase and sale thereof, and to drive out all other competitors by the purchase or merger of all competing companies. The result of this is the increase of price of tobacco to consumers, and a great decrease in its value to producers. That the dominating reason for the purchase of the entire plant, property, and good will of the Blackwell's Durham Tobacco Company is that this company is really the only formidable competitor left of the American Tobacco Company, and that this company is determined to suppress it. The answer then denies that the defendant has brought any action against the defendant company, and says that all that he has done is to declare his purpose—call it, if one will, a threat or menace—to petition the legislature to repeal the charter of the Blackwell's Durham Tobacco Company.

Many of the issues raised at the hearing of the return need not be discussed now. The Blackwell's Durham Tobacco Company is a solvent, going corporation. Can this court, under the circumstances stated, appoint a receiver for this corporation and take proceedings looking to its final dissolution? The general rule as laid down by text writers is that the general jurisdiction of equity over corporations does not extend to the power of dissolution of the corporation or to the winding up of its affairs, sequestrating the corporate property and effects, and in that connection appointing a receiver, unless such jurisdiction is expressly conferred by statute. Beach, *Mod. Eq. Jur.* § 967; 1 Cook, *Stock, Stockh. & Corp. Law*, § 629. The reason of the rule is stated in *Silver Mines v. Brown*, 19 U. S. App. 209, 7 C. C. A. 415, 58 Fed. 647, 24 L. R. A. 778:

"A court of equity, however, has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in case of a similar controversy arising between the members of an ordinary partnership. Corporations are, in a certain sense, legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief. A shareholder in a corporation cannot successfully invoke the power of a chancery court to control its officers, or board of managers, or to wrest the corporate property from their charge through the agency of a receiver, so long as they neither do nor threaten to do any fraudulent or ultra vires acts, and so long as they keep within the limits of by-laws which have been prescribed for their governance. If in either of the cases last specified a shareholder is nevertheless dissatisfied with the business policy that is being pursued or the methods of corporate management, he must seek redress within the corporation, in the mode prescribed by its charter and by-laws, rather than by an appeal to the courts."

But this statement of a general rule does not meet the question made in the bill upon circumstances admitted in the answer. This is not an application to stop a going corporation in a successful career, wind up its business, and distribute its assets among the corporators. The bill alleges, and the answer admits, that among the stockholders of this company there is a grave collision, not upon the business conduct of the company, nor as to the mode of conducting its operations, but as to its future existence; that a single stockholder, and he possessing but one share, has declared his fixed purpose to seek at the hands of the legislature a repeal of its charter, a termination of its existence, the winding up of its affairs by trustees, suggested in whole or in part by himself, one of whom bears his own name, presumably his kinsman. Not only so, but he has avowed his intention, if he fail in this application, to bring the question before the people of North Carolina; to agitate it on the stump, and to make it a question in politics. Whether he may succeed or whether he may fail, the same result will follow, so far as the interests of the corporation are concerned. With the well-known timidity of capital, its business must be injured, disorganized, and ruined. The good will of these manufacturing corporations, the brand which they use, are valuable portions of their assets. The threat of the dissolution and destruction of the company in itself will destroy the value of this good will. So the case presents itself thus: The company is seriously threatened with certain disaster in the near future. The interests of 99 per cent. of the stockholders are greatly in peril from the threatened action of one stockholder. This stockholder has declared that he will not part with his stock; that he holds it for one purpose only, and that is the destruction of the company, and embarking it on the sea of politics. This stockholder is not an obscure individual without influence or ability. He is a leader among his people, a man of character and a high order of ability, with great and deserved influence in a strong political party. His threat means and guarantees action. While the general rule as to the jurisdiction of a court of equity over solvent, going corporations is as stated supra, yet it is equally true that a court of chancery will

always grant equitable relief against such a corporation whenever a sufficient case for relief is shown upon the ordinary principles of equity jurisprudence. *Silver Mines v. Brown*, *supra*. A recognized ground of relief in equity is, when the affairs of the corporation are not satisfactory, when it is in the midst of or is threatened with disaster, when further prosecution of its business will lead to loss and insolvency. *Hayden v. Directory Co.*, 42 Fed. 875; *Treadwell v. Manufacturing Co.*, 7 Gray, 393. Private trading corporations like this at bar are created for the purposes of gain, the production of income; and when they cease to be profitable, or are exposed to danger of insolvency, the stockholders who have large interests at stake are not obliged to continue the business. As is well said in *Treadwell v. Manufacturing Co.*, *supra*:

"By accepting a charter they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of stockholders, that they should cease to transact business as soon as, in the exercise of sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation short of the entire loss or destruction of its property."

To the same effect is *O'Connor v. Hotel Co.*, 93 Tenn. 716, 28 S. W. 308.

The text writers deduce the same conclusion from their examination of the cases. Beach, in his work on *Private Corporations* (volume 2, § 781) says:

"When a minority of stockholders oppose a surrender, it cannot be forced upon them by the majority, unless it be a case where it is plain that a continuation of the business to the expiration of the time fixed by the act of incorporation for corporate existence would result only in financial catastrophe, or in the failure of the object for which the corporation was created. In that event a majority only of the stockholders may surrender the charter and take steps to have the business wound up."

See, also, section 783.

Spelling, in his work on *Corporations* (volume 1, § 373) after stating the general rule, adds this qualification:

"But, if the corporation is an unprofitable or failing enterprise, then it seems it may make a sale of all the corporate property, with a view to dissolution."

Mr. Thompson, in his exhaustive work on *Corporations* (volume 4, § 4443), quoting the remark of an eminent lawyer sitting as a master in chancery, that "the contract between the parties in a corporation is that, so long as the affairs of a company are prosperous, it shall go on, unless all consent to the contrary," adds:

"But it is believed that this dictum is unsound when applied to a case where a majority of the stockholders elect to wind up the affairs of the corporation and distribute its assets; because, although the affairs of the corporation may at the particular time be prosperous, yet circumstances may exist rendering it probable that this prosperity will not continue; and whether such circumstances do exist, or are likely to supervene, is a question committed exclusively to the judgment of the majority. It is believed that no case can be found in which a court of equity has granted an injunction, at the suit of a minority stockholder against the majority, to prevent them from discontinuing the business of the corporation and winding up its affairs. The exercise of such a

power would be most extraordinary. It would be tantamount to compelling the specific performance of an agreement to form and carry on a corporation, extending over an indefinite period of time, and when, in the judgment of the majority, on a question of mere economy and propriety, on which their judgment ought to be conclusive, it has been found more expedient to discontinue the business."

Considering only the question of appointing a receiver, it is ordered that Percival S. Hill, Esq., heretofore appointed temporary receiver in this cause, be now appointed permanent receiver, with all the duties, powers, and responsibilities to said position pertaining, and that he conduct the business of the Blackwell's Durham Tobacco Company until the further order of the court. And it appearing that the replication has been filed in the cause, and that the same is at issue, it is further ordered that this case be referred to the standing master, Shepherd, and that he take testimony on the matters of fact alleged in the bill and not admitted by the answer, and that he report the same with all convenient speed to this court.

MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE, MD., et al. v.
COLLINS PARK & B. R. CO. et al.

(Circuit Court, N. D. Georgia. April 30, 1900.)

No. 1,080.

1. STREET RAILROADS—GRANT OF FRANCHISES—EFFECT AS CONTRACT.

The grant by a city to a street-railroad company of a franchise to construct and operate its road on certain streets, when accepted and acted upon by the company, constitutes a contract between the city and the company, which the city cannot infringe or impair; and the company thereby obtains such a property right in its tracks, when constructed, and in its franchise to operate the same, that the city cannot authorize their use by another company unless such power is reserved in the grant. In the absence of such reservation, or beyond its terms, such right can only be acquired by another company under the power of eminent domain conferred upon it by the state.

2. SAME—RIGHT OF CITY TO ATTACH CONDITIONS TO GRANT.

Under the provision of the constitution of Georgia, which requires the consent of the corporate authorities of an incorporated town or city to the construction of a street railroad therein, such authorities may annex conditions to their consent; and a company which accepts a grant containing a reservation to the city of the power to condemn portions of its tracks for the joint use of other companies when deemed necessary, upon payment of just compensation, cannot repudiate such condition on the ground that the city has no statutory power to make condemnations for such purposes.

3. SAME—RESERVATION IN GRANT—CONSTRUCTION.

The city council of Atlanta, in a franchise granted to a consolidated street-railroad company, reserved to the city "the right to condemn such portions of said lines, not exceeding five blocks, as may be necessary for the allowing of other street-car companies to enter the central portion of the city." *Held*, that such reservation extended only to those portions of the company's lines within what might fairly be considered the central portion of the city, and did not authorize the condemnation of portions of its track outside that limit, although for the purpose of enabling a new company to ultimately enter the central portion of the city.

4. SAME—EXERCISE OF POWER RESERVED BY CITY.

Under such grant the city council has power to determine when the necessity exists for exercising the right reserved, subject only to the condition that its judgment must be based on reasonable grounds.

5. SAME.

The company, under the contract made by its acceptance of the grant containing such reservation, cannot object to the exercise of the power reserved in any reasonable and proper manner; and the city may, on determining the necessity for condemning portions of the company's tracks for the use of another company, properly authorize the latter to institute proceedings in its own name to make the condemnation in accordance with the procedure prescribed in such cases by the laws of the state.

6. SAME.

Under such reservation, reasonably construed, the city had the right to make and enforce such regulations as to the movement of cars or use of tracks by the company as were reasonably necessary to make the purpose of the reservation effective, by enabling the portion of the track condemned to be jointly used by the two companies.

7. SAME.

The exercise of the power of condemnation under such reservation as to a short portion of track is not reasonably justified, where each company requires but a single track, and the street is of sufficient width to accommodate two tracks without interference with other travel along it or with each other.

8. SAME.

A determination by the city council of the necessity of condemnation under such reservation for the purpose, therein expressed, of enabling the second company to enter the central portion of the city, where ineffectual because the portion of track to which it relates is outside of the limits contemplated by the contract, cannot be construed as an adjudication of the necessity of condemnation by the second company under a power given it by its charter, to be exercised under certain circumstances and upon different grounds, or as a consent by the city to the condemnation on such grounds.

In Equity. On motion for preliminary injunction.

King & Anderson and Goodwin & Hallman, for complainants.

Brandon & Arkwright, King & Spalding, Rosser & Carter, and John L. Hopkins & Sons, for defendants.

James A. Anderson, City Atty., and J. T. Pendleton, for city of Atlanta.

NEWMAN, District Judge. On May 20, 1891, the mayor and general council, the governing body of the city of Atlanta, on the petition of Joel Hurt and A. A. Glasier, representing certain independent lines of street railway then being operated in the city of Atlanta, granted to the companies represented by said Hurt and Glasier certain rights of consolidation and electrical equipment, more particularly set out in the ordinance of the city as contained in the Code of Atlanta, p. 506. It is shown by the report of the committee that the purpose of the petitioners was to combine said lines into a company to be known as the Atlanta Consolidated Street-Railway Company. This purpose was subsequently accomplished, and on December 10, 1891, the city, on the petition of the Atlanta Consolidated Street-Railway Company, by resolution recognized the consolidation as having been accomplished, and granted the privileges theretofore granted on the petition of

Hurt and Glasier to said Atlanta Consolidated Street-Railway Company. In speaking of this grant hereafter it will be referred to as the grant to the Consolidated Company. The only part of the grant on the petition of Hurt and Glasier which need be mentioned here is contained in the ninth paragraph of the report of the committee, as adopted by the mayor and general council, which is as follows:

"That the right to condemn such portions of said lines, not exceeding five blocks, as may be necessary for the allowing of other street-car companies to enter the central portion of the city, is hereby reserved, upon payment of just compensation to the company."

There were subsequent grants for various purposes to other lines which became part of the Consolidated System, as to which the foregoing reservation applied because the conditions, etc., in the grant to the Consolidated Company were expressly referred to, and others in which the reference is not specific, but as to which it is claimed that the terms employed are such as necessarily make this clause and the reservation contained therein a part of the grants. There has recently been a change of corporate name, and the Atlanta Consolidated Street-Railway Company has become the Atlanta Railway & Power Company.

On August 23, 1899, the mayor and general council granted to the Collins Park & Belt Railroad Company the right to use certain streets of the city of Atlanta for railway purposes, and the "right to condemn the use of, and such an interest therein as may be necessary to the use of," certain parts of the tracks of the Atlanta Railway & Power Company, upon the payment of just compensation. In connection with each of the grants of the right to use a portion of the track of the Atlanta Railway & Power Company, reference is made to reservation contained in section 9 of the grant to the Consolidated Company referred to, and this part of the grant to the Collins Park Company recites that the mayor and general council adjudge the existence of the necessity of such condemnation in each instance. After this right had been granted the Collins Park Company to condemn certain portions of the tracks of the Railway & Power Company, the Collins Park Company notified the Railway & Power Company that it had appointed an assessor to act with an assessor to be appointed by the Railway & Power Company, to fix the amount of the compensation which should be paid by the Collins Park Company to the Railway & Power Company for the use of the tracks of the latter company, in accordance with the grant of the city council. A similar notice was served on the Mercantile Trust & Deposit Company of Baltimore, Md., trustee for a large amount of bonds issued by the Railway & Power Company. On the 18th day of November, 1899, the trust company filed its bill in this court against the Collins Park Company and the city of Atlanta. A question of jurisdiction was raised, which was disposed of and an opinion of the court was filed on the 7th day of February, 1900. See 99 Fed. 812. After this opinion was filed, on petition of the attorneys, an order was entered making the Atlanta Railway & Power Company a party complainant, and overruling the pleas to the jurisdiction. The bill has been answered, and this is a hearing on an application for injunction pendente lite to restrain proceedings to con-

demn, on the bill, answer, and evidence submitted, documentary and by affidavit.

The rights and privileges granted the Consolidated Company in the various streets of the city to which each grant applied, when such grants were accepted and acted upon by the company, created a contract between the city and the company. When the company laid its tracks in the streets of the city in pursuance of the grant, it obtained a property right in such tracks, and in the franchise or right of operation over the same, which could not be infringed or impaired. Elliott, Roads & S. p. 564; Booth, St. Ry. Law, §§ 8, 9. In *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, the rule on this subject is stated in this way:

"It is settled that a charter granted by the common council to a street-railway company to construct and operate a street railway within the corporate limits of the city constitutes a contract between such railway company and the city,"—citing: *City of Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Coast-Line R. Co. v. City of Savannah*, 30 Fed. 646; *State v. Corrigan Consol. St. Ry. Co.*, 85 Mo. 263; *District of Columbia v. Washington & G. R. Co.*, 4 Am. & Eng. Ry. Cas. 161; *Farrar v. City of St. Louis*, 80 Mo. 329; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352.

In *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114, speaking of the right of the same company, it is said:

"That the plaintiff had a contract with the city is entirely clear. It was so held by the supreme court of Indiana in *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, in which the liability of the company for certain street improvements was discussed and passed upon."

From the opinion in this last case another quotation may be pertinent, as follows:

"The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for 30 years in consideration that the company lay its tracks and operate a railway thereon, upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company, and the road built and operated as specified, became a contract which the state was not at liberty to impair during its continuance; but if, at the expiration of the 30 years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose."

The thoroughly argued and well considered case of *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, on this question, is interesting, and states clearly the law relating to railway corporations obtaining franchises in the streets of a city.

It is useless, however, to multiply authorities upon this question. They are numerous, and sustain the proposition that a contract exists between the city and the Railway & Power Company, subject only to reasonable police regulation. The right of police regulation involving such governmental duties as relate to the safety and comfort of the people, and the orderly use and regulation of the streets, the city does

not, of course, abrogate by such grants, even when the same have, by acceptance, expenditure, and use on the part of the railway company, ripened into contracts. There is no question of police regulation here, however. The right to take the track of one company for the use of another must be reserved in the grant, or exist otherwise by contract, or such taking must be by the exercise of the state's power of eminent domain through the legislature of the state. Confessedly, the city has no power of eminent domain with reference to the matters in controversy here. It has no grant from the legislature to condemn the track of one street-railway company for the use of another. The only rights it has or can exercise are by reason of the reservation contained in the grant to the Consolidated Company. There is no question of the exercise of the power of eminent domain in connection with the city's direct action in the matter. How far the exercise of this power by virtue of the provisions of the charter of the Collins Park Company, and the city's action with reference thereto, is material, will be considered in disposing of another branch of the case.

It is said for the complainants that the city could not legally make this reservation of a right to condemn, in certain contingencies, part of the Railway & Power Company's tracks; that, having no power under its charter to condemn a part of the tracks of one railway company for the use of another, it could not reserve the same to itself, and by the reservation acquire a right which it did not have under the law. This argument is not sound. The constitution of the state (article 3, § 7, par. 20) provides that "the general assembly shall not authorize the construction of any street passenger railway within the limits of an incorporated town or city without the consent of the corporate authorities." The consent of the city was necessary, therefore, for the laying of additional tracks and the connection of the tracks of the different companies, the consolidation of which was proposed, and which was allowed by the provisions of the Consolidated grant. The right to consent to the use of the streets for street-railway purposes embraces necessarily the right to consent conditionally,—to consent with limitations, restrictions, and reservations. The city, of course, could withhold its consent entirely. There can be no doubt, therefore, of its right to withhold partially or to limit the grant. The Consolidated Company could have refused to accept the grant with this reservation in it. Accepting the grant, however, with this provision in it, it was bound by it, and cannot now set up the lack of power of the city to make the reservation. The city might not have made the grant without the reservation, and, indeed, there is evidence in the record, which all parties agree can be properly used, which shows that there was a discussion of this question between the committee of the city council and the grantees, and that the provision making the reservation as it was finally framed and embodied in the grant was mutually satisfactory. It would be manifestly unjust to hold that the Consolidated Company could accept the grant with the distinct knowledge and understanding that this reservation was contained in it, and then, when the city sought to make the reservation effective, repudiate it and deny the power of the city to make it.

One of the important phases of the case, and to which much of the argument has been directed, is the meaning of the term "lines," as contained in this reservation in the grant by the city to the Consolidated Company. It has been thought probable by counsel that this question was important to a determination of the present controversy. It is said for the complainants that the word "lines," as used in this reservation, refers to the lines of the Consolidated Company in the aggregate, and that therefore this reservation applies to five blocks of its lines, in all. On the other hand, it is contended that the reservation was as to five blocks of each line of the Consolidated Company. It has also been urged in argument for the defendants that the reservation would apply in any event only to such lines as acquired privileges by virtue of the Consolidated grant, but this is not material at present. Counsel have offered very plausible arguments in support of the respective contentions as to the meaning of this reservation. It is unnecessary, in view of the conclusions which have been reached as to the rights of the parties in this case, to express any opinion on this question. Any conclusion that might be reached would not be free from doubt, and, as its determination at present is immaterial, it had better be left to be passed upon at the final hearing of the case, or when, in some new aspect, its decision is necessary.

Another part of this reservation has given rise to opposing views and to considerable argument in the progress of the case, and that is the language, "to enter the central portion of the city." It is said on the one hand that this gives the right to the city to permit the condemnation of only such blocks as are within what may be fairly considered the central portion of the city. On the other hand it is said that, if the purpose is to reach the central portion of the city, the right is reserved to condemn blocks, even though they be not in the central portion of the city. In determining this question it is important to consider for a moment the way the streets of the city of Atlanta run. The corporate limits of the city, as originally constructed, were a circle. The circle was subsequently enlarged, and now is broken into in two or three places, where the growth in population has made it necessary to extend the corporate limits somewhat beyond the circle, but generally the circle exists yet. The main streets of the city run from center to circumference, or, as it would be better expressed for the purposes of this case, from circumference to center. This makes the traffic and business in the central portion of the city much more congested than would be the case in a city where the streets were laid out at right angles. This situation was evidently in the minds of the city authorities when this reservation was made. It is practically possible to reach the center of the city from the outskirts over only a few lines, and it is certain that this actuated the committee of the city council, and the council itself, when this provision was inserted in the Consolidated grant. The business portion of the city is in its geographical center. The great purpose of street-car lines was to carry passengers to and fro from the suburbs and residence portions of the city generally, to the business center. The language used is, "the allowing of other street-car companies to enter the central por-

tion of the city." But one construction can be given to this language, and that is that the city reserved the right to condemn the number of blocks referred to within what may be fairly considered the central portion of the city. If the council had had any other purpose in view, it would certainly have been differently expressed. If it had the purpose which is contended for by defendants' counsel, it would simply have said "the right to condemn five blocks of the Consolidated's tracks," without using any qualifying language at all. These blocks are to be used for the purpose of allowing any new company to enter the central portion of the city, and not to approach it, or to run in such a way that it may ultimately reach it. The meaning of this expression in the reservation is so obvious that it scarcely requires elaboration.

The necessity for this condemnation is to be determined, however, before the right reserved can be exercised. The mayor and general council of the city, as has been stated, in the recent grant to the Collins Park Company, adjudged the necessity for this condemnation, in respect to the sections of the Railway & Power Company's tracks as to which the right to condemn was given. Complainants contend that it is not just, nor is it legal, for the city, as a party to this contract, to itself adjudge the necessity of that which it reserved. While the city is a party to the contract in one sense, it is a party as the representative of the public. It stands for the public. It is entirely impartial as between the public and the railway company. The judgment of the city council as to whether or not there is a necessity for the use of these reserved blocks by a new company is without prejudice or preference. It is exercised solely in the public interest, with due regard to the rights of the railway company. The courts cannot assume that it will act otherwise. In this view, it is wholly immaterial that it made the reservation in question, and was to that extent a party to the contract of which the reservation is a part. The determination of the city council, however, where private rights are affected, must be reasonable. An unreasonable exercise of a reserved power or of a delegated power will not be upheld by the courts, and, where there is an attempt to enforce a wholly unreasonable exercise of even a discretionary power, its enforcement, where private rights are affected, will, in a proper case, be enjoined. If, therefore, the judgment of the city has been exercised in a wholly unreasonable manner as to the matters in controversy, its action cannot be sustained by the courts.

There is an ordinance of the city of Atlanta, passed in 1890 (City Code, § 1326), as follows:

"The mayor and general council of the city of Atlanta, in granting franchise to street railroads and street-car companies of whatever motive power, reserve the right to grant a franchise to another company or companies when in their judgment the public interest and welfare is subserved thereby, over any part of any street or streets, not to exceed three blocks, or 1,200 feet, upon the petitioning party or company paying a pro rata part of the original cost of construction, and a pro rata part of keeping up in good repair of that part of the roadbed used by them jointly."

It is contended that this ordinance was not affected by the grant to the Consolidated Company and the reservation made therein, and

that it must be considered in connection with the controversy here. Counsel for the respective parties differ as to the proper construction of this ordinance. It is claimed on the one hand that it authorized the use, in the discretion of the city authorities, by one company, of the tracks of another, and on the other hand that it relates only to the joint use of streets, and does not refer to the use by one company of the track of another; but, even if it had this meaning, in view of the undisputed evidence before the court as to the proceedings had when the grant was made to the Consolidated Company and the reservation agreed to, this ordinance was modified and repealed so far as it is inconsistent with the reservation. Unquestionably the reservation was a contract, in the respects material here, between the city and the Consolidated Company. The city is bound by it, and its action, as well as that of the Consolidated's successor, the Railway & Power Company, should be controlled by it, and it alone. The city's grant to the Collins Park Company, as has been stated, is based entirely on the reservation in the grant to the Consolidated Company, and the city does not assume to act by virtue of any other power or authority. In the charter of the Collins Park Company, the legislature granted to it the rights theretofore granted to the Metropolitan Street-Railroad Company, and one of these rights was to condemn, when certain conditions therein specified existed, certain parts of the track of another street-railway company. The charter of the Collins Park & Belt Railroad Company is found in the acts of the legislature of Georgia of 1889 (page 211), and the charter of the Metropolitan Street-Railroad Company in the acts of 1882-83 (page 201). The exact language of the charter of the Metropolitan Company material here (section 5), subsequently re-enacted as to the Collins Park Company and made a part of its charter, is as follows:

"Said corporation, for the purpose of making a connected line, or for the purpose of crossing any other street railroad with its road, may lay its tracks upon and occupy with its railroad or tracks any street or streets upon which any other street-railroad company may have its tracks, or may have the right to lay its tracks at the time: provided, it does not at any one place occupy more than five full city blocks front, contiguous to each other, and if the proper municipal authority determine that the street or streets so sought to be occupied by the tracks of both roads is not wide enough for both of said roads to have passage tracks, and at the same time to leave space enough for the passage of vehicles, then, and in that event, said corporation shall have power and authority to condemn to its use such parts of said other railroad as may be necessary for the purpose of making a connected line or of crossing any other street railroad with its road, not exceeding in any one place three full city blocks contiguous to each other. Said condemnation shall be made after the decision is made as aforesaid, by said municipal authorities, that such condemnation is necessary to the convenience of the city in the exercise of its control over the streets of said city, by pursuing the provisions and mode pointed out in section 6 of this act; and said track or road so condemned shall be used by each of said roads, each having equal rights thereon; and, in maintaining said track or road so used in common, each company using the same shall pay pro rata in proportion to the number of cars run on said track; provided, that the part of said track of any other railroad company which may be condemned with the consent of said municipal authorities shall be so used by each of said companies using the same; that neither one shall damage the business of the other nor delay its cars running upon said tracks so condemned."

The contention of counsel for the Collins Park Company with reference to the grant by the city to that company, and the extent to which the grant carried with it a determination of the rights in respect to condemnation contained in its charter, will be noticed hereafter, in connection with one of the separate grants of the right to condemn.

In this connection it will be proper to refer to another contention of counsel for complainants. They urge that, inasmuch as the city reserved the right to condemn by the terms of the reservation to itself, condemnation proceedings, if they can be instituted at all (which they deny), should be by the city. They claim that the right to condemn reserved by the city can only be exercised by it, and could not be transferred by it to the Collins Park Company. As has been stated, the reservation in the grant to the Consolidated Company became a contract between the city and the Consolidated, by which the city was bound, and by which the Consolidated was bound. There was an implied agreement on the part of the Consolidated Company when it accepted and acted upon the grant, having this reservation in it, that the city might take the number of blocks of its track reserved, at proper points; and it must be held that there was also an implied agreement that it would abide such reasonable procedure as was necessary to render the reservation by the city, and its agreement to the same, effective. The method adopted by the city was to allow the Collins Park Company to institute proceedings to ascertain the compensation which should be awarded the present corporation, the Railway & Power Company, in accordance with the law of the state of Georgia on this subject. The Code of Georgia (section 4667 et seq.) contains this law, and the proceedings on the part of the Collins Park Company in accordance with the city's authorization are in substantial, if not literal, compliance with this law. Unless this reservation by the city becomes nugatory, there must be some method of carrying it into effect, and certainly a just and proper method is provided when the general law of the state on this subject is adopted. An arbitrator appointed by each, with the right, in case they disagree, to select an umpire, seems to be a method entirely just and reasonable, and really the proper legal course.

Considerable evidence has been introduced to show that there are other practicable routes than those given to the Collins Park & Belt Company by the city council, and routes which would not have required it to go upon the tracks of the Railway & Power Company at all. There is also evidence and contradictory evidence as to the practicability of the use by one company of the track of another,—particularly with reference to joint use of overhead wires, poles, etc. In addition to the fact that the city council appears to have given a thorough investigation to this whole matter, and to have acted after a most careful examination of the subject, the evidence here clearly preponderates in favor of the proposition that a joint use of tracks, as well as of the necessary appliances, is practicable; certainly so, if there be proper effort on the part of the managers of the two companies to accomplish the same, and render it satisfactory. The evidence is sufficient to show, perhaps, that it should not be done except in

cases of real necessity. It may not be a desirable thing to do, and it probably should not be resorted to, if it can be well avoided; but that it is practicable, under proper arrangements, the evidence seems to demonstrate. All this, however, as well as the matter of determining the routes to be pursued generally by the new line, are clearly matters in the discretion, properly exercised, of the city authorities, and that discretion will not be interfered with by the courts except where it is abused. The courts cannot undertake to review and determine the action of the city council in matters such as are here involved, except where there is illegal action, and such abuse of discretion as makes the ordinance unreasonable, and one that should not be enforced.

We come now to consider each of these grants to the Collins Park Company to use the track of the Railway & Power Company separately, and to apply to these several grants the conclusions that have been reached, as hereinbefore expressed. These are not taken in the order in which they appear in the committee's report adopted by the city council, but are referred to in such a way as they can be more easily and readily disposed of.

The first considered is the grant to use the tracks of the Railway & Power Company on Whitehall street, from Mitchell to Alabama. The right, as expressed in the grant, is to use the double tracks of the Railway & Power Company on Whitehall street, between Mitchell and Alabama; the right thus granted involving a change of the single track between Hunter and Alabama so as to make the same a double track, to be used jointly by the two companies. This part of the Railway & Power Company's track between Mitchell and Alabama is clearly within the central portion of the city. The judgment of the city council that the joint use of tracks at this point is necessary is so reasonable and proper, under the evidence and from common observation, that it may pass without question. The only matter of any difficulty involved is that which requires the Railway & Power Company to use the tracks which will be laid between Hunter and Alabama by the Collins Park Company. It is hardly contested that the city could, even in the exercise of its general powers over the streets, require the Railway & Power Company to move its track to one side of the street at this point, and allow the new company to build another track. If this be true, it seems entirely reasonable that the city should, under a fair and just construction of this reservation, require the cars to be so operated by both companies that at this congested point the cars on one side of the street should all move in one direction, and on the other side in the opposite direction. It is not entirely clear, either, from the present location of the tracks, that it will be necessary for the Railway & Power Company to use the track of the Collins Park Company between Alabama and Hunter at all. They only use their tracks now between Hunter and Alabama, as shown by the evidence, as a line coming into the city; their cars going out on Broad, and thence through Hunter to Whitehall. But the city undoubtedly has the power, under this reservation, to grant the right to condemn the use of the tracks of the Railway & Power Company on these two blocks for the use of the Collins Park Company; and, assuming such a right, it seems an inevitable conclusion that such a change and readjustment

of the tracks as may be fairly and reasonably necessary to make the reservation effective and to accomplish its purpose can be ordered and enforced by the city authorities.

The next separate grant to be considered is that of the right to use the portion of the tracks on Peachtree street between Auburn avenue and Edgewood avenue. The part of the Railway & Power Company's track sought to be condemned is 238 feet, leaving the Railway & Power Company's tracks just below Walton street. There was some difference between counsel, in argument, as to whether or not this part of the track on Peachtree street sought to be condemned was one block or two blocks; but, it being only 238 feet, it was finally conceded by counsel for the Railway & Power Company that it could not be fairly claimed that it was more than one block. This, also, is unquestionably within the central portion of the city, and a necessity for its use in order to reach the central portion of the city is apparent. There was no abuse whatever of the discretion vested in the city council in so adjudging, and it is unnecessary to say more about this particular grant. Its location, and the manner in which it is approached by the lines of the Collins Park Company, make its use a reasonable necessity, which the city council had the right to declare.

The next separate grant to be considered is that on Loyd street, between Mitchell and Garnett streets. Loyd street is 60 feet wide, 40 feet between curbs. The Railway & Power Company has now one track at this point. Its line runs along Loyd street from a point north of Mitchell street to Garnett street, just opposite to which it runs into Pulliam street, which branches off on the east side of Loyd. The proposed line of the Collins Park Company will come down Mitchell street, and turn into Loyd at Mitchell, and run out Loyd street. The Railway & Power Company's track, as will be seen, leaves Loyd on the east side, and the proposed Collins Park line will enter it on the west side. No reason whatever appears why each company at this point cannot have its own line. No evidence has been introduced and no argument has been made as to situation there sufficient to justify the court in holding that the city could reasonably and properly authorize the condemnation and use of that part of the Railway & Power Company's track. Each of the companies can pursue its own side of the street with perfect ease, so far as anything submitted in the case shows. The Collins Park Company can enter this street at its west side, and pursue its course along the west side to Garnett, from which point it goes on a street on which the Railway & Power Company has no track. The Railway & Power Company's track comes into Loyd from Pulliam on the east side, and goes along Loyd street without interfering with, touching, or crossing the track of the Collins Park Company at any point. A suggestion to this effect came up during the argument of one of the counsel for the complainants, and, as it involved the removal of the track of the Railway & Power Company from the center of the street to the east side, inquiry was made if the Railway & Power Company would move its track voluntarily; and the response of counsel was that, while he was not fully authorized to speak for the company, he thought it would. It will be assumed that the Railway & Power Company will move its track at the proper time

so as to make room for the track of the Collins Park Company on these two blocks, and application for further order of the court can be made, if this assumption is erroneous.

The next portion of the lines of the Railway & Power Company, the condemnation of which is authorized, is on Peachtree street from Pine street to a point nearly opposite Forest avenue. It is unnecessary to determine the necessity for the use of this part of the Railway & Power Company's track at present, except in one respect. There has been considerable discussion as to whether any other route was practicable, to enable the Collins Park Company to construct what is called its "Juniper Street Line," but it is immaterial, in the view taken of this particular grant. The right to condemn this portion of the Railway & Power Company's tracks is, as are the other grants, based expressly on the reservation made by the city in the grant to the Consolidated Company. It is earnestly contended by counsel for the Collins Park Company that the action of the city council in adjudging the necessity for the use of the tracks of the Railway & Power Company by the Collins Park Company necessarily carried with it and embraced in it a determination of all that was required in the charter of the Collins Park Company, in order to authorize condemnation. The right is not given by the city because of the necessities stated in the charter of the Collins Park Company, but because, as they determine, it is necessary to enter the central portion of the city. It may be that if the city authorities consider, as it seems they did, they can allow the condemnation of the track of the Railway & Power Company in any part of the city, so long as the purpose is to ultimately reach the center of the city, that they would hold the use of the track in question necessary for that purpose, and would not adjudicate it to be necessary under the charter of the Collins Park Company. Certainly, where the property of one person is taken for the use of another in this way, the authority under which the taking is authorized should be strictly pursued. If the city could act by virtue of its contract rights, and at the same time carry with this action its consent to the exercise of rights existing under the charter of the Collins Park Company, the language used by which such general result is obtained should be clear and unmistakable. It is not so here, and therefore the rights that pass by the grant on this portion of Peachtree must be tested and ascertained by the terms of the reservation in the grant to the Consolidated Company. Tested by this, it is perfectly clear that it does not come within the language of the reservation, "to enter the central portion of the city." It is unquestionably several blocks beyond the extreme limits of what can fairly be considered the central portion of the city, and no right to condemn the track of the Railway & Power Company at that point for the use of another company was, in the most liberal view of it, embraced in this reservation.

As the use of the track of the Railway & Power Company on three blocks only is now taken under the reservation, it is unimportant to determine the extent of the reservation beyond what is conceded by both parties; and it is also unimportant to determine whether or not the use of the track on two blocks of Mitchell street said to have been taken by the Atlanta Railway Company from the Consolidated

Company should be considered in estimating the aggregate number of blocks. The conclusion, therefore, is that as to the track sought to be condemned, and the method of condemning and using it, on Whitehall street, from Mitchell to Alabama, the injunction will be denied. As to the track on Peachtree street from Auburn avenue to a point near Edgewood avenue, as explained in defendant's answer, and the diagram submitted, the injunction will be denied. As to the track on Loyd street from Garnett to Mitchell, the injunction will be granted, provided the Railway & Power Company moves its track, when necessary, to the east side of the street, to allow the use of the west side by the Collins Park Company. In that event the action of the city authorities in condemning the use of this track would be unreasonable, even if the use of this track is necessary to enter the central portion of the city, which is not now determined, and which latter question may be left for future determination in the event further action is necessary. As to the portion of the Railway & Power Company's track on Peachtree street from Pine street to a point near Forest avenue, for the reasons stated the injunction will be granted. A decree may be taken denying an injunction in the respects above indicated, and granting an injunction pendente lite as indicated.

KILGOUR v. SCOTT et al.

(Circuit Court, S. D. New York. April 9, 1900.)

1. MORTGAGES—ABSOLUTE CONVEYANCE AS SECURITY—RIGHTS OF PARTIES.

A creditor holding the title to real estate, subject to a mortgage, as security, who buys the property when sold under the mortgage, holds the title acquired subject to the original trust, and, in case he sells the property, is accountable to the debtor for the proceeds, less the amount expended in redeeming from the mortgage.

2. SAME—CONSTRUCTION OF CONTRACT.

Where an instrument of defeasance executed by a creditor, to whom the debtor had conveyed property as general security for his indebtedness, provided that, as security for a specified amount of such indebtedness, the creditor should accept a mortgage upon other property, which was given, and subsequently foreclosed by the creditor, the effect of such agreement was to take the amount specified from the general indebtedness secured by the property conveyed, which, on an accounting, could not be charged with any deficiency remaining due on the mortgage debt after foreclosure.

3. SAME—UNAUTHORIZED SALE BY GRANTEE.

A creditor, to whom property is conveyed as security under an agreement authorizing its sale only at a price to be agreed upon between the parties or fixed by an umpire, who sells the property without observing such agreement, is accountable to the debtor for the actual value of the property at the time of settlement, if greater than the price received.

In Equity. Suit for an accounting and redemption under a conveyance of property as security. On exceptions to report of master.

William S. Bennett, for plaintiff.
Lewis E. Carr, for defendants.

WHEELER, District Judge. The defendant Scott, cashier of the defendant bank, held the legal title to several parcels of real estate, to secure it for dues from the plaintiff, under an agreement for conveyance, with a statement of the debts, dated December 14, 1894, and an accounting has been had of the sums due in equity. Some exceptions have before been disposed of. Others have not been heard. The defendant's exceptions that have come here to be heard relate to the gains on sales of the Shohola Glen property before this agreement. St. John, president of the bank, held the title as security for what the plaintiff owed the bank; that title was conveyed to defendant Scott, cashier of the bank, without other consideration, to be held for the same purpose. Without foreclosure, he sold the property. Afterwards a part of it was sold on foreclosure of a prior mortgage, and bid in by him, and he acquired the rest. Then he made \$1,000 on an attempted sale, and \$12,000 more than was credited or disclosed to the plaintiff on a completed sale. The master has allowed these gains to the plaintiff. The defendant insists that after Scott got the property back he held it as a stranger, and could dispose of it without accountability; but it was all the while subject to the plaintiff's right to redeem, which he had no right to sell, and could not cut off by any form of sale and repurchase, or other circuitry of transfer short of a foreclosure. However it might have been as to other purchasers without notice, he always had notice, and the title came back to him subject to the right of the plaintiff to redeem it from the bank, for whom Scott held it, on proper account of what was paid to redeem it from the outside mortgage, as an expense, and of what was realized from it as a profit. The master appears to have treated the transaction according to this view, agreeably to the decree. This amount should have been applied in reduction of the statement of indebtedness attached to the agreement of defeasance of December 14, 1894, when it was made, and would have brought the amount down to \$48,936.

One of the plaintiff's exceptions now here considered relates to the Parker's Glen property, of Pennsylvania. That agreement for conveyance provided that:

"The said William E. Scott and the said bank agree to accept as security for the payment of twenty thousand dollars of said indebtedness a mortgage executed under the hand and seal of the said John F. Kilgour, or under the hand and seal of such trustees as he may elect to hold said title for him, covering all the property aforesaid in the state of Pennsylvania, conditioned for the payment of said sum in five years from its date, and bearing interest at the rate of six per cent. per annum, payable semiannually, and containing a clause setting forth that the whole of said principal sum shall be due if default be made in the payment of any installment of said principal sum or interest thereon when they shall respectively become due, and shall remain due and unpaid for three months thereafter, and containing a further clause that the necessary costs required to foreclose the said mortgage shall, upon foreclosure, be added to the principal sum, and collected therewith, as a part of said indebtedness."

The mortgage was given, and on default the property was sold on foreclosure to Scott in December, 1896, for \$9,005, and was resold by him February 13, 1898, for \$17,500. The master has, with the consent of the defendants, credited the plaintiff with \$16,222.68,

the net proceeds of this transaction, with some observations indicating that, while the property may have been worth much more, lack of due diligence, which would include good faith, had not been shown. But that part of the agreement of defeasance quoted took that \$20,000 out of the general indebtedness, and the mortgaged property out of the general property, upon the making of the mortgage, leaving the general indebtedness \$20,000 less, or \$28,936, secured by the general property, other than that covered by the mortgage. As the mortgage was to be accepted as the security for this \$20,000, by its acceptance the other property was relieved to that extent, and would not be holden for any deficiency in this mortgage security; otherwise, the making of the mortgage would be nugatory. And this mortgage to the bank itself, provided for in the agreement, was different from what a mortgage to an outsider would have been, and was not a mere charge upon the property, to be paid off as an expense, but stood, by the terms of the agreement, as a separate thing, to follow its own exigencies, without affecting the rest, whatever its outcome should be. This is not a bill to redeem that mortgage as such, and the foreclosure would apparently be a bar to it, or to that part of it, if it was. In this view, the other exception relating to Parker's Glen becomes immaterial.

Another of the plaintiff's exceptions that has come here relates to the Passaic property. It was covered by outside mortgages,—one parcel to one Archer; others to one Gaston or the Mutual Life Insurance Company, or both. The agreement for conveyance contained this clause:

"It is agreed by and among the said parties that the title to the property lying and being in the city of Passaic, county and state aforesaid, shall be and remain until said indebtedness is wholly discharged, as at present, in the name of William E. Scott, who shall, except as to that part hereinafter described, convey the same from time to time, in whole or in part, to such purchaser or purchasers as shall be obtained, at a price to be alike satisfactory to the said John F. Kilgour and the said William E. Scott. If the price named shall not be alike satisfactory to the said parties, then they shall select an umpire, whose decision upon the question of value shall be binding and conclusive upon said parties."

The property excepted is not now in question, and there was no provision for taking up the outstanding mortgages. The property covered by the Archer mortgage went to outsiders upon foreclosure,—fairly, so far as appears,—and nothing seems to be left for consideration about that. The bank bid in the other parcels in question at foreclosure sales, and sold them, without following the agreement in respect to the sale, to which the bank was a party as well as Scott, in so far as has been found and reported, and as is left to be implied. These purchases and payments were mere extinguishments of charges upon the property, which would be held afterwards, as before, subject to the agreement of defeasance, and to liability for these payments as expenses. The master has reported that "there is no satisfactory evidence to show that any larger sum could have been realized by the bank with reasonable diligence." But this does not seem to be the true measure of the liability. They were not to be sold at all, but upon the plaintiff's and Scott's agree-

ment, or the decision of an umpire, as to price. Having so, by breach of trust, parted with the title contrary to the plaintiff's rights, the bank and Scott, who stand together, have incurred a liability which can justly be no less than the full value of the property to the plaintiff. For want of a finding as to this, the case must, as now viewed, go back to the master, that this value may be supplied.

The other material exceptions relate to the personal property covered by the plaintiff's bill of sale to Wands, which afterwards came from Wands to the defendant. The plaintiff's claim as to this rests upon a transaction between him and Wands, who would be primarily liable, if any one, and is not a party here. The ruling of the master that nothing comes from it for consideration here seems to be correct.

Defendants' exceptions are overruled. The plaintiff's first and fourth exceptions are sustained, and \$20,000 is to be credited to the plaintiff on account of Parker's Glen, as of December 14, 1894, in lieu of the allowances made by the master. The third of the plaintiff's exceptions is sustained, and the report is recommitted for a finding as to the just value of the Passaic property covered by the Gaston and Mutual Life mortgages. The other exceptions are overruled, without prejudice to the decision upon those sustained.

TOURTELOT v. STOLTEBEN.

(Circuit Court, N. D. Iowa, E. D. May 5, 1900.)

1. NATIONAL BANKS—SUIT TO RECOVER ASSESSMENT—LIABILITY OF PLEDGEE.

In an action by the receiver of a national bank to recover an assessment from the defendant as a stockholder, where it is admitted or proved that defendant is in fact merely a pledgee of the stock, the burden rests upon the plaintiff to show that defendant, by reason of having knowingly permitted the stock to stand in his name as owner upon the books of the bank, is estopped to deny such ownership as against its creditors.

2. SAME—EVIDENCE—BOOKS OF BANK.

Where, in an action by the receiver of a national bank to recover an assessment from one in whose name a certificate of stock had been issued, but who it was shown held the same only as trustee to secure an unpaid indebtedness from the actual owner of the stock to a third person, the plaintiff did not produce in evidence the list of stockholders required by Rev. St. § 5210, to be kept by the bank, or show whether or not such list was in fact kept, but relied solely on the stock certificate book, all persons must be held to have been chargeable with notice of all the facts in regard to such stock therein shown; and, conceding that defendant's liability could be established by such book alone, without producing or accounting for the list of stockholders, it is insufficient to create an estoppel which would prevent him from showing the facts where it appears therefrom that the stock was transferred to him by one to whom the previous certificate had been issued as pledgee.

Action at law by the receiver of a national bank to recover an assessment from defendant as a stockholder. A jury trial was waived, and the case submitted to the court on the pleadings and a stipulation of facts.

Findings of Fact.

(1) From the admitted allegations of facts in the pleadings the court finds that the plaintiff, Ellie C. Tourtelot, was, on the 3d day of August, 1896, duly

appointed by the comptroller of the currency the receiver of the Grand Forks National Bank, of Grand Forks, N. D.; that the named bank had been duly incorporated and organized as a national bank under the statutes of the United States, with a capital stock of \$200,000; that on the 28th day of April, 1896, the bank, being then insolvent, was put into liquidation by direction of the comptroller of the currency; that on the 14th day of June, 1897, the comptroller, finding it necessary so to do, ordered and levied an assessment of 100 per cent. upon the capital stock of said bank, and authorized the receiver to enforce the collection thereof if not voluntarily paid by the stockholders on or before the 14th day of July, 1897; that the present action was brought on the 22d day of March, 1899, against the defendant, William H. Stolteben, to recover the assessment upon 50 shares of stock of \$100 each, it being claimed that the defendant was the owner of the named number of shares of stock in the insolvent bank, and therefore was liable for the assessment levied thereon by the comptroller of the currency, which the defendant refuses to pay on the ground that he is not, and never has been, the owner of any shares of the capital stock in said bank in such sense as to be made liable for the assessment ordered by the comptroller.

(2) The court further finds that the parties hereto, by a writing duly signed, stipulated the facts touching the ownership of stock in the insolvent bank by the defendant to be as follows, and the court finds the facts to be as stipulated, to wit: That on or about June 29, 1892, the said Grand Forks National Bank issued to one George B. Clifford, a certificate (No. 579) for 50 shares of its capital stock of the par value of \$100 per share, as appears by one of the books of the bank (hereafter called the "stock certificate book"), which book contained originally the blank certificates of stock and stubs thereto, with certain subsequent memoranda thereon as to the issuance and return and cancellation of the stock, which stock issued to Clifford has never been sold, assigned, or transferred otherwise than as may appear from the facts herein-after stated. That the memoranda on the stub of said certificate to Clifford show that certificate No. 579 for 50 shares was issued June 29, 1892, to George B. Clifford. That on June 22, 1893, the said George B. Clifford solely, as collateral security for a loan then made and still unpaid, transferred said certificate No. 579 to one George A. Burden by assignment on the back thereof, and said certificate so assigned was returned to said Grand Forks National Bank, and now appears pasted to its stub in said stock certificate book, and on such stub, in addition to the memoranda above given, there appear the further memoranda: "Returned and canceled June 22, 1893, & Ctf. 657 issued." And on the face of said original certificate No. 579 there is stamped the following: "Canceled by order of the board of directors Nov. 6, 1893, and certificate No. 657 issued in lieu thereof." That said certificate of stock No. 657 for 50 shares, bearing date June 22, 1893, was so issued to said George A. Burden, and the memoranda on the stub thereof in said stock certificate book state that certificate No. 657 for 50 shares, of date June 22, 1893, has been issued to George A. Burden, "as collateral to George B. Clifford's indebtedness, issued in lieu of Ctf. No. 579." That on or about December 11, 1893, the said George A. Burden, while still so holding said stock as collateral as aforesaid, transferred said certificate to the defendant William H. Stolteben by assignment on the back thereof, and said certificate so assigned was returned to said bank, and now appears pasted to its stub in said stock certificate book, and on such stub, in addition to the memoranda above given, there appear the further memoranda, "Returned and canceled Dec. 14, 1893, & Ctf. 670 issued;" and on the face of said original certificate No. 657 there is stamped the following: "Canceled by order of the board of directors Feb'y 23, 1894, and certificate No. 670 issued in lieu thereof." That said certificate of stock No. 670 for 50 shares, bearing date the 14th day of December, 1893, was so issued to said William H. Stolteben, and the sole memoranda on the stub thereof state that certificate No. 670 for 50 shares of date December 14, 1893, has been issued to William H. Stolteben, and that it was "issued in lieu of Ctf. No. 657." That said transaction by which said certificate to Burden was assigned, and a certificate in lieu thereof was issued to defendant, Stolteben, was wholly without consideration given or received by the parties thereto, but was done with said Clifford's and said Stolteben's consent, and simply as a matter of convenience, for the

sole purpose of enabling said Stolteben, instead of said Burden, to hold the same as collateral security for the said indebtedness of Clifford.

Henderson, Hurd, Lenehan & Kiesel, for plaintiff.

Powers, Lacy & Brown, for defendant.

SHIRAS, District Judge. In the case of *Pauly v. Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844, the supreme court reviewed the previous decisions of that court upon the question of who can be deemed to be owners of stock in national banks in such sense that they may be held liable for assessments imposed by the comptroller under the provisions of section 5151, Rev. St., and deduced therefrom the following rules:

"That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151." "That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable upon the basis of that section for the contracts, debts, and engagements of the association."

The facts stipulated in this case show clearly that the 50 shares of stock now represented by certificate No. 670 are the property of George B. Clifford, and that he, as the actual owner thereof, is liable for the assessment levied by the comptroller under the first of the rules just cited from the decision of the supreme court in *Pauly v. Trust Co.* It no less clearly appears that the defendant is not now, and never has been, the actual owner of these shares of stock, nor has he had any interest therein even as a creditor. He holds the stock as a trustee and as collateral security for the indebtedness due from Clifford, the actual owner of the shares, to George A. Burden. Under these circumstances, to hold him liable he must be brought within the rule laid down in *Pauly v. Trust Co.* in the following language:

"It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that, by allowing his name to appear upon the stock list as owner, he represents that he is such owner; and he will not be permitted, after the bank fails, and when an assessment is made, to assume any other position as against creditors."

In other words, the liability of the defendant, if it exists, is because he knowingly permitted himself to appear upon the books of the bank to be the real owner of the shares of stock, and to now permit him to aver the truth—i. e. that in fact he is not the owner—would work a fraud upon the creditors of the insolvent association. In cases of this nature the estoppel is based upon the fact that the person sought to be held liable has been derelict in his duty, in that he has caused or allowed his name to be carried on the books of the bank as an owner of stock therein, whereas in fact he was not such

owner. To recover, therefore, in this case, the burden is upon the receiver, representing the creditors, of proving that the defendant has been derelict in the particular named, for, unless that be shown, there is no ground upon which to base an estoppel as against the defendant. The query is, therefore, whether the plaintiff has proven that the defendant, with his knowledge, appears upon the books of the bank to be the owner in fact of the 50 shares of capital stock represented by stock certificate No. 670, and the first question to be considered is, what is meant by the books of the bank? In section 5210 of the Revised Statutes it is provided that:

"The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association."

The evidence in this case is wholly silent with respect to what is shown upon the stock list of the Grand Forks National Bank, and it is strongly contended on behalf of defendant that this is the only book to which reference can be made in determining who are to be deemed to be stockholders in the association. It certainly must be true that if, upon the list of the Grand Forks Bank, it is shown that Clifford, and not the defendant, is the owner of the shares of stock represented by certificate No. 670, then liability as owner cannot be imposed upon the defendant by showing entries made upon other books of the bank in conflict therewith; but it does not necessarily follow that liability may not be incurred by one whose name does not appear upon the stock list required to be kept by section 5210. Thus, in a given case, it might appear that through the negligence of the bank officials no stock list had been kept, or only a partial list had been made out, and which contained no reference to the particular shares of stock in controversy. Under these circumstances, if the other books of the bank, such as the transfer book or stock register, should clearly show that the party sought to be held had permitted his name to appear as a stockholder in fact, he might be held liable, under the rule stated in *Pauly v. Trust Co.*, supra, that "those may be treated as shareholders, within the meaning of section 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners." But the failure to prove what the stock list does show with reference to the shares of stock in question must have weight in deciding the issues in this case. The evidence is wholly silent upon this matter. In the absence of evidence, the court cannot presume that there is in fact no stock list showing the shareholders in the Grand Forks Bank. On the contrary as the duty to keep a proper stock list is one imposed by the statute upon the president and cashier of the association, the presumption would be that the list was kept as required by the statute. Presumably, the books and papers of the insolvent bank are under the control of the receiver. He has not chosen to inform the court as to the contents of the stock list. For aught the court knows,

there may be such a stock list, and that upon its face the truth is stated, to wit, that George B. Clifford is the actual owner of the stock, and that the defendant has no interest therein. Under these circumstances the rule might be invoked that when a party has under his control material evidence upon a question in dispute, and he fails to produce it, the presumption is that, if produced, it would be against his contention. Instead of producing the stock list, or accounting for its absence, the receiver places his right of recovery upon the matters shown upon the stock certificate book. It will be kept in mind that the real contention of the receiver is that upon the face of this book it is made to appear that the defendant is the owner in fact of the shares of stock represented by the stock certificate No. 670. What, then, is made to appear by the entries on this book touching the ownership of these shares of stock? The first entry shows that the original certificate, No. 579, was issued, under date of June 29, 1892, to George B. Clifford, thus causing him to appear to be, what he in fact was, the full and actual owner of the 50 shares of stock represented by the certificate then issued to him. The next entry, under date of June 22, 1893, shows that this certificate was taken up, and a new certificate, No. 657, was issued in place of it to George A. Burden, the entry on the stub showing that the transfer to Burden was as security only for the indebtedness due to Burden from Clifford. The effect of this entry on the stock register showed that Clifford continued to be the actual owner of the 50 shares of stock, and that Burden held the same as collateral security for the debt due him; or, in other words, his title was that of pledgee only, and as such pledgee Burden could not be held liable for an assessment levied under the provisions of section 5151 of the Revised Statutes, that fact appearing on the face of the register. *Pauly v. Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 4 L. Ed. 844. The next entry is under date of December 14, 1893, showing that certificate No. 657, issued to George A. Burden as collateral security, was assigned by Burden to the defendant, and a new certificate, No. 670, was issued to the defendant in lieu of that assigned to him by Burden, the record on the stub in the stock register showing that certificate 670 was issued in lieu of No. 657, which was returned to the bank, and pasted onto the proper stub in the register; thus causing the register to show that the defendant derived his title only from Burden, who was not the owner of the shares, but only the pledgee thereof. The register, therefore, on its face showed just what the truth is,—that Clifford, since June 29, 1892, has been, and is now, the owner in fact of the 50 shares of stock in question; that the title and interest conveyed to Burden was that of a pledgee only, and that the only title held by the defendant is that derived from Burden. It is, however, contended on behalf of the receiver that the creditors were not required to look beyond the single entry on the register which shows that a certificate for 50 shares of stock had been issued to the defendant, and that this entry justified them in assuming that the defendant was in fact the owner of the 50 shares represented by the certificate then issued. If the entry relied on was part of the stock list required to be kept by the provisions of section 5210, it might

well be that the creditors would not be required to look further than to the bare entry on that list, but that is not the fact in the present case. It is now urged that the court shall hold that the creditors, ignoring what may appear on the stock list, can hold the defendant bound as a stockholder because the stock register shows that he is a shareholder; and it is not held that this may not be done, but it is held that the rights of the parties are to be determined by what fairly appears on the stock register, and the inquiry is not to be limited to the effect of a single entry thereon, when that entry, by its terms, shows that it has a connection with and relation to another and preceding entry. The theory on which the claim of the receiver is based is that the parties dealing with the Grand Forks National Bank had the right to assume that all persons whom the stock certificate register showed to be owners of shares were in fact stockholders within the meaning of section 5151 of the Revised Statutes. If, however, this book is to be taken as a criterion for determining who are stockholders in the association, it must be taken as a whole; that is to say, in determining from its contents who are stockholders, all entries throwing light upon the ownership of particular shares must be taken into account. The entry relied on by the receiver simply recites that certificate No. 670 was issued to the defendant in lieu of certificate No. 657. This entry does not recite that certificate 670 was issued to defendant as the owner of the stock. The entry is silent upon the character of the certificate issued to defendant, except that it recites that it is issued in lieu of certificate No. 657. This was sufficient to challenge the examination of certificate 657 on part of any one who should examine the stock register for the purpose of ascertaining who in fact were shareholders in the association, and that examination would have disclosed the fact that the only title to the stock held by the defendant was that derived from Burden, who was not the owner, but only a pledgee. Under these circumstances it must be held that the evidence fails to show that the defendant permitted his name to appear as the actual owner of the stock upon the books of the bank in such a manner as to render him liable to creditors under the rule laid down in *Pauly v. Trust Co.*, *supra*, and therefore judgment must be for the defendant.

STUFFLEBEAM v. DE LASHMUTT.

(Circuit Court. D. Oregon. April 27, 1900.)

No. 2,409.

1. NATIONAL BANKS—LIABILITY OF STOCKHOLDERS FOR ASSESSMENT ON INSOLVENCY—RIGHT TO RESCIND SUBSCRIPTION.

In exceptional cases, where there is no ground for an inference that credit was extended to a national bank on the faith of the ownership of stock by a defendant, he should be permitted to rescind his agreement of subscription after insolvency of the bank, where it was induced by fraud, as well when there are creditors as when there are none. There should be no presumption of law to overcome the fact capable of proof in such a case.

2. SAME—SUIT TO RECOVER ASSESSMENT—DEFENSES.

Defendant, sued by the receiver of an insolvent national bank for an assessment as a stockholder, was induced to purchase the stock held by him at the time the bank was closed from the president of the bank by the fraudulent representations of the president and cashier. Such fraud had been established in a suit for rescission of the contract, brought by defendant in a state court, to which the receiver was a party. The bank was in fact insolvent when the purchase was made, and was closed by the comptroller within 36 days thereafter. The defendant lived several hundred miles from the place where the bank was located, and took no part in its affairs. *Held*, that an answer setting up such facts as a defense was not demurrable.

3. SAME.

While, in such case, the decree of the state court rescinding the contract could not be pleaded as a bar, the question of defendant's liability as a stockholder to creditors of the bank not having been in issue, such decree was conclusive as between the receiver and the defendant as to the question of fraud in defendant's purchase, and for that purpose might properly be pleaded by defendant.

This is an action at law by the receiver of a national bank to recover an assessment from defendant as a stockholder. On demurrer to amended answer.

Wm. H. Effinger, for plaintiff.

R. & E. B. Williams, for defendant.

BELLINGER, District Judge. This is a demurrer to two separate defenses in the amended answer to the complaint of the receiver in an action brought to recover an assessment upon national bank stock held by the defendant. The defense in the original answer was that the defendant was induced by the fraudulent representations of one Browne, president of the bank, and Brune, its secretary, to purchase shares in the bank belonging to Browne. It appears from the allegations of the answer that Browne and Brune made various fraudulent representations in respect to the condition of the bank, to the effect that the bank was in a solvent condition, and that it had assets above its liabilities; that its surplus capital amounted to \$30,000; that the capital stock of said bank was worth 20 per cent. over and above its face value; that it was not indebted to any one except regular depositors and \$10,000 loaned money; that it had loans and discounts that were good and collectible, amounting to above \$122,000; that it owned stocks and securities of the reasonable value of above \$15,000, and that there was due the bank from solvent state banks and bankers more than \$8,000; that the bank had sufficient assets to pay all of its liabilities of every kind and nature, and both its time and stock deposits, and then leave over and above after such payments cash sufficient to pay all the capital stock of the bank and 40 per cent. premium thereon; and it was further represented that the bank was doing a lawful business, and had complied with the laws of the United States and the state of Idaho, and had good credit and standing. It was alleged that these representations were made for the purpose of deceiving and defrauding the defendant out of a certain tract of land owned by him and situated in the state of Oregon, which land, it was proposed, should be exchanged for the stock in question, and was thereafter so exchanged, and a conveyance therefor

executed to said Browne, who subsequently conveyed to Brune. All these representations are alleged to have been false and fraudulent, and the facts showing the false and fraudulent character thereof are set forth in the answer. A demurrer to this original answer was overruled by the court upon the ground that the liability of the defendant, if any, upon the facts as alleged, was upon the principle of an estoppel, and that there could be no recovery, under such circumstances, unless it appeared, or there was ground for the presumption, that creditors for the payment of whose debt the assessment sued on was levied had become such after the transfer to the defendant of the stock upon which he is sought to be charged. 83 Fed. 449. In the amended answer, in addition to the matters hereinbefore recited, the defendant pleads a decree in his favor in the circuit court of the state of Oregon, for the county of Washington, in the suit of himself and Inez De Lashmutt against Browne and the receiver, brought to rescind the contract of subscription and to compel a reconveyance of the land transferred to Browne as the purchase price of the stock in question. Plaintiff demurs, as before, to the defense that the defendant was induced by the fraudulent contrivances of Browne and Brune to become a stockholder in the Moscow Bank, and also to that part of the answer which sets up the suit and decree in the state court.

It is held that contracts by which a party becomes a stockholder under circumstances such as are set forth in this complaint are not void, but voidable. Upon that doctrine the defendant became a stockholder in the Moscow Bank, and was such at the time the receiver took charge; and, under the rule adopted in some of the cases, the utmost diligence in rescinding the voidable contract will not relieve the unfortunate stockholder if he does not discover the fraud practiced upon him until after proceedings are begun to liquidate the bank's affairs, and if any "considerable amount of corporate indebtedness" has been created in the meantime. *Bank v. Newbegin*, 20 C. C. A. 339, 74 Fed. 140, 33 L. R. A. 727. And so in the earlier case of *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800, it is said that, "if a person has accepted a certificate of stock, and become, to all external appearances, a stockholder, persons may have become creditors of the company on the faith of his membership, and in law are presumed to do so; and, as they cannot know the manner in which he was induced to become a stockholder, there is ground to maintain that as to them the manner is immaterial." In a recent case, where a stockholder in a national bank sought to avoid liability on the ground that his subscription was induced by fraud, the court says that it is immaterial whether there were creditors of the bank who became such in reliance on the fact that the defendant had become one of its shareholders, since the creditors of a bankrupt company "are entitled to nothing less than its whole outstanding capital stock as a fund for the payment of their claims, and because all persons are in law presumed to extend credit to corporations, and especially to national banks, whose shares are subject to a double assessment, in reliance upon the amount of their issued capital stock, although

they do not know accurately by whom such stock is at the time held." *Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 869. If, as stated in the last case cited, it is immaterial whether there were creditors of the bank who became such in reliance on the fact that the defendant had become one of its shareholders, because of a presumption that all persons extend credit in reliance upon the amount of the issued capital stock of the bank, although they do not know accurately by whom such stock is at the time held, then it is immaterial whether the defendant has acted before or after insolvency proceedings have been begun, or has acted with diligence in repudiating the contract by which his stock was procured, or by assuming the external appearance of a stockholder has possibly led persons to become creditors of the company on the faith of the defendant's membership; these being conditions of liability as laid down in the case of *Upton v. Englehart*. And yet in all the cases involving the question of the liability to creditors of a stockholder who has been duped into that relation it is laid down as a condition to his relief that the shareholder "shall be guilty of no laches in discovering the fraud and repudiating the purchase." What advantage is there in the greatest possible diligence if the defendant in such a case is liable to creditors who do not know who the stockholders are; or if he is liable to creditors because their debts were created subsequent to the contract by which he acquired his stock, on the presumption of law that the credit so extended to the corporation was in reliance on the stockholder's ownership in the corporation; or if he is liable because he failed to discover the fraud practiced upon him until the company became insolvent, however impossible it may have been to have made the discovery sooner? Of course, if a defendant has played fast and loose, he forfeits his defense of fraudulent imposition as against creditors without reference to the time when their debts were created. But good faith and diligence are not always the same. Lack of diligence does not necessarily involve absence of good faith, and there is no sufficient reason for the importance that is given in all of the cases to the question of diligence in discovering the fraud and rescinding the contract founded upon it if an absolute liability results from the fact that the discovery was not made until after insolvency proceedings were begun, or from the fact that credit has been given the bank subsequent to the transfer of stock to the defendant. There can be no appreciable interval of time between the making of a contract by which shares are acquired and its rescission without credit being given in the ordinary course of business. If the company is a going concern, there will necessarily be such credit to cut off the luckless shareholder's right to relief from liability unless the contract is repudiated as soon as made. I do not think the courts have intended to lay down a rule that will, in effect, preclude relief from liability to creditors in all cases. Whatever unfavorable inferences may arise from the fact that the fraud complained of has not been discovered until after the company has gone into insolvency, it is not ground for a conclusive presumption of bad faith; and so of the credit that is given to the

company by those dealing with it in the interval between the taking of stock by a purchaser and his repudiation of the contract of purchase, it does not necessarily follow that such credit is upon the faith of the stock purchase. In the case of *Bank v. Newbegin* the opinion is expressed that, where the proof of fraud is clear, and the shareholder has been diligent in discovering it and in repudiating his contract, and no debts have been created in the meantime, a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern, and, notwithstanding the rule adopted in the case that the creation of any considerable amount of corporate indebtedness subsequent to the subscription precludes the right to relief, the court refers to the exceptional facts in the case tending to show diligence, although the decision is not put upon that ground. In the case of *Langtry v. Wallace* it appeared from the answer that the defendant became a registered shareholder of the insolvent bank on April 18, 1896, when it was a going concern, and that he remained such until it was placed in liquidation by the comptroller, about eight months thereafter; that one of the reasons which were assigned by the officers of the bank for soliciting the defendant to become a stockholder, was that he was a man of large means, with an extensive acquaintance in Kansas, whose connection with the bank would attract to it a large amount of patronage from that state. Upon these facts the court concluded that it must be presumed, from the very nature of the business in which banks are engaged, that during the eight months that intervened between the date when the defendant was registered as a shareholder and the date when the bank was placed in liquidation the latter incurred large obligations to depositors and other creditors, and that probably some of these became creditors of the concern because of the defendant's connection with it as a stockholder.

I am of the opinion that in exceptional cases, where there is no room for an inference that credit has been given on the faith of the ownership of stock by a defendant, he should be permitted to rescind his agreement of subscription as well when there are creditors as when there are none; that there should be no presumption of law to overcome the fact capable of proof in such a case. My inclination is to follow in the way which seems to be pointed out by the cases cited, and yet, upon the facts so far appearing, this would probably result in great injustice to the defendant. There ought to be no failure of justice, much less an unjust judgment. It appears from the complaint that the defendant was imposed upon by the false representations made to him and contained in the official reports of the president and secretary of the bank as to the bank's condition. The defendant lived several hundred miles from the place where the bank was located. He took no part in its affairs, and had no means of information respecting it save through the officers who contrived the imposition practiced upon him. The bank was insolvent at the time of his purchase, and was closed by the comptroller of the treasury, so it is alleged, some 20 days thereafter (although it otherwise appears that some 36 days intervened between the defendant's pur-

chase and that event). The fact of the fraud has been judicially established in the state circuit court for this state in a suit to which the receiver of the bank was a party. I think that the inference is warranted that no one other than the defendant himself was in any way prejudiced by the defendant's purchase of stock. It is not a question as to which of two innocent persons shall suffer loss. So far as appears, there has been no loss attributable to this stock purchase, and the question is whether the creditors are to become the beneficiaries of the fraud complained of. If such a judgment is to be rendered here, it must be upon the mandate of a higher court. As to so much of the answer as sets up the decree in the state court, I am of the opinion that, while such decree is conclusive between the parties as to the fact of the fraud practiced upon the defendant by Browne in the transfer of the stock in question, it cannot be pleaded in bar of this action. Browne had conveyed to Brune, and the latter had in the meantime conveyed to his wife, M. T. Brune. Stufflebeam, the receiver of the bank, intervened in the suit, and filed his answer denying all the material allegations of the complaint, and thereupon he filed his cross bill against Browne and Brune, in which he set up the recovery of a judgment against them upon a debt due the bank, and the levy of an attachment upon the land in question. Upon this levy and judgment the receiver claimed a lien on the land, which he sought to have established and enforced in that suit. Pending these proceedings, Stufflebeam resigned the receivership, and Conoway was appointed receiver in his stead. Thereafter Browne and the two Brunes conveyed the land in dispute to Conoway, who thenceforth became the only party defendant in interest, and against whom the suit was prosecuted to final decree in favor of the De Lashmutts, plaintiffs therein. The fact that De Lashmutt had a right to rescind his contract with Browne, and compel a reconveyance of the land conveyed to the latter, does not determine the question of the former's liability to creditors as a stockholder. De Lashmutt's right to relief against Browne and Brune is one thing; his liability to the creditors of the bank another. In De Lashmutt's suit the receiver appeared to defend the lien of a judgment against Browne and Brune. He claimed through the latter. The question of De Lashmutt's liability as a stockholder was not, as a matter of relief, involved. Nothing was claimed on that account. I am of the opinion that such a question could not have been litigated in that suit. Browne and Brune had no interest in that question; nor had the plaintiff Inez De Lashmutt. The receiver could not have intervened for any such purpose. His only ground of intervention was the lien which he claimed upon the property which was the subject of that suit. That property was, in effect, impounded in that suit, and all persons claiming an interest in it must, of necessity, intervene to protect such interest. This was all that the receiver did, and the decree in favor of the plaintiffs was an adjudication against the lien claimed by the receiver. It is an adjudication conclusive upon the receiver as to the question of fraud, but no further; and, while it is not a separate defense, it is matter of defense, and for that purpose is properly pleaded. The demurrer is overruled.

TINSMAN et al. v. F. R. PATCH MFG. CO.

(Circuit Court of Appeals, Third Circuit. February 23, 1900.)

No. 12.

1. SALE—CONSTRUCTION OF CONTRACT—ACTION FOR PRICE.

A contract for the sale of machinery to be set up "ready to run" by the seller which provided that one-fourth of the price should be paid when the machinery was delivered, one-fourth 10 days after the successful operation of the same, and the remainder 90 days after the successful operation of the same, cannot be construed to require the machinery to stand a test of 10 days' successful operation before the second payment became due, and of 90 days before the final payment should be due.

2. APPEAL—REVIEW—NECESSITY OF EXCEPTION.

An assignment of error in the charge of the court must be based on an exception taken at the time of the trial to entitle it to be considered on a writ of error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion on motion for new trial, see 94 Fed. 1023.

Alfred P. Reid, for plaintiffs in error.

C. La Rue Munson, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. This action was brought to recover the alleged balance due on the price of machinery sold by the plaintiffs to the defendants under a contract which provided that the plaintiffs should furnish such machinery ready to run, and connected with electric motors, in accordance with plan of mill and building submitted; all foundations to be erected by the defendants according to plans and specifications furnished by the plaintiffs; payments to be made 25 per centum of the amount on delivery of machinery at the ground, 25 per centum 10 days after the successful operation of the same, and the balance 90 days after the successful operation of the same. The record shows the delivery of the machinery and the payment of the 25 per centum of the price as required by the contract. It was set up on the defendants' premises, and various defects were found in the same, which were afterwards remedied, for some of which changes charges of extra work were made. Payments were made from time to time by the defendants, but at the time the suit was begun there was still a large part of the contract price unpaid. The defendants objected to the payment of this balance, because they said that the machinery had never been in successful operation, as provided for in the contract, and that the cause of its failure was defects in its construction and in the erection of the same by the plaintiffs, and therefore that by the terms of the contract the purchase price was not due. The alleged defects upon which the defendants principally relied related to the instability of the machinery, due, as they said, to the insufficient foundations upon which the machinery was placed, and the failure of the plaintiffs to provide guards for

the screws or nuts of the machine which would prevent the dirt or waste from the saws so clogging them as to interfere with the successful operation of the machine.

In his charge to the jury, the learned judge, speaking of the contract, said, "The defendants were to erect the foundations and furnish the necessary power and common labor and some other matters specified in the contract." This part of the charge is made the subject of the defendants' first exception, the error assigned being that the learned judge failed to state that the said foundations were to be built according to the plans and specifications of the plaintiffs below. Inasmuch as one of the alleged defects in the practical operation of the machinery was said to be due to the insufficiency of these foundations, it was of considerable consequence whether the defects, if any, were due to the plans prepared by the plaintiffs, or to the construction by the defendants. Standing alone, the part of the charge quoted might well seem to be objectionable in omitting this important clause of the contract, but the learned judge elsewhere referred the jury to the contract itself as setting out its terms and conditions. The learned judge identified it as the paper he held in his hand, as being the one which had been read in the hearing of the jury on the trial of the cause. It was the same which was afterwards taken by the jury into the jury room for consideration. In addition to this, the omitted clause was specifically alluded to in the presence of the jury at the conclusion of the charge of the learned judge, and the attention of the jury directed to it by counsel in such manner as forbids us to believe that the apparent failure of the court to mention it worked any harm to the defendants.

The subject-matter of the third assignment of error relates to the alleged defects in the machinery incident to the failure of the plaintiffs to provide protection to the exposed screws from the dirt and waste of the horizontal saws. The learned judge charged the jury that "the custom of the trade puts the obligation to protect these screws upon the person who buys the machine." The defendant insisted that a protection for the screws was a part of the machine necessary to its successful operation, while, on the other side, it was contended that the "gauges" or saws could be and were operated by skilled sawyers without protection of any kind being required for the screws, and that such protection was rendered necessary only by incompetency or inefficiency of unskilled operators. The machine, they said, was "ready to run" when it was in a condition to be successfully operated by skilled workmen. It was not contemplated that means should be furnished to enable incompetent persons to keep it running after once it was ready. A careful reading of the charge of the learned judge satisfies us that he fairly and fully presented to the jury this branch of the case, and left to them the determination of the facts relating thereto.

We are also satisfied with the correctness of the interpretation put upon the contract by the learned judge, both as respects the liability of the defendants, in case of acceptance, to pay for the

machinery, even if defective, according to the terms of the contract, as well as in respect to the time when the payments became due. The defendants' counsel, in their brief, admit that the learned judge correctly stated the law as to the first proposition, but complains that it was applied to this case in such a vague and misleading manner as to work them injury. We do not think the charge bears this construction. If the jury did not understand the legal meaning of an acceptance, the fault did not lie with the learned judge. With regard to the time when the payments fell due, the words of the contract must govern. As we read it, the plaintiffs were obliged to set up the machinery "ready to run," and to demonstrate that it could be successfully operated, and that 90 days after such successful operation the purchase price was payable. That the machinery should stand a test of 10 days' successful operation before the second payment became due, and a further test of 90 days before last payment became due, is a forced construction, which the contract will not bear.

The second assignment of error does not seem to be founded on any exception taken at the time of the trial, and is not, therefore, properly before the court for consideration. *Tucker v. U. S.*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112. If it were, we might say that we regard the language of the learned judge warranted by the evidence in the cause. As was said by the learned judge in his refusal to grant a new trial, "The amount of the verdict shows conclusively that the jury were satisfied from the evidence that the machinery had been accepted by the defendants," and their liability thereby fixed. We find no error in the charge of the learned judge. The judgment will be affirmed, with costs.

WILLIAMS v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, S. D. New York. March 27, 1900.)

NEW TRIAL—CONFLICT OF EVIDENCE—MOTION TO SET ASIDE VERDICT.

Where, in an action by a passenger against a railway company for damages for being detained and searched on a train for the theft of a pocketbook, the evidence as to whether plaintiff voluntarily remained on the train for the exoneration of himself and defendant is so evenly balanced as to be a fair one for the jury, and its finding does not seem to have been influenced by any improper motive, the verdict will not be set aside on motion.

At Law.

Samuel D. Levy, for plaintiff.

Henry W. Taft, for defendant.

WHEELER, District Judge. The plaintiff was a porter on one of defendant's cars, and was accused by a passenger of picking up and keeping her pocketbook containing money. He was searched for it on the journey, and detained in the car for some time, and searched again by direction of officers of the defendant on the arrival of the train, without finding anything of the pocketbook or money. The

principal question on the trial was whether the plaintiff, for the exoneration of himself and the defendant, voluntarily remained, and submitted himself to the searches. This question was so submitted to the jury that no exception was taken in behalf of the plaintiff. The evidence as to this was so evenly balanced that the question was a fair one for the jury, and the finding upon it does not seem to have been influenced by any prejudice or improper motive. No valid ground appears for disturbing the verdict, and the motion to set it aside must be denied. Motion to set aside verdict denied, and judgment on the verdict for defendant.

BOWEN v. HART.

(Circuit Court of Appeals, Fifth Circuit. April 17, 1900.)

No. 878.

1. PLEADING—ISSUES AND PROOF—ACTION FOR BREACH OF CONTRACT.

An action at law in which the petition alleges the making of a contract with defendant's testator by which plaintiff was to have a one-third interest in certain lands in consideration of services rendered in clearing the title thereto, and that defendant, as executor, has refused to recognize plaintiff's interest in such lands, and which sets out a list of the lands, giving their value, and prays judgment for one-third the amount, and contains no count or claim on account of work and labor done or for services rendered, is an action for breach of the contract alleged, and not to recover for the services; and, unless such contract is proved, there can be no recovery.

2. CONTRACTS—ACCEPTANCE OF OFFER.

Plaintiff, while engaged in looking up lands owned by another, clearing up the title, obtaining possession, etc., wrote to the owner, proposing that he should receive for his services in such employment one-half the lands and pay his own expenses, or one-third of the lands and his expenses. In answer the owner wrote: "Go ahead and get all our lands clear, and, after all entanglements are removed, satisfactory settlement will be made. Perhaps your ideas are not too high." *Held*, that this was not such an acceptance of plaintiff's offer as to create a contract.¹

Maxey, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas.

The petition beginning this action was filed by R. D. Bowen against E. J. Hart, Jr., as the executor of E. J. Hart, Sr., and it is alleged: "That on or about the 16th day of November, 1888, and both prior and subsequent thereto, for valuable consideration, E. J. Hart, Sr., since deceased, employed your petitioner to clear up the title to all lands in Texas belonging to or claimed by said Hart, and obligated himself, after all entanglements were removed, to deliver to your petitioner one-third of all of said lands from which such entanglements might be removed by him, a partial list and description of which lands are contained in Exhibit A hereto attached, the titles to all of which lands were from time to time incumbered by divers clouds and entanglements and adverse claimants, and persons in possession denying the title of the said E. J. Hart, Sr., deceased; that, under and by virtue of such employment, your petitioner began immediately to clear the title of said lands from all entanglements, remove clouds, and recover possession of the same, and with diligence prose-

¹ As to mutuality in contracts, see note to *American Cotton-Oil Co. v. Kirk*, 15 C. C. A. 543.

cuted said work from said November 16, 1888, and prior and subsequent thereto." The petitioner then alleges that he was discharged on May 7, 1896, by the defendant, as executor, from the further performance of his duties under the contract. The petition then states: "Your petitioner represents that in clearing said title to said lands of all entanglements and securing possession thereof he performed, among others, the services substantially as follows: [Here follows an elaborate statement in seven printed pages of the services rendered by the petitioner under the alleged contract in removing the "entanglements with reference to the titles" of each separate tract of land.] The petition then concludes in these words: "Your petitioner further represents that under the said contract with E. J. Hart, Sr., he has been and is now entitled to the possession of an undivided one-third interest in and to each tract of land described in the said Exhibit A, and that, being so entitled to the possession, the said E. J. Hart, Jr., acting for and on behalf of the estate of E. J. Hart, Sr., deceased, has unlawfully ousted your petitioner of his right to the said lands, and has held and is now holding the same adversely to your petitioner since May 7, 1896; that your petitioner on or about said last-named date demanded of the said E. J. Hart, Jr., the said one-third undivided interest in said lands, and that he be recognized as the owner thereof, which said demand on the part of your petitioner was refused, and the said lands were claimed and held by said E. J. Hart, Jr., as the property of the estate of his deceased testator, and the said contract between your petitioner and E. J. Hart, Sr., deceased, was broken, and your petitioner discharged from further service thereunder from and after said last-named date, whereby the said estate of E. J. Hart, Sr., became obligated and bound to pay to your petitioner one-third of the reasonable market value of said lands, which is here alleged to be the several amounts set opposite said several tracts of land, the said one-third aggregating the sum of \$30,631.66; that heretofore, since the qualification of the said E. J. Hart, Jr., as executor of the estate of E. J. Hart, Sr., deceased, your petitioner has presented to the said E. J. Hart, Jr., his claim upon the estate of E. J. Hart, Sr., deceased, as set out in Exhibit A, which is made a part hereof as to the said claim, together with the affidavit thereof attached; that said E. J. Hart, Jr., acting for and on behalf of the estate of E. J. Hart, Sr., deceased, has rejected the said claim, and failed to indorse thereon a memorandum thereof, and the same is now a just demand against the estate of E. J. Hart, Sr., deceased, and all legal offsets, payments, and credits known to affiant have been allowed thereon. Wherefore your petitioner prays for a judgment against the estate of E. J. Hart, Sr., deceased, in the sum of \$30,631.66, with interest at the rate of six per cent. per annum from May 7, 1896, and he further prays for judgment, and that the same be certified to the county court for observance, and for general and special relief." The Exhibit A referred to is a schedule or list of the lands alleged to be freed from "entanglements" as to the titles. It states the county in which each tract is situated, and its abstract number, its certificate number, the name of the grantee, the number of acres, its estimated value, and, in the last column, headed "Bowen's 1-3," is stated the value of one-third of each tract; the estimated value of all the lands being \$91,895, and the estimated value of "Bowen's 1-3" being \$30,631.66.

The defendant's answer to this petition contained, first, a demurrer alleging various grounds of demurrer. As the demurrer was never passed on by the circuit court, it need not be stated in detail. The answer also interposed the defense of the statute of limitation of two years and the statute of limitation of four years. It was also alleged in the answer that there had been a settlement between the parties, and that the defendant had paid the plaintiff a large sum on such settlement, and that this was in accord and satisfaction of the matters set up in this section. The answer also contained a general denial of all the averments in the petition.

The plaintiff filed a replication or supplemental petition, replying to the defendant's answer. The replication was as follows: "That the contract referred to in plaintiff's original and amended petition, hereinbefore filed, was entered into on or about the 16th day of November, 1888; that plaintiff began to carry out the obligations devolving upon him thereunder, as alleged in plaintiff's original petition, and so continued until his discharge from said contract by defendant, on or about the 7th day of May, 1896; that an undivided one-

third interest in and to the lands described in plaintiff's original petition was recognized to be had and held for your petitioner by E. J. Hart, Sr., during his lifetime, and his estate since his death, and by Mrs. Juliana Hart, his devisee, until on or about the 7th day of May, 1896, when for the first time plaintiff demanded a conveyance thereof to him, and the said estate and said Mrs. Juliana Hart, by and through defendant acting as executor of said estate and agent of the said Juliana Hart, refused to make said conveyance, and refused to recognize the right of plaintiff thereto, thereby for the first time violating the obligations of said E. J. Hart, Sr., and of his estate, to carry out and perform the obligations devolving upon said E. J. Hart, Sr., and his estate to this plaintiff under said contract. Your petitioner further represents that there was a mutual account pending between your petitioner and the firm of E. J. Hart & Co. and E. J. Hart, Sr., in his lifetime, and his estate after his death; that said account was kept in the books of the firm of E. J. Hart & Co., and remained an outstanding mutual account between your petitioner and said E. J. Hart, Sr., from a date previous to November 16, 1888, until the death of said E. J. Hart, Sr., and until the discharge of your petitioner, on or about May 7, 1896, by defendant herein; that no refusal had been made to settle the same so far as the same related to services rendered by your petitioner in investigating and clearing up the title and removing entanglements from the title to the lands described in plaintiff's petition and amended petition until May 7, 1896; that from time to time said E. J. Hart, Sr., in his lifetime, and this defendant after his death, acting as his executor, promised your petitioner that the demand of your petitioner for a settlement of the said lands and a conveyance to your petitioner thereof would be made, and the rights of your petitioner in said lands recognized, until on or about May 7, 1896, when your petitioner was discharged from said service, and the defendant then for the first time refused to recognize your petitioner's rights in said lands or to pay your petitioner for the services rendered in clearing the title to the same from clouds and entanglements, and removing from the possession thereof claimants and occupants adverse to the title of the said E. J. Hart, Sr. Wherefore petitioner represents that the statute of limitation cannot bar the right of your petitioner to recovery herein, and of this he puts himself upon the country." The case was tried on these pleadings. The following four letters were offered by the plaintiff in proof of the contract alleged in the petition:

"October 30, 1888.

"Mr. E. J. Hart, President Canal & Claibourne R. R. Co., New Orleans, La.—
Dear Sir: I regret that I did not see more of you when in New Orleans last, as it is necessary for a vigorous course to be pursued in regard to lands. I gathered valuable evidence on my trip North, but I find your property out here, with the exception of paying taxes, has been neglected, and it will require a considerable time and expense to get lands, etc., in the proper shape, and you must bear in mind that under our present arrangement I can make little or nothing, as this land investigation takes nearly all my time from mercantile work. In my last communication with you on this subject you assured me everything would be made satisfactory when all matters were clear and finished, but when I leave Galveston again on land trip it will be necessary, as now, to devote about four-fifths of my time to looking after and trying to recover some of your lands, and it will be better for us to have an understanding in advance as to my reimbursement. The Edwards survey, Montgomery county, is badly mixed up, and I will report under separate cover details of the same to the firm. Under laws of Texas, Morefield can claim and hold one hundred and sixty acres of the Edwards, and he is aware of this fact, and it will require prudent means to get it from him. Most all of the land in McCulloch county is virtually lost to you, and must be recovered. A small portion of the Evans survey in McLennan county, and all of the Stewart survey in the same county, is in the same fix, and it will require prompt, ingenious, and continued activity to recover same. One hundred and sixty acres of the Snell survey, Harris county, is in the same fix; and also another survey, which will receive attention later. The usual charge in Texas for such services is one-half of the land, where person doing the work pays all expenses, and one-third of the land where owner pays expenses. I am not able to advance ex-

penses, which can be advanced to me by the firm; and, after all land complications are finally settled and clear, we can settle upon the above basis. If you prefer all expenses advanced, can charge to me, and when work is completed I take one-half of the land in settlement, or I to get credit for expenses advanced, and take one-third of the land, and a fair compensation be allowed me separately for mercantile services. I know you will do what is right, but it is better to settle all such affairs in advance; so please let me hear from you at once concerning this, as it is essential for this land trip to be continued now in order to be successful. I think I can recover most every acre of lost land, and, if I do compromise any, it will be as much to our advantage as possible. If you will read all of my reports, you can form a fair idea of these land complications, and the work, time, and expense required to correct the same, and this class of work cannot be rushed. Under separate cover I will write you concerning a rare plant which might be nice for your flower garden. Address me as below.

"Yours,

R. D. Bowen.

"111 Market Street, Galveston, Texas."

"Canal & Claibourne R. R. Co.

"E. J. Hart, Pres. Jas. H. Degrange, Sec.

"No. 6 Canal Street.

"New Orleans, La., November 3, 1888.

"Mr. R. D. Bowen, 111 Tremont St., Galveston, Texas—Dear Sir: Thanks for offer in your kind favor of October 30th just at hand. Mrs. Hart will be much pleased to receive the cutting of a sea bean sent originally from South America that your friend has growing in Galveston. With good wishes, and hoping that your trip will prove pleasant and profitable,

"Yours, truly,

E. J. Hart.

"C. K. H. returned last evening. His reports are favorable to your joint interest."

"November 11, 1888.

"E. J. Hart & Co., c/o Canal & Claibourne R. R. Co., New Orleans, La.—Dear Sir: I am just in receipt of your favor 3d inst., and note you hope my land trip will prove 'pleasant and profitable.' I look for profit eventually, but for little pleasure. As you do not comment upon compensation as mentioned by me in one of my letters of October 30, 1888, I presume terms mentioned by me are satisfactory to you, and shall continue to attend to land and firm's other business upon the basis of terms mentioned in my letter to you of October 30th, '88. I think I can get rid of Morefield by giving up only about seventy-five acres, which will be a saving of about eighty-five acres. I will write particulars of this under separate cover to the firm. I hope that you and Mrs. Hart will like the sea bean plant, which is the finest I ever saw. Write me at Waco, Texas, c/o W. M. Sleeper.

"Yours,

R. D. Bowen."

"Office Canal & Claibourne R. R. Co.

"E. J. Hart, Pres. Jas. H. Degrange, Sec

"No. 6 Canal Street.

"New Orleans, La., Nov. 16, 1888.

"Mr. R. D. Bowen, c/o Judge W. M. Sleeper, Waco, Texas—Dear Sir: Your favor of 11—11—88 recd. and noted. Don't get restless. Go ahead and get all your lands clear, and, after all entanglements are removed, satisfactory settlement will be made. Perhaps your ideas are not too high. Whilst attending to lands, don't forget to sell goods where you can spare time. With best wishes for your success.

"Very truly, yours,

E. J. Hart."

On the question whether the letters constituted a contract, and on the question of the statutes of limitation, the court charged the jury as follows: "The defendant also, among other things, pleads as a bar to recovery in this action the statute of limitation, which provides that certain actions must be brought

within two years from the date at which such actions accrue. As to the law of the case, the court charges you that the letters which passed between R. D. Bowen and E. J. Hart, Sr., in October and November, 1888, and which have been introduced in evidence, do not in law constitute a contract, as there was no sufficient acceptance of the proposition contained in the letters of the plaintiff by E. J. Hart, Sr. There was not that meeting of the minds of the writers in relation to the compensation which plaintiff was to receive for his services which is necessary in order to give to correspondence the binding effect of a contract. The defendant has pleaded the statute of limitations of two years in bar of plaintiff's demand, and you are instructed that if you believe from the evidence that the plaintiff was discharged from his employment in connection with the Texas land which belonged to E. J. Hart, Sr., at a date more than two years prior to April 30th, 1898, which is the date when suit was filed in this claim, then it would be your duty to find for the defendant. If you find from the evidence that plaintiff was discharged from his said employment at a date within two years before April 30th, 1898, then you will ignore the question of the statute of limitation." The jury found a verdict for the defendant. The plaintiff reserved exceptions to these charges given by the court, as well as other exceptions not material to state, and sued out this writ of error.

Eugene Williams, for plaintiff in error.

George Clark and Chas. P. Fenner (Chas. E. Fenner, Sam Henderson, Jr., and S. C. Bolinger, on the brief), for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The claim asserted and sued on is a contract, and the evidence offered to sustain it is the correspondence between the plaintiff and the defendant's testator. It is claimed that the correspondence entitles the plaintiff to one-third of certain lands, or the value of them for services rendered by the plaintiff under the contract in clearing up the titles to the lands. It is alleged that "the plaintiff is now entitled to the possession of an undivided one-third interest" in the lands. It is further alleged that "having demanded possession of the lands and been refused by the defendant," the said contract was broken, * * * whereby the defendant becomes obligated to pay your petitioner one-third of the reasonable market value of said lands." The petitioner, therefore, prays for \$30,631.66, which is the alleged value of the plaintiff's "Bowen's $\frac{1}{3}$ " of the lands. The action is at law. It is not a suit in equity for specific performance or for partition; but it is an action for a breach of contract. The petition contains no count or claim on an account for work and labor or for services. The right to recover is based in the plaintiff's pleadings entirely on the averment of a contract and the breach of it. It follows, we think, as a necessary consequence of the issue raised by the pleadings and evidence, that, if there was no contract as averred, there could be no breach of it, and therefore no recovery. A valid contract may be made by correspondence; but, in ascertaining whether the letters between the parties constitute a contract, we must have in view the same principles that are applicable to contracts in other cases. There must be a meeting of two minds in one and the same intention. In the absence of this element, there can be no contract. To constitute a contract, therefore, by letters between

the parties, a definite proposition must be made by one party and an absolute and unconditional acceptance of it by the other party. 7 Am. & Eng. Enc. Law (2d Ed.) p. 129, note 3; Clark, Cont. § 19. Bowen in his letter to Hart, of October 1, 1888, proposes that he should be compensated for his services in reference to the titles to the lands in one of two ways: He offers to take one-third of the land, Hart to pay expenses; or, if Hart prefers all expenses advanced, "can charge to me, and when work is completed I can take one-half of the land in settlement, or I to get credit for expenses advanced, and take one-third of the land and a fair compensation be allowed me separately for mercantile services." If Hart had replied accepting the terms offered without specifying which of the propositions was accepted, it could not be said that the parties had reached an agreement; but Hart made no such answer. In his answer of November 3, 1888, he merely acknowledged receipt of the letter, and hoped that the "trip will prove pleasant and profitable." On November 11, 1888, Bowen writes to Hart that, as he does not comment "upon compensation mentioned in my letter of October 30th, 1888, I presume terms mentioned by me are satisfactory." Then Hart writes on November 16, 1888: "Don't get restless. Go ahead and get all our lands clear, and, after all entanglements are removed, satisfactory settlement will be made. Perhaps your ideas are not too high. Whilst attending to lands, don't forget to sell goods where you can spare time." Instead of agreeing to either one of the two propositions made by Bowen in his letter of October 30, 1888, Hart by his letter of November 16, 1888, declines to agree on the compensation, saying that after entanglements are removed satisfactory settlement will be made. The correspondence distinctly shows that the minds of the parties did not meet. This correspondence did not make a contract. *Eliason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556; *Compania Bilbaina de Navegacion de Bilbao v. Spanish-American Light & Power Co.*, 146 U. S. 483, 497; 13 Sup. Ct. 142, 36 L. Ed. 1054; *Minneapolis & St. L. Ry. v. Columbus Rolling-Mill Co.*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; *Insurance Co. v. Young's Adm'r*, 23 Wall. 85, 107, 23 L. Ed. 152. We think the court correctly charged the jury that there was not that meeting of the minds of the writers of these letters which was necessary to make a contract as to the compensation that Bowen was to receive. This view of the case is conclusive, for the plaintiff was not entitled to recover for the breach of a contract that had no existence. The judgment of the circuit court is affirmed.

MAXEY, District Judge, dissents.

NORTON et al. v. HOUSE OF MERCY OF NEW YORK.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1900.)

No. 885.

RES JUDICATA—MATTERS CONCLUDED BY JUDGMENT—RIGHTS UNDER WILL.

Plaintiff, a charitable corporation organized under the laws of New York, by which it was given power to take and hold real estate not exceeding \$50,000 in value, was made a beneficiary under the residuary clause of the will of a citizen of Kentucky. After the testator's death his heirs brought a suit in the chancery court against the executors to determine their rights under the will, in which plaintiff appeared, and filed a petition of intervention setting up its claim as beneficiary thereunder. The litigation resulted in a decision by the court of appeals of Kentucky which determined as a matter of fact that plaintiff, at the time of the testator's death, held real estate of the value of \$50,000, and as matters of law that it was incapable of taking any real estate under the will, and that the residual real estate of the testator relapsed to his heirs. *Held* that, while the Kentucky court could not adjudicate upon the title to lands situated in another state, its judgment was nevertheless conclusive between the parties and their privies as to each of the questions so determined, and estopped the plaintiff to maintain an action in another state against grantees of the testator's heirs to recover lands there situated, as passing to it under the will.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This suit of trespass to try title was originally instituted in the state district court by the defendant in error, House of Mercy of New York, a charitable corporation organized under the laws of New York, to recover an undivided one-half interest in 48 surveys of land situated in various counties of the state of Texas. Several parties named as original defendants were dismissed from the suit, and as the record stood at the date of the trial the following were defendants: George W. Norton, executor, and Martha H. Norton, executrix, of the will of G. W. Norton, deceased, both citizens of the state of Kentucky; the Louisville Presbyterian Orphans' Asylum, and the Presbyterian Orphans' Home Society, corporations organized under the laws of the state of Kentucky; and Mrs. A. M. Finney, a resident of the District of Columbia. The defendants interposed a plea of not guilty. The cause having been removed to the circuit court for the Northern district of Texas, it was heard upon the following agreed statement of facts: "Now come the plaintiff and defendants in the above-styled suit, and agree on the following facts upon which said cause shall be tried in this court and the appellate courts to which said cause may be appealed: (1) It is agreed that the plaintiff is a private corporation created for charitable purposes, under an act of the legislature of the state of New York entitled an 'Act for the incorporation of benevolent, charitable, scientific and missionary societies,' passed by the legislature of the state of New York on the 12th day of April, 1848. That said act, among other things, contained the following provision relating to the power and rights of said charitable institutions to hold and acquire property, to wit: 'And they and their successors, by their corporate name, shall in law be capable of taking, receiving, purchasing, and holding real estate for the purposes of their incorporation, and for no other purpose, to an amount not exceeding the sum of fifty thousand dollars in value, and personal estate for like purposes to an amount not exceeding seventy-five thousand dollars in value.' (2) That plaintiff was incorporated under said act prior to the year 1860, and the purpose or object of its incorporation was and is the reclamation and reformation of fallen women; that its place of business was, and is now, and always has been, the city and state of New York. (3) That plaintiff and defendant claim the land in controversy under

Isaac Cromie, deceased, as a common source of title. (4) The plaintiff claims said land under the will of said Isaac Cromie, deceased, who died August, 1865, a true copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof, which will was duly probated in Louisville, Ky., according to the laws of that state, and that the executors accepted and qualified on the 16th day of August, A. D. 1865, and that a copy of such will, and of its probate properly attached, was filed and recorded in the office of the clerk of the county court of Young county, Tex.; in the manner that deeds and conveyances are required to be recorded prior to the institution of this suit. (5) That plaintiff has never been in actual possession of the property in controversy, or exercised any visible act of ownership over it, such as the payment of taxes, etc. (6) That the defendants claim the land under a regular consecutive chain of transfers from and under the heirs of said Isaac Cromie, deceased, for a valuable consideration paid. (7) That on the 22d day of January, 1866, the heirs of Isaac Cromie, deceased, filed a suit in equity in the chancery court of Louisville, Ky., against Wm. Cromie and John Gill, as the executors of Isaac Cromie, deceased, and others, for the recovery of all the property mentioned in the sixth clause of Isaac Cromie's will, hereto attached as Exhibit A. A copy of the petition filed in said suit is hereto attached, marked 'Exhibit C,' and made a part hereof. (8) That the executors of said Isaac Cromie, deceased, answered said bill, and among other things alleged the claims of the plaintiff herein to the property mentioned in the sixth clause of said will, and also alleged that there was another corporation in the city of New York known as the 'Institution of Mercy of New York,' claiming to be the corporation intended as the beneficiary under the sixth clause of said will, and said executors prayed that both of said corporations, as well as the Presbyterian Orphans' Asylum of Louisville, another claimant under the sixth clause of said will, all be made parties to this suit, and litigate their rights to the property involved, and for an order and decree construing said will, and decreeing to whom said property belonged, to the end that said executors might be protected in the distribution of said estate. (9) That all of said corporations, to wit, the House of Mercy of New York, plaintiff herein, the Institution of Mercy of New York, and the Presbyterian Orphans' Asylum, each and all intervened in said cause, and filed pleadings therein, asserting their respective rights to portions of the property mentioned under the sixth clause of said will. The answer of the House of Mercy of New York, plaintiff herein, was filed in said cause on the 13th day of July, 1866, and was duly sworn to by W. F. Bullock, one of its attorneys of record in said cause. Said plea of intervention or cross petition averred, among other things, that 'it, the House of Mercy of New York,' was the corporation intended as the object of Isaac Cromie's munificence and charity, as set forth under the sixth clause of said will. Said House of Mercy also alleged and averred its rights to said property as against the heirs of said Isaac Cromie, deceased, the plaintiffs in said suit aforesaid. (10) That afterwards, on the 24th day of May, 1867, said chancery court of Louisville, Ky., rendered a decree in said cause, in which it decreed that the Presbyterian Orphans' Asylum was entitled to recover one half of the property named under the sixth clause of said will, and that the Institution of Mercy of New York was entitled to receive the other half of said property, and that the plaintiffs in said cause, as the heirs of Isaac Cromie, deceased, and the House of Mercy of New York, were entitled to nothing, and from which said judgment or decree both plaintiffs in said cause and the House of Mercy of New York prosecuted appeals to the court of appeals of the state of Kentucky. (11) That the court of appeals of said state, on May 27, 1868, rendered its opinion and judgment in said cause, in which it affirmed the decree of the lower court as between the heirs of Cromie, appellants, and the Presbyterian Orphans' Asylum, but reversed said cause as to appellants and the other appellees and appellants therein; said court, among other things, deciding by its opinion therein rendered that the House of Mercy of New York, plaintiff herein, was the corporation intended by and under the sixth clause of said will, and not the Institution of Mercy of New York, as decreed by the court below. Said court in its said opinion further held and decided that as between the House of

Mercy of New York and appellants, as the heirs of said Isaac Cromie, deceased, the evidence showed that at the date of said Isaac Cromie's death the House of Mercy of New York owned and possessed real estate in value amounting to fifty thousand dollars or over; that it could not take any of Cromie's real estate under said will; and as to the real estate the appellant heirs of Cromie were entitled to recover. Said court in its said opinion further held and decided, as between said House of Mercy of New York and said appellant heirs, that said House of Mercy of New York, if it did not own and possess at Cromie's death personal property amounting in value to \$75,000, should have set apart to it one-half of the personalty named under the sixth clause of said will, or a sufficient amount thereof to make, with what it already owned, the sum of \$75,000, and said cause was remanded to the lower court, with instructions to refer said cause to a master to ascertain and report the value of the personal property owned by the House of Mercy of New York at the date of Cromie's death, and with directions to the chancery court, if the House of Mercy held personal property amounting in value to less than \$75,000, to decree it one-half of Cromie's personal estate mentioned under the sixth clause of said will, or a sufficient amount thereof, if the same existed, to make, in the aggregate, with what it already held, the sum of \$75,000. The opinion of said court at length is referred to in 3 Bush, 365-401, and to which reference is here made, and to be used by either party hereto. (12) On the filing of the mandate in the court below, said cause was referred to a master, who found the value of the personal estate of said House of Mercy at the date of Cromie's death to be \$673.75. (13) That on the — day of —, 1869, the House of Mercy of New York filed in said chancery court of Louisville, Ky., its cross petition, in the nature of an original bill, against the heirs of said Isaac Cromie, in which it sought to have a decree entered in said cause directing a sale of all the realty belonging to said estate in Kentucky, and converted into personal property, and one-half of the proceeds thereof, or a sufficient amount of same, to be paid to it to make the sum of \$74,321.25, to which amount of personalty it was entitled under the master's report, and the decision of the court of appeals therein previously rendered, a copy of which said bill is hereto attached, marked 'Exhibit D,' and made a part hereof. (14) That a demurrer was interposed, and by the court sustained, to said bill, from which judgment of the court the House of Mercy appealed. (15) That the court of appeals of Kentucky affirmed the judgment of the court below sustaining said demurrer, in a written opinion, a copy of which is hereto attached, marked 'Exhibit E,' and made a part hereof. (16) That under the orders of the chancery court of Louisville, Ky., in which said proceedings were pending, the House of Mercy of New York, plaintiff herein, from time to time received the following amounts of money, stocks, and bonds, to wit: Cash, \$8,050.50; 21 U. S. bonds, 5-20 bonds, of the denomination of \$1,000.00 each, \$21,000.00; 60 shares of preferred stock of the Louisville, Cincinnati & Lexington R. R. Co., each \$100.00 par value; 470 shares of the Louisville & Frankford R. R. Co. stock (common), each share of the par value of \$50.00; 29 ²/₃ shares of stock in the Louisville & Nashville R. R. Co., of the par value each of \$100.00; 20 shares of the common stock of the Louisville, Cincinnati & Lexington R. R. Co., of the par value of \$100.00; 13 shares of the Franklin Fire & Marine Insurance Co. stock, each of the par value of \$50.00; also 50 shares of the Franklin Saving Bank; and also 100 shares of the Southern Pacific R. R. stock. (17) That there has never been any partition of the residuary portion of Isaac Cromie's real estate between the House of Mercy of New York and the other residuary legatee, under the sixth clause of said Cromie's will. (18) It is further agreed that either party hereto may introduce any additional testimony to that set out in the foregoing statement that may be desired, subject, however, to such legal objections as may be made to the introduction of such additional evidence. (19) It is further agreed that the lands in controversy exceed ten thousand dollars in value."

The foregoing stipulation of counsel recites that the petition, filed by Isaac Cromie's heirs in the chancery court of Louisville, Ky., against the executors named in Cromie's will, was attached as Exhibit C. This exhibit is not contained in the record, for the reason, presumably, that counsel re-

garded its insertion as unnecessary. Exhibits A, D, and E form a part of the record, but it is not deemed essential to incorporate them in this statement.

Upon the trial the court directed a verdict for the defendant in error, and judgment was rendered thereon in its behalf for an undivided one-half interest in the lands described in the petition. To this ruling the plaintiffs in error duly excepted, and to reverse the judgment thus rendered this writ of error is prosecuted.

Seth W. Stewart and Thos. W. Bullitt, for plaintiffs in error.

Chas. K. Bell, A. M. Carter, and R. F. Arnold, for defendant in error.

Before PARDEE, Circuit Judge, and NEWMAN and MAXEY, District Judges.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

The important question to be decided in this case arises upon the third assignment of error, which devolves upon the court the duty to ascertain how far the litigation, prosecuted in the courts of Kentucky by the defendant in error, the heirs of Isaac Cromie, and others, may be determinative of the present controversy. It is insisted by the plaintiffs in error that the defendant in error is estopped from asserting title to the real estate involved in this suit, because the question to be determined by the circuit court was whether the title to the real estate devised to the House of Mercy of New York by the sixth clause of Isaac Cromie's will passed to it, or to the heirs by descent cast, and that precise question was distinctly presented and directly passed upon adversely to the House of Mercy by the Kentucky courts in suits in which it and the heirs of Isaac Cromie were parties. The law in respect to estoppel by judgments seems to be well settled, although there is frequently difficulty in applying the law to the facts of a particular case. In the early case of *Hopkins v. Lee*, 6 Wheat. 114, 115, 5 L. Ed. 218, it is said by the court:

"It is not denied, as a general rule, that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties, in the same or any other court. Hence a verdict and judgment of a court of record or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suits. In this there is and ought to be no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is therefore not confined, in England or in this country, to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries."

The rule and the reasons for it are admirably stated by Mr. Justice Harlan in the comparatively recent case of *Southern Pac. Co. v. U. S.*, 168 U. S. 48, 49, 18 Sup. Ct. 27, 42 L. Ed. 355, and he applies it not only to cases where the former and subsequent suits are the same, but also where the latter is for a different cause of action.

The learned justice in the case referred to declares the rule in the following language:

"The general principle announced in numerous cases is that a right, question, or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them. Among the cases in this court that illustrate the general rule are *Hopkins v. Lee*, 6 Wheat. 109, 113, 5 L. Ed. 218; *Smith v. Kernochen*, 7 How. 198, 216, 12 L. Ed. 666; *Thompson v. Roberts*, 24 How. 233, 240, 16 L. Ed. 648; *Packet Co. v. Sickles*, 24 How. 333, 340, 341, 343, 16 L. Ed. 630; *Russell v. Place*, 94 U. S. 605, 608, 24 L. Ed. 214; *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 681; *Campbell v. Rankin*, 99 U. S. 261, 25 L. Ed. 435; *Lumber Co. v. Buchtel*, 101 U. S. 638, 25 L. Ed. 1073; *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 230, 8 Sup. Ct. 495, 31 L. Ed. 411; *Johnson Steel Street Rail Co. v. William Wharton, Jr., & Co.*, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429."

Last Chance Min. Co. v. Taylor Min. Co., 157 U. S. 683, 15 Sup. Ct. 133, 39 L. Ed. 859; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; *Hubbell v. U. S.*, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; *Hanrick v. Gurley* (decided by the supreme court of Texas, March 29, 1900, and not yet officially reported), 56 S. W. 330. And it is equally well settled that, if the questions raised in the second suit were presented and directly passed upon in the first, the judgment rendered in the first suit imports absolute verity, whether the reasons upon which it was based were sound or not, or whether the judgment was right or wrong upon the facts presented. *Hubbell v. U. S.*, *supra*; *New Orleans v. Citizens' Bank*, *supra*.

The question, then, to be considered is whether the principles of law, so clearly and repeatedly announced by the courts, apply to the facts of this case. It will be observed that the written stipulation of the parties makes the will of Isaac Cromie, the two decisions of the court of appeals of Kentucky, and the cross petition, in the nature of a cross bill, filed by the House of Mercy of New York against the heirs of Isaac Cromie, a part of the agreed statement of facts upon which the case was tried. If we consider the record as thus made by the parties, there would seem to be little difficulty in reaching the conclusion that the defendant in error is estopped from denying or questioning the correctness of the judgment rendered by the courts of Kentucky. In the present suit the House of Mercy of New York was plaintiff in the court below, and the written stipulation of the parties discloses that the defendants below claim the land in controversy by regular chain of transfers from and under the heirs of Isaac Cromie for a valuable consideration paid. The material controlling issue in the court below was whether

the House of Mercy took the real estate devised by the sixth or residuary clause of Cromie's will, or whether the real estate attempted to be devised by that clause of the will passed to Cromie's heirs. And that issue could only be determined by considering and giving a construction to the laws of New York under which the House of Mercy was incorporated. The heirs of Cromie inaugurated the litigation in Kentucky by filing on the 22d day of January, 1866, in the chancery court of Louisville, a bill against Isaac Cromie's executors and others for the recovery of all the property mentioned in the sixth clause of Cromie's will. Without attempting to give a history of the proceedings, it is sufficient to say that the House of Mercy and another New York corporation known as the "Institution of Mercy," and the Presbyterian Orphans' Asylum of Louisville, intervened in the suit. The question to be decided by the chancery court was, who took the residual real and personal estate mentioned in the sixth clause of Isaac Cromie's will, which reads as follows:

"I give, devise, and bequeath all the rest and residue of my estate, real, personal, and mixed, of which I shall be seised and possessed, or which I shall be entitled to at the time of my decease, in as nearly equal amounts or parts as may be, say one-half to the Presbyterian Orphan Asylum of Louisville, and the remaining one-half to the House of Mercy of the City of New York, to be divided equally within two years, or sold within five years, and the proceeds accruing to be divided as previously set forth."

Whether the House of Mercy was capable of taking and holding real estate depended upon the law of its creation, and the laws of New York at that time applicable to the House of Mercy, and other charitable institutions organized thereunder, provided as follows:

"And they and their successors by their corporate name shall in law be capable of taking, receiving, purchasing and holding real estate for the purposes of their incorporation and for no other purpose to an amount not exceeding the sum of fifty thousand dollars in value, and personal estate for like purposes to an amount not exceeding seventy-five thousand dollars in value."

Upon consideration of the case, the chancellor divided the residuary estate between the Louisville Orphans' Home Society and the Institution of Mercy, and from that decree Cromie's heirs and the House of Mercy appealed to the Kentucky court of appeals. It was held in the court of appeals that, as between the House of Mercy and the Institution of Mercy, the most rational deduction was that the New York beneficiary intended by the testator, Isaac Cromie, was the House of Mercy of New York. But, in reference to the claim of the House of Mercy to the real estate, the court denied its capacity to take, on the ground that the value of its real estate, as shown in the record, exceeded \$50,000 at the time of Cromie's death. "None of the real estate," said the court, "devised that corporation, should therefore be adjudged to it in this case, but relapses to the testator's heirs, and should be decreed to them." 3 Bush, 384, 385; Buckner's Ex'rs v. Cromie's Ex'rs, 5 Bush, 603. "The court in its opinion further held," employing the language used by the parties in their written stipulation, "and decided, as between the House of Mercy and said appellant heirs, that the House of Mercy of New York, if it

did not own and possess at Cromie's death personal property amounting in value to \$75,000, should have set apart to it one-half of the personalty named under the sixth clause of the will, or a sufficient amount thereof to make, with what it already owned, the sum of \$75,000, and the cause was remanded to the lower court, with instructions to refer it to a master to ascertain and report the value of the personal property owned by the House of Mercy of New York at the date of Cromie's death, and with directions to the chancery court, if the House of Mercy held personal property amounting in value to less than \$75,000, to decree it one-half of Cromie's personal estate mentioned under the sixth clause of the will, or a sufficient amount thereof, if the same existed, to make in the aggregate, with what it already held, the sum of \$75,000. * * * On the filing of the mandate in the court below, the cause was referred to a master, who found the value of the personal estate of the House of Mercy at the date of Cromie's death to be \$678.75. That on the ——— day of ———, 1869, the House of Mercy of New York filed in said chancery court of Louisville, Ky., its cross petition, in the nature of an original bill, against the heirs of the said Isaac Cromie, in which it sought to have a decree entered in the cause directing a sale of all the realty belonging to said estate in Kentucky, and converted into personal property, and one-half the proceeds thereof, or a sufficient amount of same, to be paid to it to make the sum of \$74,321.25, to which amount of personalty it was entitled under the master's report and the decision of the court of appeals therein previously rendered." The cross petition, in the nature of an original bill, filed by the House of Mercy, expressly recognized, in the following allegations, the ruling and order of the court of appeals as a real, subsisting judgment: "This judgment of the court of appeals was qualified by the direction of said court, in the opinion delivered and now on file herein, that no part of the real estate of the testator should be given to this defendant, because her charter restricted the corporation to holding a value not exceeding \$50,000 of real estate, which value it was adjudged belonged to, and was held by, said corporation at the time of the testator's death." To the cross petition of the House of Mercy a demurrer was interposed and sustained, and from that order the House of Mercy again appealed to the court of appeals. Upon affirming the judgment of the chancery court upon this appeal, the court in the opinion in the record, but not reported, used this emphatic language: "And the will of the testator to that extent executed to the one half of the residual or real estate this court has adjudged the heirs of the testator are entitled, and to the other half the Presbyterian Orphans' Asylum of Louisville is entitled under the will of the testator; and of these rights this court has no more power to divest the parties than it has to make a will for the testator." It is also disclosed by the record that the House of Mercy received, under the orders of the chancery court of Louisville, \$8,050.50 in cash and bonds and stocks, of the approximate par value of \$66,000. From an analysis of the proceedings, it thus clearly appears that the issue submitted to the circuit court in this case was distinctly presented to, and directly decided by, the court of

last resort in the state of Kentucky adversely to the defendant in error. That issue—that is, the right of the defendant in error to take the real estate devised by the sixth clause of Cromie's will—involved questions of both law and fact. The court of appeals of Kentucky found as a fact that, at the date of Cromie's death, the House of Mercy had real estate exceeding in value \$50,000, and adjudged, as matter of law, that it was incapable of taking additional real estate under the will, because of restrictions placed upon such corporations by the laws of New York, and further adjudged that the residual real estate mentioned in the will relapsed to Cromie's heirs. The facts thus found must be taken as conclusively established, and the judgments thus rendered, whether right or wrong, import absolute verity, and the House of Mercy of New York, the present defendant in error, is forever estopped from disputing their correctness.

But counsel for the defendant in error insist, if we correctly understand their contention, that judgments rendered by the courts of Kentucky cannot affect the title to real estate situated in Texas. "It is a principle firmly established," said the supreme court in *De Vaughn v. Hutchinson*, 165 U. S. 570, 17 Sup. Ct. 461, 41 L. Ed. 827, "that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances." *U. S. v. Crosby*, 7 Cranch, 115, 3 L. Ed. 287; *Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334; *McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858. See, also, *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; *Moseby v. Burrow*, 52 Tex. 396; *Osborne v. McCartney*, 121 Ill. 408, 12 N. E. 72. This well-recognized principle of law is not questioned by this court. Its application, however, to the facts of the present case is more apparent than real. The courts of Kentucky did not by their judgments attempt to alienate, transfer, or otherwise affect the title to real estate in Texas. They held, in effect, that, under the laws of New York, a New York corporation was incapable of taking a greater quantity of real estate than those laws authorized or permitted. And such was precisely the view subsequently taken by the court of appeals of New York in the well-known case of *In re McGraw's Estate*, 111 N. Y. 66, 19 N. E. 233. But, should the defendant in error look to the laws of Texas for relief, it would be confronted with the solemn judgment of the supreme court of that state, delivered in one of its own cases (*House of Mercy v. Davidson*, 90 Tex. 532, 39 S. W. 924), that the title to the land mentioned in the residuary clause of Cromie's will did not vest in the defendant in error, "because the corporation was without capacity to receive and hold it at the time the will took effect."

In view of the disposition made of the case, it is deemed unimportant to consider other assignments of error pressed upon our attention. The judgments of the courts of Kentucky operating, as we have shown, as an effectual bar to a recovery by the defendant in error in this suit, the circuit court should have directed a verdict in favor of the plaintiffs in error. For the error committed the

judgment will be reversed; and, as the parties have stipulated that the cause should be tried in this court upon the agreed statement of facts, judgment will be here rendered that the defendant in error take nothing by its suit, and that the costs of both courts be taxed against it. Ordered accordingly. Reversed and rendered.

SANSOL v. COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

(Circuit Court, S. D. New York. May 3, 1900.)

1. MASTER AND SERVANT—INJURY TO EMPLOYEE—MASTER'S DUTY TO FURNISH SAFE PLACE TO WORK.

Plaintiff, being employed as a longshoreman in unloading one of defendant's ships in port, was directed to go below deck by the steerage way, which led through a dark passage, and while going through such passage fell through a trapdoor that had been left open, and was injured; the steerage being outside the usual place of employment for longshoremen, and only used because the ladder usually used was out of repair. *Held*, that it was the duty of defendant to furnish plaintiff a safe place to work, and the passage referred to did not meet that requirement.

2. SAME—FELLOW SERVANTS.

A longshoreman employed in unloading a ship, and the servants aboard ship, having charge of the ship's supplies, are not fellow servants, within the rule precluding recovery for a personal injury sustained through the negligence of a fellow servant.

John J. Jeroloman, for plaintiff.
Edward K. Jones, for defendant.

WHEELER, District Judge. The plaintiff is a longshoreman and was employed on the third deck in unloading one of the defendant's ships lying at a wharf in New York. The ladder for going down was out of repair, and he was told to go by the steerage way, which led through a dark passage. He was sent up to the dock for a block and fall, and while he was gone a trapdoor in the floor of the passage was left open, and when he came back he fell through it and was hurt. This suit is brought for the injuries. Since a verdict for the plaintiff, the case has been heard on a motion of the defendant for a new trial. The principal grounds of the motion are the alleged fellowship with the plaintiff of the servant of the defendant whose negligence caused the injury, and the alleged contributory negligence of the plaintiff.

The plaintiff was entitled to expect a reasonably safe place for, and means of ingress and egress to, from, and about, his work, such as would be consistent with the usual dangers of his employment, and the obvious ones of the situation. The ladder which was the usual means of ingress and egress was not safe, and the substitute, as the jury has found, was not kept safe, nor the danger made obvious. The dark passage was not such a safe place as the plaintiff was entitled to, unless the trapdoor in the floor was kept shut, or the opening guarded, or the danger made obvious when it was open. *Grace & Hyde Co. v. Kennedy* (C. C. A.) 99 Fed. 679. The dark passage was wholly outside the usual place of employment of longshoremen,

and the duty of the defendant was to keep it reasonably safe from pitfalls for any persons who might be lawfully there. The ship was in port, the trapdoor led to the ship's supplies, and those in charge would be domestic servants, wholly separate from those specially there unloading the ship. The questions of fact relating to this, as well as those relating to the plaintiff's alleged contributory negligence, have been submitted to the jury, and found for the plaintiff.

Upon this review, no adequate ground for disturbing the verdict has been made to appear. Motion overruled. Judgment on verdict. Stay extended 30 days hence for exceptions.

FRATER, Receiver, v. OLD NAT. BANK OF PROVIDENCE, R. I., et al.

(Circuit Court of Appeals, First Circuit. April 24, 1900.)

No. 324.

NATIONAL BANKS—ASSESSMENTS AGAINST STOCKHOLDERS—LIABILITY OF PLEDGEE.

It is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment on national bank stock, instead of the owner, upon whom the legal obligation rests; and, where stock stood upon the books of a bank in the name of a person as cashier of another national bank, the designation suggested a qualified or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is not estopped to show that it held the stock as collateral only,—at least, in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership.

Appeal from the Circuit Court of the United States for the District of Rhode Island.

Algernon S. Norton and C. Frank Parkhurst (Henry W. Bookstaver, on the brief), for appellant.

Herbert Almy, for appellees Old Nat. Bank of Providence, R. I., and Francis A. Cranston.

Abram Barker, for appellee Frank L. Hinckley.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

ALDRICH, District Judge. It seems quite unnecessary to add anything to the clear and conclusive reasoning of Judge Brown, in the court below, with respect to the questions presented by this record. See (C. C.) 86 Fed. 1006.

Certain shares of the Merchants' National Bank of Seattle were held by the Old National Bank of Providence, R. I., as collateral security to indebtedness of one Barker. The shares stood upon the records in the name of "F. A. Cranston, cashier Old National Bank, Providence, R. I."; but they were in fact owned by Barker, and in fact were pledged as collateral security to indebtedness from Barker to the bank.

The primary purpose of the statutory assessment law was to secure members of the public dealing with corporations, by creating an assessment liability upon the owner of the stock. That is where the primary burden should rest, and there is where legal rules place

the liability, unless some one not the owner holds himself out as the owner under such circumstances as to lead the public to deal with the corporation in reliance upon what is represented by the record of the holding in respect to ownership. This is not a case where the security right has ripened into absolute title, so the situation presents none of the aspects which result from full bank ownership under such conditions. Again, the primary object and purpose of such a holding is security for indebtedness. It is, therefore, a substantial departure from the original object in any case to find the holding not only worthless as security, but subject to an assessment to the amount of its par value. If, however, a party holds himself out as owner, and the public relies upon such holding as a fact, it would be unfair to allow the holder to relieve himself from liability, because he would thereby relieve himself at the expense of another, who was induced to act upon a situation which he had held out as being a true situation. So, under certain circumstances, the pledgee may be liable for the assessment. Liability, however, under such circumstances, would result, not from the primary legal obligation, but upon grounds of estoppel, which operate to reverse the primary legal status, by holding a party who, contrary to the fact, has held himself out as the owner, and permitted the public to deal with such conditions as representing the truth. It is only in clear cases that legal obligations which primarily rest upon one party are shifted and fastened upon another by operation of law. The case under consideration is not within this rule; for, while the record of the standing of the stock did not fully represent the conditions upon which it was held, it did suggest that the holding of the bank or the cashier was a qualified holding,—a holding less than that involved in full ownership,—and was therefore sufficiently suggestive of the character of the holding to put the public upon inquiry as to the fact of ownership, if any member of the public dealing with the bank had sufficient interest to make inquiry in respect to the actual conditions of the title to the stock. The argument in this case is that the record, "F. A. Cranston, cashier," etc., in effect means, and would naturally be accepted as indicating, ownership by the bank. We do not think this is so clearly that way as to present a situation which would justify holding the pledgee to the assessment on grounds of estoppel. One element of estoppel in pais is that the person relying upon estoppel shall have acted in actual reliance upon a situation, supposing it to be as represented. There is no evidence or argument of that kind in this case. How it would be if this questionable entry was supplemented by evidence of that character, we do not say. It is sufficient for the purposes of this case to say that the entry upon the books was of such a character as to suggest a qualified or representative holding, and such as to put the public upon inquiry; and, there being no evidence that the public or the Seattle Bank actually acted upon any belief or representation of ownership by the Providence Bank, the rules governing estoppel do not operate to create the liability contended for by the appellant. The decree of the circuit court is affirmed, with costs.

VETALORO v. PERKINS et al.

(Circuit Court, D. Massachusetts. April 17, 1900.)

No. 881.

WRONGFUL DEATH—STATUTORY ACTION FOR DAMAGES—RIGHT OF ALIEN TO MAINTAIN.

Section 2 of the employers' liability act of Massachusetts (Acts 1887, c. 270), which gives a right of action to the widow or dependent next of kin of an employé who is instantly killed, or dies without conscious suffering, as the result of negligence for which the employer is liable under the other provisions of the act, is highly remedial, merely taking away a common-law obstacle to a recovery for an admitted tort, and should receive a liberal construction. The act nowhere makes any distinction in terms between citizens and aliens, and the fact that the widow of a deceased employé is a citizen and resident of a foreign country will not debar her from the right to maintain an action thereunder to recover damages for his death.

On Answer in Abatement and Motion to Dismiss.

H. J. Jaquith and William Reed Bigelow, for plaintiff.
Nason & Proctor, for defendants.

COLT, Circuit Judge. This is an action brought by the widow of an employé to recover damages for the death of her husband, under section 2 of the employers' liability act of Massachusetts (Acts 1887, c. 270). It is contended that this action cannot be maintained, because it appears that the plaintiff is a citizen and resident of Italy. There is nothing in the language of the act which limits the right of recovery to citizens or residents of Massachusetts, and there seems to be no sound reason for holding that nonresident aliens are excluded from the benefits conferred by section 2. Nonresident aliens have the same right to sue in the courts of Massachusetts as citizens. *Roberts v. Knights*, 7 Allen, 449; *Peabody v. Hamilton*, 106 Mass. 217. To adopt such a construction of the statute would be to say that employers may escape liability for negligence, where an employé is instantly killed or dies without conscious suffering, by the employment of alien laborers. This consideration alone is sufficient to condemn such a construction, in the absence of some express limitation in the statute itself.

The Massachusetts statute, with some variations of detail, is copied from the English statute (43 & 44 Vict. c. 42). It was intended to remove certain bars to the right of employés to sue for personal injuries based on their relation to their employer. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 191, 22 N. E. 766, 5 L. R. A. 667. "The purpose of the legislature in enacting this statute, as its title indicates and its provisions show, was to soften some of the harsh features of the old common law of master and servant, and so to place upon the statute books a law beneficial to the laboring classes. This obvious purpose furnishes a key to the interpretation of the whole act. Its terms are to be given a liberal construction, favorable to the employé just so far as the plain meaning of the words used will permit." *Williams*, St. Torts Mass. p. 122, § 114. Section 1

of the act declares the liability of employers for injuries suffered by employes in their service (1) by reason of any defect in the condition of ways and works of machinery, due to the negligence of the employer or any person in his service; (2) by reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence; (3) by reason of the negligence of any person in the service of the employer who has charge or control of any signal, switch, locomotive engine, or train upon a railroad. In case the injury results in death, the legal representative of such employe shall have the same right of compensation and remedy against the employer as if the employe had not been an employe of nor in the service of the employer, nor employed in its work. It is not suggested that an alien employe, or, in case death should result from the injury, the representative of such employe, could not maintain an action under this section. Section 2, under which the present suit is brought, reads as follows:

"Where an employee is instantly killed or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased, or in case there is no widow, the next of kin, provided that such next of kin were at the time of the death of such employee dependent upon the wages of such employee for support, may maintain an action for damages therefor and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered."

This section extends the liability of employers under the act to cases of instant death resulting from the negligence of the employer, and gives the widow or next of kin the right to maintain an action. In construing the words at the close of the section, "in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered," it was said by the court in *Ramsdell v. Railroad Co.*, 151 Mass. 245, 249, 23 N. E. 1104, 7 L. R. A. 155: "The meaning obviously is that the right of action given in the first part of the section shall not be affected by the fact that the deceased died instantaneously or without conscious suffering." The manifest purpose of section 2 is to give the widow and next of kin of an employe the same right to bring an action in the case of death as the employe in case he had survived would have had under section 1. No distinction is made between citizens and aliens in either section. The only limitation imposed is that the next of kin, in order to maintain an action, must be dependent for support on the wages of the employe. To exclude nonresident aliens from the right to maintain an action under section 2 is to incorporate into the act a restriction which it does not contain. It is to refuse compensation to a certain class of persons for a real injury recognized by statute law. It is to relieve employers with respect to some employes from the exercise of due care in the employment of safe and suitable tools and machinery and competent superintendents. It is to offer an inducement to employers to give a preference to aliens and to discriminate against citizens. It is to hold that the legislature of Massachusetts intended by this act to declare that employers should

not be liable for the grossest negligence which results in the instant death of an alien employé in cases where his widow or next of kin happen to reside in a foreign country.

The argument urged in support of the proposition that a non-resident alien cannot maintain an action under section 2 is as follows: The right to recover for the death of a person did not exist at common law. The statutes of the various states creating such a right are based upon Lord Campbell's act (9 & 10 Vict. c. 93, A. D. 1846). No English case has been found in which it has been held that Lord Campbell's act extended to nonresident aliens, and the same is true of the decisions in the various states under similar acts. Further, it has been expressly held by the supreme court of Pennsylvania and the circuit court of the United States for the district of Colorado, under statutes framed after Lord Campbell's act, that nonresident aliens cannot maintain an action. *Deni v. Railroad Co.*, 181 Pa. St. 525, 528, 37 Atl. 558; *Brannigan v. Mining Co.* (C. C.) 93 Fed. 164.

In *Deni v. Railroad Co.* the court bases its decision upon the following grounds:

"No case has been cited to us, nor are we aware of any, in which a non-resident alien, whether husband, widow, child, or parent of the deceased, has maintained a suit, under the act of April 26, 1855 (P. L. 309), to recover damages for an injury causing death. Our legislation on this subject is in accord with the English statute of August 26, 1846, and therefore the decisions of the English courts construing this statute are often referred to in cases grounded upon our acts of April 15, 1851, and April 26, 1855. But no case has been brought to our notice in which an English court has held that a nonresident alien is entitled to the benefits conferred by the act of 1846. The same may be said of the decisions of the courts of our sister states having statutes similar to our own. * * * Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it. * * * There is nothing on the face of the act which limits the protection afforded by it to our own citizens. It is referred to as another illustration of the general rule that we do not legislate for persons beyond our jurisdiction."

In *Brannigan v. Mining Co.*, Judge Hallett, in an oral opinion, follows the Pennsylvania case. He says:

"I have examined the statute of Pennsylvania, and upon this question it is the same as the statute of Colorado; that is to say, the right of action is given to certain representatives of the deceased generally, and without any statement as to whether they shall be citizens of Pennsylvania or residents of Pennsylvania. * * * The reasoning of the [Pennsylvania] court upon the subject is clear and full to the point that such a statute cannot be taken to be for the benefit of people residing in foreign parts. * * * Under the circumstances, I see no reason for denying the force and effect of this opinion. It appears to be founded upon good reason, and to be as applicable in Colorado as it is in Pennsylvania."

The decisions of the court in both these cases rest largely upon the proposition that no case can be found in which Lord Campbell's act has been extended to nonresident aliens, and that the act has

no extraterritorial force. This is hardly in accordance with the fact. A more correct statement, it seems to me, would be to say that the English courts have never questioned the right of a non-resident alien to maintain an action in the common-law courts under Lord Campbell's act. In *The Explorer*, L. R. 3 Adm. & Ecc. 289, Sir Robert Phillimore held that the provisions of Lord Campbell's act extended to a case where the person in respect to whose death damages were sought to be recovered was an alien, and was, at the time of the wrongful act which caused his death, on board a foreign vessel on the high seas. Although that case has been overruled so far as it held that a court of admiralty had jurisdiction in an action in rem in which damages were claimed under Lord Campbell's act (*The Vera Cruz*, 9 Prob. Div. 96, 10 App. Cas. 59; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727), the right of a nonresident alien to maintain such a suit in the common-law courts was never doubted or questioned either before or since that decision. Such a doctrine is clearly repugnant to the spirit and purpose of Lord Campbell's act. In Webb, Pol. Torts, p. 77, it is said:

"Railway accidents, towards the middle of the present century, brought the hardship of the common-law rule into prominence. A man who was maimed or reduced to imbecility by the negligence of a railway company's servants might recover heavy damages. If he died of his injuries, or was killed on the spot, his family might be ruined, but there was no remedy. This state of things brought about the passing of Lord Campbell's act (9 & 10 Vict. c. 93, A. D. 1846), a statute extremely characteristic of English legislation."

In Maryland there is a statute substantially like Lord Campbell's act. The statute of the District of Columbia, although differing in details, is essentially the same as the statute of Maryland. A suit was brought in the District of Columbia to recover for the death of a person caused by the negligence of a railroad company in the state of Maryland. The supreme court held that the action could be maintained. *Stewart v. Railroad Co.*, 168 U. S. 445, 448, 449, 18 Sup. Ct. 106, 42 L. Ed. 538. The opinion of the court in that case is instructive. Mr. Justice Brewer, speaking for the court, said:

"A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim, '*Actio personalis moritur cum persona*,' damages therefor could have been recovered in an action at common law. * * * The purpose of the several statutes passed in the states, in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439. * * * Where the statute simply takes away a common-law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed. * * * The substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect."

Under an act of the state of Alabama to suppress murder, lynching, and assaults, it was held by the supreme court of that state that

statutes passed for the security and protection of life, in the absence of clear and unexceptionable language forcing a contrary conclusion, will be held to apply as well to aliens and mere sojourners as to citizens, and the fact that the person murdered and the widow or next of kin were aliens is no defense to recovery under the act. *Luke v. Calhoun Co.*, 52 Ala. 115.

The purpose of section 2 of the Massachusetts statute was to remove a common-law obstacle, and to create a right of action for an admitted tort. The language of the section does not restrict the right to any particular class or classes of persons. It says "the widow of the deceased"; "the next of kin." These words comprehend every widow, and all next of kin, whether citizens, residents, aliens, or nonresident aliens. The only qualification mentioned is that the next of kin must be dependent on the wages of the employé for support. I can find no sound or just reason for holding that the legislature intended to exclude nonresident aliens from the benefits of this section. If statutes of this character have no extraterritorial force, as was held in *Deni v. Railroad Co.*, *supra*, it is difficult to see why citizens or residents of other states are not excluded as well, in the absence of any constitutional prohibition.

This whole act relating to the liability of employers is highly remedial. It was designed to benefit all employés. It has received, and should continue to receive, a liberal construction. It certainly should not receive a narrow and inequitable construction, founded upon any distinction between citizens and aliens, or residents and nonresidents. The answer in abatement is overruled, and the motion to dismiss denied.

NEW ENGLAND R. CO. V. HYDE.

(Circuit Court of Appeals, First Circuit. April 6, 1900.)

Nos. 322, 323.

1. APPEAL AND ERROR—SUPERSEDEAS.

Neither a circuit court, nor a judge thereof, has power to allow a supersedeas pending a review of its judgment on writ of error after the expiration of 60 days from the date of such judgment.

2. SAME.

A circuit court of appeals cannot, as an exercise of its general powers under Rev. St. § 716, allow a supersedeas, where a plaintiff in error has failed to bring himself within the provisions of section 1007 by filing the writ of error and bond within 60 days from the entry of the judgment complained of.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Petition by the New England Railroad Company for a writ of mandamus to the United States circuit court, and motion for a supersedeas by the New England Railroad Company, defendant in an action brought against it by Ruth E. Hyde, by her next friend, in which judgment has been entered.

Charles F. Choate, Jr. (Frank A. Farnham, on the brief), for petitioner, and for the motion.

Daniel G. Perkins, opposed.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. The motion of the plaintiff in error to this court in No. 323, for a supersedeas, and its petition in No. 322, for a mandamus to the circuit court to compel the granting of supersedeas, may be considered together.

The writ of error was not allowed or served within 60 days after the entry of judgment in the circuit court. It did not, therefore, operate as a supersedeas, since there was a failure to comply with the provisions of section 1007, of the Revised Statutes of the United States. Though a bond was filed within 60 days after judgment, it was not presented for approval, and was not approved, within that time, nor has it since been approved. After the expiration of 60 days, application was made to the circuit judge for approval of the bond, and for an order superseding the judgment, whereupon the following order was entered: "Denied, because at the present time neither the circuit court, nor any judge thereof, has power to allow a supersedeas." We think it clear that this ruling was correct. *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810; *Sage v. Railroad Co.*, 93 U. S. 417, 23 L. Ed. 933. It follows that the petition for mandamus is without substantial merit, even if we disregard the fact that it was filed before the entry of the writ of error in this court.

After the expiration of 60 days, and within 6 months from the date of judgment, a writ of error was properly issued and served, and there is now pending in this court a proceeding for a review of the judgment of the circuit court. The defendant below, now plaintiff in error, in support of the motion to this court for a supersedeas, contends that, as a writ of error may be sued out lawfully at any time within 6 months, and as by section 1007 of the Revised Statutes the writ of error itself operates as a supersedeas only when served within 60 days, there must be power in the appellate court to grant supersedeas upon writs of error sued out after 60 days, and within 6 months; for otherwise, it is urged, the right of review which exists after the expiration of 60 days, may be a mere barren right, for if the judgment be paid, without security for its repayment, there is danger that the amount cannot be recovered in the event of a reversal of the judgment. It is contended, therefore, that, in order to preserve the substance of a right to proceed by writ of error after 60 days, the appellate court should interpose, and relieve the plaintiff in error from the necessity of paying a judgment before a final decision as to its validity. The plaintiff in error contends that congress intended to permit executions to be superseded in two ways—First, under section 1007; and, secondly, under the general powers conferred upon this court by sections 11 and 12 of the act of March 3, 1891, establishing United States circuit courts of appeals, and by section 716 of the Revised Statutes of the United States. It is true that in many cases the supreme court has declared

and exercised its power to grant a supersedeas under proper conditions. *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138; *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676; *In re Claassen*, 140 U. S. 200, 207, 11 Sup. Ct. 735, 35 L. Ed. 409; *Sage v. Railroad Co.*, 96 U. S. 712, 24 L. Ed. 641; *Peugh v. Davis*, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. Ed. 127; *Hudson v. Parker*, 156 U. S. 277, 283, 15 Sup. Ct. 450, 39 L. Ed. 424; *Jerome v. McCarter*, 21 Wall. 17, 31, 22 L. Ed. 515. We should have no doubt of the power of this court to grant supersedeas, as an appropriate mode of relieving a petitioner from the consequences of a failure or refusal of the court below to do that which he had properly sought, and which should have been done by the court or judge in furtherance of the appeal. But cases in which the supreme court has granted a supersedeas on the ground that the petitioner was legally entitled thereto, and had been deprived of his legal rights through error of the lower court, are not in point. Our present question is whether the appellate court will grant supersedeas where there has been a failure by the petitioner to take the steps prescribed by statute for giving to the writ of error itself the effect of staying execution, and where there is no fault or error of the court below. Though the exact point decided in *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810, was as to the power of a justice of the supreme court to allow a supersedeas, the opinion contains a valuable historical review of the law pertaining to the general subject, and states that section 1007 of the Revised Statutes expresses the intention of congress to restore the policy of the old law, which had been relaxed by the former statute of 1872 (17 Stat. 198, § 11). The later opinion by the same eminent judge in *Sage v. Railroad Co.*, 93 U. S. 412, 417, 418, 23 L. Ed. 933, states with force the rule of necessity of strict compliance with the statute, and says, "Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard." We think, therefore, that the legal situation presented when this court is urged to grant supersedeas, as an exercise of the general powers enumerated in section 716, Rev. St., by a party who has failed to bring himself within the provisions of section 1007, does not differ from the situation under the former statutes. Under section 14 of the judiciary act of 1789 (1 Stat. 81), the supreme court's powers were similar to those under section 716 of the Revised Statutes. By section 23 of the judiciary act of 1789, it was provided "that a writ of error as aforesaid shall be a supersedeas and stay execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days," etc. No valid distinction can be based upon the words "in cases only," which appear in section 23 of the act of 1789, but not in section 1007, Rev. St. Each of these sections relates to the effect of the writ of error itself as a supersedeas, and neither section in terms imposes any limitation upon the supreme court in the exercise of the general powers conferred by the other sections. The arguments advanced in this case would have been quite as forcible under the previous statutes, and were in fact presented in cases to which hereafter we will refer. There-

fore, should we find that the supreme court, having the broad powers conferred by section 14 of the act of 1789, had refused to grant supersedeas on the ground that congress had especially dealt with the subject in section 23 of that act, its decisions to that effect must be regarded as of controlling force in the present case. Upon an examination, the decisions of the supreme court are found to be conclusive.

In *Wallen v. Williams* (1812) 7 Cranch, 278, 3 L. Ed. 342, a motion to quash an execution was made directly to the supreme court, when the writ of error was too late to be a supersedeas to the decree. It was said in the opinion denying the motion:

"If this motion should prevail, it will make the writ of error operate as a supersedeas, contrary to the intention of the act of congress."

In *Hogan v. Ross*, 11 How. 294, 13 L. Ed. 702, on a like motion to the supreme court, it was said:

"For the court is unanimously of the opinion that, in the exercise of their appellate power, they are not authorized to award a supersedeas to stay proceedings on the judgment of the inferior court, upon the ground that a writ of error is pending, unless the writ was sued out within ten days after the judgment, and in conformity with the provisions of the twenty-third section of the act of 1789."

In *Railroad Co. v. Harris*, 7 Wall. 574, 19 L. Ed. 100, as in the present case, there was pending in the appellate court a writ of error, which did not itself operate as a supersedeas, and motion was made to that court for a supersedeas; yet it was held that the provisions of section 23 of the judiciary act were controlling, and compliance therewith indispensable.

In *Saltmarsh v. Tuthill*, 12 How. 389, 13 L. Ed. 1035, Chief Justice Taney said:

"This court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of congress regulating appeals and writs of error on any equitable ground. No such power is given them by law. It was so decided in this court in *U. S. v. Curry*, 6 How. 113, 12 L. Ed. 363, and *Hogan v. Ross*, 11 How. 297, 13 L. Ed. 702."

An examination of the arguments of counsel in that case will show that it was argued there, as here, that the specific directions of the law as to writs of error did not take away the general powers of courts to grant a supersedeas upon the allowance of a writ of error.

The case of *U. S. v. Curry*, 6 How. 113, 12 L. Ed. 363, referred to by Chief Justice Taney, states the general principle which seems to have been uniformly applied in applications of this character:

"But this court does not feel itself authorized to treat the directions of an act of congress as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this is conferred upon the court by acts of congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them. And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for congress to provide a remedy, by altering the existing laws, not for the court."

See, also, *Slaughter-House Cases*, 10 Wall. 273, 291, 292, 19 L. Ed. 915; *French v. Shoemaker*, 12 Wall. 100, 20 L. Ed. 270; *Kitchen*

v. Randolph, 93 U. S. 86, 23 L. Ed. 810; Sage v. Railroad Co., 93 U. S. 417, 23 L. Ed. 933.

The case of Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424, cited by the plaintiff in error, is not to the point under consideration; for the question there related to the power of a judge, other than the judge who presided below, to sign citation and grant supersedeas, rather than to the question of supersedeas relief by the appellate court after the expiration of the statutory period.

Nor do we find any ground for relief in the fact that the entry of judgment was without the knowledge of the attorney of the plaintiff in error; for if we were to assume (what is probably true) that the practice has been for the judges of the circuit court not to enter judgment except in usual course, unless upon motion or with notice, the petitioner is in no position to get relief on that ground, for the reason that knowledge of the judgment was brought to it within the 60 days, thus affording an opportunity to perfect its rights. The opportunity was acted upon, and, acting with knowledge of the judgment, the petitioner stopped short of doing what was necessary under the provisions of section 1007 of the Revised Statutes. In No. 322, the petition for mandamus is denied, with costs. In No. 323, the motion for supersedeas is denied.

NEW ENGLAND R. CO. v. HYDE.

(Circuit Court of Appeals, First Circuit. April 25, 1900.)

No. 323.

RAILROADS—INJURIES TO PERSONS AT STATIONS—ACTION FOR DAMAGES.

The duty of a station agent to the public about the station grounds is not necessarily limited by the rules prescribed by the company, but is measured by the requirements of the law, and whether such duty was performed under the circumstances of a particular case where a person received an injury on such grounds is a question of fact for the jury.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Frank A. Farnham, for plaintiff in error.

Donald G. Perkins, for defendant in error.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. Rules promulgated by a railroad company do not necessarily limit the duty of a station agent towards the public about the station grounds to what is prescribed therein, nor do they necessarily fully describe the duties which the law imposes upon the agents of the corporation at the railway station. In the presence of danger like that in question, the law requires reasonable conduct and reasonable action under the existing circumstances of the particular case. Whether the conduct and action were reasonable and in accordance with duty, or unreasonable and culpable, under the particular circumstances of a case like this, are ques-

tions of fact. The questions of fact relating to the situation, which involved, of course, the conduct of the child, the conduct of the station agent, and the conduct of the servants of the corporation in charge of the train, were submitted to the jury under proper instructions. Judgment of circuit court affirmed, with costs.

In re FRANKLIN SYNDICATE et al.

(District Court, E. D. New York. March 1, 1900.)

BANKRUPTCY—EXAMINATION OF BANKRUPT—NOTICE TO CREDITORS.

A person duly adjudged bankrupt on an involuntary petition may be ordered before the referee for examination, before the first meeting of his creditors and the appointment of a trustee; and, if the examination is limited to obtaining information on which to prepare the schedules, it is not essential to the validity of the proceeding that 10 days' notice thereof by mail should have been given to creditors, as provided in Bankr. Act 1898, § 58a, subd. 1.

In Bankruptcy.

The Franklin Syndicate, Incorporated, and William F. Miller having been adjudged bankrupt, and a receiver appointed by the court to take charge of their property pending the first meeting of their creditors and the selection and qualification of a trustee, one of the creditors presented a petition for the examination of the bankrupts; whereupon the following order was made by the court:

THOMAS, District Judge. Upon reading and filing the annexed petition of Bernard O'Kane, a creditor of the aforesaid bankrupts, the proof of claim hereto annexed, and on all the papers and proceedings herein, and on motion of Belfer & Flash, his attorneys, it is ordered that the examination of the bankrupts, and of all material and necessary witnesses herein, and the taking of their testimony, as prayed for in the petition, be, and the same hereby is, referred to Augustus J. Koehler, Esq., the referee in bankruptcy herein, to take proof under the acts of congress relating to bankruptcy, and that said examination be directed to the facts and circumstances concerning the acts, conduct, and property of said bankrupts; also concerning the cause of bankruptcy, the conducting of the bankrupts' business, the disposition of the bankrupts' property, and the bankrupts' dealings with creditors; and let subpoenas issue directing the bankrupts, and all other persons whose testimony may be material and necessary herein, to submit to examination before the aforesaid referee, pursuant to the rules and practice of this court, and for such other and further relief as may be just herein.

Thereafter, in pursuance of the above order, the bankrupt William F. Miller was brought before the referee for examination; and, after counsel for the receiver had been allowed to intervene in the proceeding, counsel for the bankrupt interposed an objection to any proceeding being had or taken under the order of court. This objection was based upon the ground that there was no proof that the creditor who sought the examination had procured the allowance of his claim in bankruptcy; that, if such claim had been allowed, its allowance was illegal, and not in pursuance of the bankruptcy law; that such claim could not be allowed until a first meeting of creditors was held; that the bankrupt had a right to object to the claim, and contest its validity, before it could be allowed, of which right he could not be foreclosed; that there could be no examination of the bankrupt until there had been a first meeting of creditors; that, under section 58 of the bankruptcy law, there could be no examination of the bankrupt without notice to all the creditors of at least 10 days; that none of the requirements provided for by the bankruptcy law and the rules had been complied with; and that the order directing the examination of the bankrupt was wholly void, and without power, and that the

referee had no jurisdiction to proceed to examine the bankrupt. The referee overruled the objection to the validity of the order, on the ground that he had no power or jurisdiction to modify, set aside, or vacate an order made by the judge of the court. Counsel for the bankrupt, and counsel representing various parties in interest, then moved for a continuance of the proceedings until a meeting of creditors should have been held, and renewed their objection to the examination of the bankrupt on the ground that the statutory notice to creditors had not been given. The referee reserved his decision on this question, and adjourned the proceedings to a future day. Exceptions to the ruling of the referee having been noted, he certified the record of the proceedings to the court for review, together with his decision on the question reserved, wherein he said:

"An objection of a nature which warrants due consideration is made by the attorney for the bankrupt, and by Mr. Goldsmith, of counsel for certain creditors, and the receiver, and other attorneys, representing different creditors, 'that no examination can be had, for the reason that the notice required by Bankr. Act, § 58a, subd. 1, was not given.' I do not deem the objections so made by the attorney for the bankrupt, as to the failure of such notice required by section 58a, subd. 1, to be available to him; but as this objection also emanates from Mr. Goldsmith, representing a large number of creditors, as well as representing the petitioning creditors on the application to have said Miller adjudicated a bankrupt, and also Mr. Burr, and other attorneys representing different creditors, as well as by the receiver, and affects the statutory rights of all the creditors in this proceeding, it seems to me that this objection should be considered, in view of the rights and privileges of all the creditors concerned and interested in the bankrupt's estate and property. It is my opinion, upon a careful examination of all the proceedings before me, and of the petition and order of February 16, 1900, which directs me to 'take proof under the acts of congress relating to bankruptcy, pursuant to the rules and practice of this court,' that this objection to the examination of the bankrupt, for failure to give the notice required by section 58a, subd. 1, should be sustained, and that, before proceeding with such examination, at least 10 days' notice be given by mail to the creditors herein."

T. E. Hodgkin, for receiver.

Belfer & Flash (Francis A. McCluskey, of counsel), for petitioning creditor.

Ralph Underhill, Frank R. Dickey, Meyers, Goldsmith & Bronner, and William P. Burr, for various creditors.

Robert A. Ammon and House, Grossman & Vorhaus (Louis J. Vorhaus, of counsel), for bankrupt.

THOMAS, District Judge. The order for the examination of William F. Miller will be amended so as to authorize and to limit the examination solely for the purpose of preparing the schedules, and the examination will proceed without notice to creditors.

WALL et al. v. COX.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 355.

1. BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEE.

Under Bankr. Act 1898, § 2, granting jurisdiction in bankruptcy to the district courts of the United States as courts of bankruptcy, such a court has jurisdiction of a suit in equity by a trustee in bankruptcy to set aside a transfer or conveyance of property previously made by the bankrupt to the defendant, and alleged to have been fraudulent as to creditors.

2. SAME—FORM OF ACTION—BILL IN EQUITY.

A trustee in bankruptcy, seeking to set aside and annul a bill of sale and transfer of property previously made by the bankrupt, and alleged to have been fraudulent under the bankruptcy law, and as against creditors, may appropriately proceed by bill in equity, and will not be required to seek his remedy at law.

On petition to superintend and revise, in matter of law, proceedings of the district court of the United States for the Western district of North Carolina in the matter of W. H. Gilbert, trading as Winston Hardware Company and as Gilbert Hardware Company, bankrupt, in bankruptcy. (See 99 Fed. 546.)

C. B. Watson and Clement Manley, for petitioners.

Louis M. Swink and Lindsay Patterson (A. H. Eller, on the brief), for respondents.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This cause is now before the court upon an application to "superintend and revise, in matter of law," a certain decree of the United States district court for the Western district of North Carolina, and the real question presented is whether said court has jurisdiction in equity to entertain a bill to set aside and annul a bill of sale for a stock of goods made by the bankrupt, W. H. Gilbert, to the petitioners here, three days before the petition of involuntary bankruptcy was filed against him by his creditors, and on account of which bill of sale he was adjudged a bankrupt. The trustee for the bankrupt attacked said transfer because fraudulent, and made to hinder, delay, and defraud the bankrupt's creditors, and averred that the petitioners here entered into collusion with the bankrupt to defraud his creditors, and insisted that the goods were still the property of the bankrupt, and the title in him as trustee. Said petitioners, on the other hand, claim to be purchasers in good faith, and for a present fair consideration, and raise specially the question of jurisdiction aforesaid. The question of the jurisdiction of the United States district court over controversies between third parties, or adverse claimants to the bankrupt, and the bankrupt's trustee, is one that gave rise to much controversy under former bankrupt laws, and the present act has afforded fresh opportunity for a revival and renewal of many of the objections urged against previous legislation on the subject of the federal courts' jurisdiction. Indeed, under the present act, the claim of limitation on the jurisdiction of the United States district court goes to the extent of excluding that tribunal from all jurisdiction in cases of the class now under consideration; the contention being, in effect, that the jurisdiction conferred upon that court under the existing act is administrative, merely, in its character, and is limited to entertaining petitions of bankrupts, making adjudications in such cases, distributing the estates brought in, and granting discharges; and that as to all matters affecting the bankrupt's estate the bringing in and collection of assets, the determination of the rights of parties of the character involved in this cause, that recourse can alone

be had to the state courts, unless it happens that by reason of the amount involved, and the citizenship of the parties, jurisdiction would be in the United States circuit court. And the contention as to where the bankrupt's trustee can sue goes even further, namely, that he is confined entirely to the state court, unless suit be allowed in the United States circuit court with the defendant's consent. The far-reaching effect of these conflicting claims will be readily appreciated. One makes the state courts practically the medium through which the law is to be administered; the other, the federal courts. If the district courts have only the jurisdiction conceded to them, then they become, so far as the bankrupt law is concerned, unimportant tribunals; their chief office as to the bankrupt's estate being to distribute ratably among creditors such estate as the bankrupt sees proper to bring in, or such as other courts may from time to time, and indefinitely, decide should be distributed. In the consideration of so important a question, in the administration of a national bankruptcy law, it is fortunate that we are aided by the interpretation given by the highest court in the land to previous acts, having under review the same positions taken here; and while, of course, these decisions are not controlling in the interpretation of the present act, they shed much light on the question, and to them, as well as to the fact that the subject under consideration is that of a national bankruptcy act, supposed to be uniform in its character, great consideration should be given. In the case of *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414, Mr. Justice Bradley, in discussing the jurisdiction of the district court under the act of 1867, said:

"Of this there are two distinct classes: First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge, or the refusal of a discharge, of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction of the district courts is very broad and general. It is that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified, resulting, however, in the two general classes before mentioned."

If the two distinct classes of jurisdiction thus mentioned by Mr. Justice Bradley are kept in view, it will aid materially in the interpretation of the present act, for precisely the same classes of jurisdiction in terms are enumerated in the present act. Indeed, the act of 1898 goes further than either the act of 1841 or 1867 in describing the second class, and specifically provides that the district courts shall be invested with such jurisdiction "at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." Just why jurisdiction "at law and in equity" should have been bestowed if only the purpose was to create the mere administrative tribunal claimed, cannot well be conceived. The act in this regard is more comprehensive than the previous acts; those of 1841 and 1867 not containing the words "at law and in equity" in terms. The grant of jurisdiction to the district court under the act of 1898 is found in section 2 of the act, and is in these words: "Are hereby

made courts of bankruptcy, and are hereby invested within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held;" and then follows the jurisdiction at law and in equity mentioned and defined specifically in the subsections, to wit: To (1) "adjudge persons bankrupt who have had their principal place of business," etc.; (2) "allow and disallow claims," etc.; (3) "appoint receivers or marshals, upon the application of parties in interest, in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed or the trustees qualified"; (5) "authorize the business of bankrupts to be conducted for limited periods by receivers," etc.; (6) "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of the matter in controversy"; (7) "cause estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided"; (15) "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." Then, continuing the specific enumerations (19 in all), those specially quoted above relating particularly to the jurisdiction as a court of law and equity, and the others to the jurisdiction, as a court of bankruptcy, over bankruptcy proceeding, concludes: "Nothing in this section shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." This proviso and conclusion of the section shows plainly that it was not the purpose of congress, in enumerating the 19 specific grounds of jurisdiction, to limit or take away the jurisdiction conferred by the general grant of power. The language, "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms as they are now or may be hereafter held," would clearly confer upon the United States district courts jurisdiction to hear and determine cases of the character now under consideration. To clothe the court with power to entertain a bankruptcy petition, and discharge and relieve the bankrupt from the payment of his debts, and not confer upon it the power to make the person thus receiving an acquittance and release, and those fraudulently colluding with him, bring in and give up to the creditors interested the bankrupt's property which of right belongs to them, would be a strange anomaly; and unless there is something in the jurisprudence of the law of bankruptcy, and the jurisdiction conferred upon courts of bankruptcy, so peculiarly engaged in the administration of insolvent estates and the detection and prevention of fraud, and singularly combining in their legal nature and operation the elements and powers of courts of admiralty and courts of equity, it ought not to be accepted and adopted. To say that the United States district

court, sitting as a court of bankruptcy, with all the analogous powers and jurisdiction of a court of equity, and with jurisdiction at law and equity specially conferred upon it as ancillary and supplementary to its inherent power, in an involuntary bankruptcy proceeding can only afford the creditors the relief of making certain that the debtor is a bankrupt, and has committed acts of bankruptcy, and that, where he has fraudulently transferred his estate, although it be the act of bankruptcy set up, as in this case, that as against the alleged fraudulent transferee no relief can be afforded, but the creditors must inaugurate in the state courts wherever such transferee happens to reside litigation to secure any substantial relief, would be to impose upon them a burden that would be unreasonable in the extreme, and in many cases one that would be entirely ineffective; and, besides, it would bring about a result manifestly not contemplated by those enacting the law, the predominating feature of all bankruptcy legislation being simplicity and expedition in the collection and administration of bankrupts' estates. Bankrupts wishing to defraud their creditors, and those colluding with them, would be a bungling set of conspirators who could not elude and evade a law so handicapped by the machinery necessary to put it in motion, and the result would be that the estate, pending the many stages of litigation through which creditors would have to pass, and, indeed, in anticipation of the necessity of the various requirements, would be readily placed beyond their reach. The claim of limitation upon the district court's jurisdiction is based upon the concluding words "except as herein otherwise provided" in subdivision 7, § 2. The subdivision reads:

"(7) Cause estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Those making this contention apparently overlook the concluding paragraph of section 2 of the act, which provides that the particular specifications named shall not be construed to deprive the court of bankruptcy of any jurisdiction conferred by the general grant of power. The bankrupt act of 1841 was less comprehensive as to the district court's jurisdiction than is the present act, for no specific power to collect debts was given, nor were the courts granted in terms common law and equity jurisdiction. Section 6 of the act is as follows:

"The district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act. And the jurisdiction hereby conferred on the district court shall extend to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the closing of the proceedings in bankruptcy."

The act, however, was held to confer jurisdiction upon the court, the same being declared to be incidental to the powers given. *Mitchell v. Manufacturing Co.*, Fed. Cas. No. 9,662; *Ex parte Christy*, 3 How. 312, 11 L. Ed. 603. Under the bankrupt act of 1867, the provision as to the court's jurisdiction was as follows:

"The several district courts of the United States are hereby constituted courts of bankruptcy, and they shall have original jurisdiction in their respective

districts in all matters and proceedings in bankruptcy. And the jurisdiction hereby conferred shall extend * * * to the collection of all the assets of the bankrupt."

Under this clause the courts held that the jurisdiction at law and in equity was granted, being necessarily implied from the powers expressly given. *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Goddall v. Tuttle*, Fed. Cas. No. 5,533; *Sherman v. Bingham*, Id. 12,762. Those disputing the district courts' jurisdiction insist that the qualifying words, "except as herein otherwise provided," of subdivision 7, § 2, refer to section 23, subds. "a" and "b," and that the effect of the qualification is to take from the federal district court jurisdiction in all cases of the character now under consideration, or where the rights of third persons in possession of and adverse claimants to the bankrupt or his trustee are concerned. We need not specially consider subdivision "a," § 23, as it does not immediately concern the question presented in this case. In passing, it may be said that abundant scope can be given that section without in the slightest infringing on the general chart of jurisdiction laid out for the United States district court, and in entire harmony with that court's jurisdiction. First. One of the purposes of said subdivision was to make clear that the full and sweeping jurisdiction given the district court in bankruptcy matters should not operate to take away from the circuit court its proper jurisdiction in cases arising out of bankruptcy proceedings, where the amount and citizenship of the parties entitled them to go into a federal circuit court. Second. Another, to prescribe that the trustee of a bankrupt's estate should not, merely because of his being an officer of a federal court, have the right to go into the circuit court, regardless of the amount involved, or of the citizenship of the parties. Subdivision 23b is as follows:

"(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted; unless by consent of the proposed defendant."

The construction placed upon this clause has not been harmonious; indeed, quite a contrariety of views has been judicially expressed as to its true intent and meaning. Some insist that it refers not to the jurisdiction of the court at all, but to the venue of suits, and requires suits to be instituted in the district and subdivision in which they could have been brought if prosecuted by the bankrupt; others, that it is meant as a limitation on the jurisdiction of the circuit, and not the district, court; others, that it confines jurisdiction to the state court, except with the consent of the defendant; and others, who earnestly insist that it places all jurisdictions in the state courts. Which of either of these conflicting constructions may be correct, we need not stop to determine, as, in our view, the clause in question clearly does not, assuming the exception in subdivision 7, § 2, specially to refer to it, take away from the United States district court jurisdiction to entertain suits of the character under consideration, or causes affecting the bankrupt's estate, merely because the rights of third persons, or parties claiming or having

an interest adverse to the bankrupt or his trustee, may be involved. Those making the claim are forced to deny the jurisdiction of the United States district court altogether. Their theory is inconsistent with concurrent jurisdiction in the two courts, and, if they are right, the result inevitably follows that the state court has exclusive jurisdiction of this class of suits; and as to suits by the bankrupt's trustee, it even denies him the right of admission to the United States circuit as well as the district court, although by subdivision "e," § 70, he is specially authorized to avoid any transfer of the bankrupt's estate that a creditor of the bankrupt might have avoided, or to recover any property, or its value, so transferred, from the person to whom it was transferred, and such creditor could have proceeded in the United States circuit court in a proper case for its jurisdiction. The exception contained in subdivision 7, § 2, was manifestly not intended to have the effect claimed for it, and it cannot be given that interpretation without violating well-understood canons of construction. That exceptions should be strictly construed is elementary, and if an interpretation of an act will give effect to its several provisions, as against one that will only partially accomplish this purpose, can be arrived at, it should always be adopted. An exception should not be so construed as to wholly destroy the grant of which it forms a part. *U. S. v. Dickson*, 15 Pet. 141, 165, 10 L. Ed. 689; *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, 22 L. Ed. 80; *Ryan v. Carter*, 93 U. S. 78, 23 L. Ed. 807.

The view presented that section 23b has reference to the venue, rather than to the jurisdiction, of the court, has considerable force in it, as it should not be presumed that congress meant to legislate upon the theory that the consent of a defendant could give jurisdiction to a court, and consent is entirely consistent with the idea of venue. It is allowable for a defendant to appear and submit to the jurisdiction of a court otherwise possessed of jurisdiction, and in which he could not be sued without his voluntary appearance, but his consent would avail nothing if the court was not clothed with jurisdiction of suits of the character involved; and full scope can be given to the section by its application to cases of the class that the bankrupt himself might have brought,—i. e. to the collection of debts due the bankrupt. To require such suits to be brought at the debtor's home in the state court is, perhaps, what congress intended, unless, with the consent of the defendant, the suit should be instituted in the United States district court, a tribunal also having jurisdiction of the parties and over the subject-matter. To allow this section to qualify the whole bankrupt act, and at the same time make it applicable as well to suits that the trustee brings, as the representative of the creditors, as to those of the character that the bankrupt himself could not have brought, would be to clearly violate the plain letter and manifest spirit of the act. Another view shows conclusively that it was not intended to take away from the bankrupt court jurisdiction of the class of cases now under consideration, namely, which involve dealings with the bankrupt's estate in contravention of the rights of his creditors, the bankrupt could not have brought such suits. This is a suit by the trustee in

bankruptcy to set aside and annul an alleged fraudulent bill of sale and transfer of property made by the bankrupt on the eve of his going into bankruptcy, and to have the property of the bankrupt surrendered to the trustee cleared of such cloud on his title. The trustee is vested, as of the date of adjudication, by operation of law, with the title of the bankrupt, among other things, "to all property transferred by him in fraud of his creditors, as well as to all property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold by judicial process against him." Bankr. Act, § 70. The word "transfer" includes the sale and every other different mode of disposition of or parting with property, absolutely or conditionally; as by payment, pledge, mortgage, gift, or security. Id. § 1, cl. 25. The title to the property alleged to have been fraudulently conveyed, by the express terms of the act, as of the date of adjudication, vests in the bankrupt's trustee upon the assumption of the transfer being void, and the bankrupt court has, as authorized by the act, appointed a receiver to seize and take charge of the property involved, and now, in fact, holds the same. Can it be seriously claimed that in such a case, with an officer of the court before it, with property thus vested in him, and the same seized by the court and brought in for the benefit of creditors, the court is powerless to afford relief either to its own officer, or to the creditors of the bankrupt, because the rights of an alleged fraudulent transferee are involved, and that on that account the hands of the bankrupt court should be stayed until the question of the transferee's rights can be determined in a state court? This cannot be the law. The property is in custodia legis, and all persons having interest in it or claiming title to it have necessarily to come into the court having it in charge. Any other course would be unheard of. It would be to except the United States district court from the otherwise universal and fundamental rules, principles, and practice of courts of justice in respect to property lawfully under their charge.

Another view of the act would seem to be equally conclusive of the question under consideration. The whole act should be taken into account, and not a single or isolated section. "It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole and every part of a statute, taken and compared together. * * * And the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to a palpable injustice, contradiction, and absurdity." 1 Kent, marg. p. 462. "The object of the rule is to ascertain and carry into effect the intention, and it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Upon the same principle, whenever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied." Id. 464. When the fact is taken into account that the question presented is whether congress meant, in dealing with a subject confided by the constitution to the federal government, and

affecting the people of the entire country, and especially charged to be uniform in character, to leave the important features of jurisdiction, under the enactment, to the exclusive control of the courts of 44 different states, or to the federal courts, where one general and harmonious rule of interpretation could be adopted and followed, there ought to be but little difficulty in reaching a correct conclusion. The state courts, as to many matters in which exclusive jurisdiction is not conferred on the federal courts, have a concurrent jurisdiction with the courts of bankruptcy, but such jurisdiction is not conferred by act of congress. It exists in those courts by reason of their general jurisdiction, and independent of any enactment by congress. Indeed, congress is without the power to give jurisdiction to the state courts to administer the bankrupt law, so far as the collection of the estates of bankrupts is concerned; and while such state courts, in enforcing the rights and duties under the federal law, exercise the concurrent jurisdiction with federal courts, it is entirely a discretionary jurisdiction on their part, and one they may wholly renounce or conditionally exercise whenever they wish to do so. *Sherman v. Bingham*, Fed. Cas. No. 12,762; *Goodall v. Tuttle*, Id. 5,533; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 330, 4 L. Ed. 97; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715. Every consideration accentuates the desirability, if not the necessity, of the federal courts having at least a concurrent jurisdiction in the administration of a national bankruptcy act. It cannot be presumed that congress was not fully alive to the importance of this question, particularly as it was one upon which so much stress was laid under the former acts. In discussing this question in *Ex parte Christy*, 3 How. 292, 320, 321, 11 L. Ed. 616, Mr. Justice Story said:

"If we are told that resort may be had to the state courts for redress, one answer is that in some of the states no adequate jurisdiction exists in the state courts. * * * But a stronger and more conclusive answer is that congress did not intend to trust the working of the bankrupt system solely to the state courts of twenty-six states, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is, by the constitution, competent for all such purposes; and congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do. * * * The truth is that in no way could the bankrupt system be put into operation without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof."

And in *Lathrop v. Drake*, 91 U. S. 516, 518, 23 L. Ed. 415, Mr. Justice Bradley said:

"The state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts, and it is not to be presumed that embarrassments would be encountered in these courts in the way of a fair and prompt administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the states, in which it is possible that embarrassments might arise."

The precise question here presented under the act of 1898, as far as we have been able to ascertain, has never been passed upon by the circuit court of appeals of any of the circuits, though on kindred questions, and in some instances ones almost conclusive of the pres-

ent controversy, several of these courts have passed, namely: In the Second circuit, in *Re Gutwillig*, 34 C. C. A. 377, 92 Fed. 337; in the Eighth circuit, in *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325; in the Sixth circuit, in *Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 637; in the Ninth circuit, in *Re Francis-Valentine Co.*, 36 C. C. A. 499, 94 Fed. 793; in the Fifth circuit, in *Re Abraham*, 35 C. C. A. 592, 93 Fed. 767; and in this circuit, in *Bear & Co. v. Chase*, 99 Fed. 920. The decisions in all of the circuits, with the exception of the Fifth, have been favorable to the views herein expressed, while those of that court tend rather to support the contrary view. The decisions of the district courts have likewise been favorable to the views herein expressed. Only the cases in those courts bearing particularly on the point in issue here, and in conformity herewith, will be given. In *re Sievers* (D. C.) 91 Fed. 366; *Carter v. Hobbs* (D. C.) 92 Fed. 39; In *re Smith*, Id. 135; *Robinson v. White* (D. C.) 97 Fed. 33; In *re Newberry*, Id. 24; *Murray v. Beal*, Id. 567; In *re Woodbury* (D. C.) 98 Fed. 833; In *re Hammond*, Id. 845; *Pepperdine v. Headley*, Id. 863. The following text writers, in their several treatises upon the present act, will be found to support the jurisdiction of the district court herein laid down: *Loveland, Bankr.* pp. 67-73, 409; *Black, Bankr.* pp. 123, 124; *Lowell, Bankr.* pp. 411, 412; *Coll. Bankr.* pp. 14-19; *Smith, Eq. Rem. of Cred.* §§ 407, 418.

The petitioners earnestly insist that, if the United States district court has jurisdiction to entertain a suit of the character under consideration, the action should be by appropriate proceedings at law, and not by bill in equity. That courts of equity are clothed with full power and authority to entertain suits involving questions of fraud in the conveyance and transfer of property, and the annulling and cancellation of such transfers, is too well and firmly established in the jurisprudence of the country to admit of serious question at this late day. "It is not enough that there is a remedy at law; it must be plainly adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." *Boyce v. Grundy*, 3 Pet. 213, 7 L. Ed. 655. In *Clements v. Moore*, 6 Wall. 299, 18 L. Ed. 786, the same being a creditors' bill in the district court to set aside a fraudulent transfer of a stock of goods, the court said that equity is the appropriate remedy, being more flexible and tolerant, and capable of administering justice to fit the particular case, than could be done under the rules of law. "It is objected that a court of equity has no jurisdiction of the case, because the law affords a complete remedy in damages. This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment; and it does not depend on discovery." *Jones v. Bolles*, 9 Wall. 364, 369, 19 L. Ed. 734. "Jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances." Mr. Chief Justice Fuller, in *Kilbourn v. Sunderland*, 130 U. S. 505, 515, 9 Sup. Ct. 594, 32 L. Ed. 1005.

For the reasons given, the decision of the lower court is affirmed, at the costs of the petitioners.

In re MULLEN.

(District Court, D. Massachusetts. April 23, 1900.)

No. 1,889.

1. BANKRUPTCY—FRAUDULENT CONVEYANCES—AVOIDANCE BY TRUSTEE.

Bankr. Act 1898, § 70e, providing that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided," gives to a trustee in bankruptcy, with respect to the setting aside of fraudulent conveyances by the bankrupt, only the same rights which are conferred upon the bankrupt's creditors, or any of them, by the common law or the statutory law of the particular state.

2. SAME—RIGHTS OF ATTACHING CREDITOR OF GRANTEE.

Where the law of the state does not permit creditors of a grantor to set aside a fraudulent conveyance made by him, as against an attachment levied by a creditor of the grantee without notice, a trustee in bankruptcy cannot recover property from one who has attached the same in a suit against the holder of the record title, on the ground that such holder received the property by a conveyance from the bankrupt which was fraudulent as to his creditors; the conveyance having been made more than four months before the institution of the proceedings in bankruptcy, and the attaching creditor having no actual notice of the fraudulent nature of the transfer or of the bankruptcy proceedings.

3. SAME—NOTICE.

Where a debtor has conveyed away his property in fraud of his creditors, the institution of proceedings in bankruptcy against him does not give constructive notice to creditors of the grantee of the right of the trustee in bankruptcy to avoid the conveyance and recover the property; and the proceedings in bankruptcy are not, for that purpose, equivalent to a creditors' suit to set aside the conveyance.

4. SAME—TITLE OF GRANTEE.

Although Bankr. Act 1898, § 70a, provides that a trustee in bankruptcy "shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all * * * property transferred by him in fraud of his creditors," this does not render the title of the fraudulent grantee absolutely void, but only voidable, and does not prevent a creditor of the grantee, without notice, from acquiring rights in the property superior to those of the trustee.

In Bankruptcy. On review of decision of referee in bankruptcy.

Alfred S. Hayes, for trustee in bankruptcy.

Putnam & Putnam, for attaching creditor.

LOWELL, District Judge. The trustee's amended petition, filed February 23, 1900, alleges that in 1892 the bankrupt, by a mesne conveyance, transferred real estate to his wife; the conveyance being duly recorded. No conveyance of this real estate was thereafter made by Mrs. Mullen, who died in 1898. On November 1, 1899, Mullen was adjudicated a bankrupt on his voluntary petition. By writ dated November 3, 1899, the respondent in this case, the Continental National Bank, attached the real estate belonging to Mrs. Mullen in a suit against her administrator, upon which suit the bank subsequently recovered judgment. An execution was issued thereon January 26, 1900, by virtue whereof the respondent levied upon the real estate above mentioned. The petition further alleges that the real estate in question is the property of the bankrupt, that his wife held the title

thereto solely as trustee for his benefit, and that the record title to the real estate had been put in her name by the bankrupt for the purpose of hindering, delaying, and defrauding his creditors. The petition asks that the respondent be ordered to reconvey the real estate to the trustee in bankruptcy. To this petition the respondent has filed a paper in the form of a demurrer, which demurrer was overruled by the referee, of whose decision the respondent has duly sought a review. No question of the general jurisdiction of the court was raised, either before the referee or before me.

Before discussing the questions of law involved in this case, it is proper to say that no opinion is to be taken as expressed upon the applicability of a demurrer to a summary petition in bankruptcy like this. I doubt if the forms of pleading at common law and in equity are applicable to such summary proceedings. It may well be that the objections raised by the demurrer should have been presented, as they certainly might have been, in an answer to the merits. I am also inclined to think that it would have been more regular had the review sought by the respondent in this case been made to await a decision of the referee upon the facts involved. It is not usually convenient for this court, by way of review, to deal twice with the same petition,—once upon the law, and again upon the facts. As, however, all parties are desirous that the questions of law should now be settled, and as it lies in my discretion to pass upon them at this time, I shall not send the case back to the referee for further hearing.

The trustee does not now contend that he is entitled to a conveyance on the ground that Mrs. Mullen held the property in dispute as her husband's trustee, but solely upon the ground that it was conveyed in fraud of his creditors. The clauses of the bankrupt act concerning transfers in fraud of creditors are:

Section 67e:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Section 70a, subds. 4, 5, which read substantially as follows:

"The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all * * * (4) property transferred by

him in fraud of his creditors; (5) property which, prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *

Section 70e:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

I find myself unable to interpret and arrange all these provisions so that they shall be altogether free from contradiction, repetition, and redundancy. Manifestly, they deal (perhaps not exclusively) with transfers made by the bankrupt in fraud of his creditors, and the classes in which they arrange these transfers are not mutually exclusive. Clause "e" of section 67 was inserted in the bankrupt act at a very late state of its consideration. It is not found in the house bill, so called, as printed in S. 1035, 55th Cong., 2d Sess. In that draft section 67 ends with clause "d." The origin of the interpolated clause I have not been able to discover. Section 67f, which was interpolated at the same time, is said to have been added in order to strengthen the bill. See *In re Richards*, 96 Fed. 935, 939, 37 C. C. A. 634. A part of the phraseology of section 7 of the so-called senate bill printed in S. 1035 suggests a part of the phraseology of the second sentence in the existing clause "e," but the differences are as considerable as the resemblances. The interpolation of the latter part of clause "e" was so hastily made from a draft of some other bankrupt bill that the word "assignee" was left therein, and was not changed to "trustee," according to the nomenclature of the existing act. There is nothing to be found in the senate bill resembling the first half of clause "e," which seems to have had a separate origin. Most of the property dealt with in one part of the clause is again dealt with somewhat inconsistently in the other part, and the whole clause, thus introduced without corresponding amendments to other parts of the bill, contains contradictions and superfluities. As the conveyance in question is not within the terms of any part of section 67e, not having been made within four months prior to the filing of the petition, that clause need not be further considered here, and it is mentioned only to show that it has not been overlooked, and that little argument by way of analogy can be drawn from its provisions. Section 70a, subd. 4, invests the trustee with the title to property transferred by the bankrupt in fraud of his creditors. By section 67e the trustee had been already vested with the title to some property so transferred. But section 70a, subd. 4, in its present form was part of the bill before section 67e was interpolated, and was not modified to suit the interpolation. The inconsistency of the clauses, one of which invests the trustee with property transferred in fraud of creditors within four months of bankruptcy, and the other with property so transferred without limit of time, is thus explained. Probably section 70a was not so much intended to avoid certain classes of transfers, as to declare the right of the trustee to avoid transfers voidable by other persons. A similar observation is applicable to section 70a, subd. 5. See *Pratt v. Curtis*,

2 Low. 87, Fed. Cas. No. 11,375. The history of section 70e is as follows:

In its original form the Torrey bill read:

"The trustee may avoid any transfer, by the bankrupt, of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, or his assignee, unless he is a bona fide holder for value."

Subsequently the clause was altered to read as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the filing of the petition. Such property may be recovered, or its value collected from whoever may have received it except a bona fide holder for value." H. R. 9348, 52d Cong., 1st Sess.

This alteration left the clause as it now stands, except that the words "filing of the petition" have been changed to "adjudication."

It is contended by the respondent that the application of the first sentence is limited to the immediate transferee of the bankrupt, while the second sentence is intended to deal with the case of an assignee from such original transferee. If the first sentence is limited to the immediate transferee, the construction above stated is the correct one; and by the removal from the first sentence of the phrase "or his assignee," and by the plain reference in the second sentence to the assignee of the original transferee, I am brought to think that the respondent's contention above stated is correct, and that the case of the assignee of the original transferee is dealt with exclusively in the second sentence. It is hard to imagine, indeed, how an original transferee in fraud of creditors can be a bona fide holder for value, as is implied by the construction thus given to the first sentence of the clause; but, in general, I am inclined to think that section 70e was intended to provide simply that the trustee in bankruptcy should have the same right to avoid conveyances as was possessed by creditors, and this with especial reference to the statute of 13 Eliz., and similar statutes of the several states. Section 70e was not intended to define what conveyances creditors of the bankrupt might avoid, or to distinguish, in the respect of such conveyances, between the rights of the creditors taken together and the rights of a trustee in bankruptcy, but only to give to the trustee such rights as the creditors, or any of them, possessed. In Low. Bankr. p. 513, it is said to add nothing to the common law. The statute of 13 Eliz. makes void, as against creditors, conveyances in fraud of creditors, but provides that the operation of the statute shall not extend to any estate conveyed upon good consideration and bona fide. In inserting a like exception in section 70e, I think congress meant substantially to re-enact the exception placed in the statute of Elizabeth, and not to give to bona fide purchasers for value greater or less rights than those which that statute gives them. The reference to bona fide purchasers in section 70e should therefore receive the same construction that a like reference has received in the statute of 13 Eliz. and its American substitutes. Now, it has been generally held in the United States that, where

property conveyed in fraud of creditors is first attached by creditors of the transferee who have no knowledge of the fraud, their attachment will prevail as against the rights of defrauded creditors of the transferor. *Parker v. Freeman*, 2 Tenn. Ch. 612; *Applegate v. Applegate* (Iowa) 78 N. W. 34, 38; *Shallcross v. Deats*, 43 N. J. Law, 177. That this is so in Massachusetts is clear. *Gibbs v. Chase*, 10 Mass. 125. The right of the bankrupt's creditors to set aside the conveyance here in question was given by the law of Massachusetts, of which law the statute of 13 Eliz. is a part. See *Bump*, *Fraud. Conv.* § 12. The right originally given by the statute of 13 Eliz. has been in some respects modified by the statutes of Massachusetts, and the whole law upon the subject has been interpreted by the decisions of Massachusetts courts. By the interpretation put by those courts upon the law which gives the right, I am bound. *Schreyer v. Scott*, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955, and cases there cited. If the rights of the trustee under section 70a, subds. 4, 5, and section 70e, are substantially those possessed by the creditors of the bankrupt under the law of Massachusetts, the trustee in this case cannot defeat the respondent's attachment unless the respondent shall be held, before the attachment, to have been affected with notice of the bankruptcy proceedings. I do not think that he was so affected. It has been said, indeed, that bankruptcy proceedings affect with notice the whole world (*Bank v. Sherman*, 101 U. S. 403, 406, 25 L. Ed. 866); and this in spite of section 21e. See *Hall v. Whiston*, 5 Allen, 126. But bankruptcy proceedings can hardly affect any one with notice that certain property standing in the name of a stranger belongs to the bankrupt. This limitation of the effect of the notice given by bankruptcy proceedings was generally recognized under the act of 1867 (*Paddock v. Fish* [D. C.] 10 Fed. 125; *Myers v. Hazzard* [C. C.] 50 Fed. 155; *Murray v. Jones*, 50 Ga. 109; *Jarrell v. Harrell*, 1 Woods, 476, Fed. Cas. No. 7,222), and was apparently assumed in *Harrell v. Beall*, 17 Wall. 590, 21 L. Ed. 642. It has been said in Massachusetts that the attaching creditor is regarded in the light of a bona fide purchaser. *Cowley v. McLaughlin*, 141 Mass. 181, 182, 4 N. E. 821. But the attaching creditor is not a bona fide purchaser for value, though he may in some respects resemble one. Certainly he is not a purchaser "in good faith and for a present fair consideration," within the provisions of the first sentence of section 67e. Here I need not decide what is his relation to a bona fide purchaser for value. The decision in this case is put upon these grounds: (1) That by section 70e the trustee is given only the rights of the bankrupt's creditors; (2) that by the law of Massachusetts these rights do not extend to defeating a prior attachment made by a creditor of the fraudulent grantee, who had no notice of the fraud or of bankruptcy proceedings; and (3) that bankruptcy proceedings do not give constructive notice of the trustee's rights in a case like this, and are not, for the purpose of giving notice, the equivalent of a creditors' suit to avoid the conveyance. I do not decide that the respondent here is a bona fide purchaser for value, but only that the exception of such purchasers introduced into the bankrupt act was intended, not to vary, but to

confirm, the interpretation otherwise put upon the statute of Elizabeth, and similar American statutes. For these reasons, though with great doubt, I think that the respondent's position in this case is a sound one, and that his attachment will hold against the claim of the trustee in bankruptcy. Were the transfer in fraud of creditors brought within the provisions of section 67e, the result might well be different.

The trustee contends that the legal title to the real estate transferred in fraud of creditors passed to the trustee upon adjudication, and so there was no title to be attached by a creditor of the transferee, and none to be taken by a bona fide purchaser for value. But I do not so understand the bankrupt act. It is true that section 70a, subd. 4, gives the trustee the title of the bankrupt to all property transferred by him in fraud of creditors; but this vesting of the trustee with certain rights and with a certain title was not intended, as it seems to me, to make absolutely void a transfer hitherto held to be only voidable; and this conclusion is strengthened by the language of section 70e, which states that the trustee may avoid certain transfers of the bankrupt as a creditor might avoid them, thus plainly implying that, against the trustee as against the creditor, the transferee's title is not void, but voidable,—voidable at law as well as in equity, but still only voidable. *George v. Kimball*, 24 Pick. 234. In this case the contest is not between the bankrupt's transferee and his creditors, but between the creditors of two persons, one of whom has the record title to the property, as well as a legal title to it, though that title is voidable at law, and another person who has conveyed it so fraudulently that his creditors may avoid the conveyance. This is not a question of equality of distribution among all the creditors of the bankrupt, but a controversy between the creditors of one person and the creditors of another, where no general maxim that equality is equity can apply. The judgment of the referee is reversed, and the petition of the trustee is dismissed.

In re FINKELSTEIN.

(District Court, S. D. New York. April 24, 1900.)

BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF ASSETS.

Where creditors opposing a bankrupt's application for discharge show his possession of substantial assets a year before his failure, which are not listed in his schedule nor turned over to his trustee, and which, after making all proper allowance for business losses and for expenses, remain largely unaccounted for, the burden of proof devolves upon the bankrupt to account for such disappearance of assets or give a reasonable explanation of his inability to do so, and, in default of either, it will be inferred that he has withheld and concealed property from his trustee, and his discharge will be refused.

In Bankruptcy. On bankrupt's application for discharge, and opposition thereto by creditors.

Adams & Adams, for bankrupt.

Eugene G. Kremer, opposed.

BROWN, District Judge. The only ground of opposition to the discharge that it seems to be necessary to notice beyond those noticed in the referee's report, is the charge of concealment of assets.

It appears that the bankrupt in January, 1897, made an itemized statement of his affairs to Dun's Agency, showing a surplus of \$53,774 over his liabilities. He had been doing business for 18 years previous in Canal street. In March following he opened an additional store in Fourteenth street, which he conducted up to December 28, 1897, when he made an assignment with preferences, which was subsequently set aside as fraudulent. His schedules showed an indebtedness of \$105,777.16 and assets coming to the receiver's hands amounting only to \$33,500; thus showing a net loss during 1897 of \$126,051.16. The examination of the bankrupt showed no special causes for this change during the year. There were no losses by bad debts in the Canal street store except a couple of thousand dollars; and none at all in the Fourteenth street store, where the sales were for cash. Deducting his estimated real estate assets, living expenses and a large allowance for expenses, there would seem to remain at least from \$50,000 to \$75,000 not reasonably accounted for. Sufficient is shown by the creditors in this regard to place the burden of proof upon the bankrupt to account for such a large disappearance of assets within the year previous to his assignment; or some reasonable explanation why he cannot do so. In default of either, the necessary inference must be that the bankrupt has withheld and concealed assets from his creditors and from his trustee. In re Meyers (D. C.) 96 Fed. 408, 2 Am. Bankr. Rep. 707. Until explanation made a discharge must be withheld.

In re TEBO.

(District Court, D. West Virginia. April 30, 1900.)

1. BANKRUPTCY—PRIORITY OF CLAIMS—COSTS AND EXPENSES.

The costs and expenses of administration of an estate in bankruptcy must be paid out of the estate before there is any distribution to creditors; and although there are specific liens on the estate, sufficient in the aggregate to absorb the entire assets, their payment must be postponed to the payment of the costs and expenses.

2. SAME—WAGES OF LABOR.

Under Bankr. Act 1898, § 64b, par. 4, giving priority of payment in full out of bankrupts' estates to "wages due to workmen, clerks, or servants," earned within three months before the commencement of proceedings, and not exceeding \$300 to each claimant, such claims for wages are entitled to be allowed and paid before the funds of the estate can be applied to the discharge of liens against the bankrupt's estate.

3. SAME—FEE OF ATTORNEY OF VOLUNTARY BANKRUPT.

The amount to be allowed as a fee to the attorney of a voluntary bankrupt rests largely in the discretion of the referee in bankruptcy having charge of the case; and his allowance will not be disturbed by the judge, in the absence of evidence to show that it was unjust, excessive, or exorbitant, especially where creditors, being given 30 days in which to file evidence that the amount allowed was too great, have failed to do so.

4. SAME—REFeree's EXPENSES.

Exceptions to the referee's charges against the estate in bankruptcy for his expenses therein will not be heard by the court, when the referee's

account of such expenses has been duly kept and returned to the court, under oath, with vouchers, as required by General Order No. 26 (32 O. C. A. xxvii., 89 Fed. xl.), and approved by the court, and especially when distribution of the estate has already been made before such exceptions are presented.

5. SAME—HIRE OF REFEREE'S CLERK.

A referee in bankruptcy may employ a clerk to assist him in the discharge of his duties, and may charge the hire of such clerk as a part of the costs of administration in the several estates in bankruptcy coming before him.

In Bankruptcy. On exceptions certified for review by referee in bankruptcy.

Adrian C. Nadenbousch, for appellants.

Pitzer & Lindsay, for appellees.

JACKSON, District Judge. On the 7th day of March, 1899, William E. Tebo filed his petition in bankruptcy praying that he be declared a bankrupt under the act of congress. On the 7th day of March, 1899, the petition was heard, and he was adjudicated a bankrupt. On the same day an order of reference was made, referring the case to James D. Butts, Esq., one of the referees in bankruptcy, to take further proceedings therein. The record of the referee discloses that he convened the creditors of the bankrupt; that they proved their debts, and elected a trustee; that during the proceedings that were had before the referee, at the instance of the creditors, several adjournments were had, and quite a number of exceptions were noted to the rulings of the referee. It appears from the certificate of the referee that only two questions are certified to the judge of this court for his review, which questions are presented by the petition of the executors of A. J. Thomas.

The first question certified for review involves the question of administration of the bankrupt's estate. The costs of the administration of an estate are always chargeable against the assets of the estate, as provided for by Bankr. Act, § 64, par. 3. It is claimed, however, that the referee, in his order of distribution, directed the payment of costs out of the estate when there were specific liens on the estate which would have absorbed the entire assets of the bankrupt's estate, and that in this the referee erred. The court is of opinion to overrule this exception, for the reason that the bankrupt law expressly provides for the cost of administration as a prior lien upon the assets of the bankrupt's estate before there is any distribution of it to creditors.

The second question certified for review is the allowance by the referee of \$677.57 to the several laborers whose names, with the amount reported in favor of each, appear in said order of distribution of the date of August 21, 1899. These are what are known as "labor claims," and, by the order of the referee, payment was suspended until the opinion of this court could be obtained. The court is of opinion that under Bankr. Act, § 64b, par. 4, all wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceedings, not to

exceed \$300 to each claimant, must be allowed and paid out of the bankrupt's estate before the funds arising therefrom can be applied to the discharge of liens against the bankrupt's estate, and for this reason the order suspending the payment of the amount retained by the trustee until the action of the court could be invoked should be set aside, and the fund distributed, as provided for in Bankr. Act, § 64b, par. 4.

These two exceptions dispose of the only questions certified to the court by the referee for its action; but there are some other exceptions noted which the court will consider and dispose of, to serve as a precedent in questions of a similar character.

There is an exception to the allowance of counsel fees for the bankrupt. The court is of opinion that the allowance to counsel rests largely in the discretion of the referee in bankruptcy, and, there being no evidence filed before the judge of this court that the allowance made by the referee was unjust, excessive, and exorbitant, I am of opinion not to disturb it, as it appears from the record that the referee, after making the allowance, held the matter under advisement for a period of 30 days to give the creditors an opportunity to file evidence to show that the allowance was excessive, which they failed to do. If this were not so, I am of opinion that they waived their grounds of opposition to the allowance, as it appears from the record that the distribution had been made, and the counsel has been paid the amount allowed to him.

As to the exceptions taken by counsel in regard to the expenses of the referee, the court is of opinion to overrule all the exceptions in regard to it, for the reason that by general order No. 26 in bankruptcy (32 C. C. A. xxvii., 89 Fed. xi.), the referee is required to keep an account of his "traveling and incidental expenses, and those of any clerk or other officer that he may need in the performance of his duties in any case which may be referred to him, and shall make a return of the same under oath, with proper vouchers," etc.; and for the additional reason that the charge of \$10 per day for the meetings held by the referee, at the instance of the creditors in these proceedings, under rules 5 and 6 of this court, was a proper and legitimate charge against the bankrupt's estate, and falls clearly within the provision of Bankr. Act, § 64b, par. 3. In this case the referee has complied with the rule which requires him to submit his accounts to the judge of the court to be approved by him, and the court is of opinion to overrule said exception as to these accounts, for the reason that it is not now an open question, and for the further reason that the exception comes too late, as the distribution of the assets has been made.

In regard to the allowance of clerk hire, the court is of opinion that no referee can, without the aid of a clerk or such other officer as he may require, discharge his public duties. This is a matter largely within the discretion of the referee, which discretion, if abused, would justify the court in removing him. While Bankr. Act, § 64b, par. 3, does not mention clerk hire as being embraced in the costs of administration, yet the paragraph does not forbid it, and this court is of opinion that it is a necessary incident to the referee,

in the due administration of his office, as he is, in fact, the judge of the bankrupt court.

The other exceptions noted to the action of the referee were not certified to this court for its review, and the court, for this reason, will not consider them; but it is of opinion that, if it did consider these exceptions, it would overrule them, for the reason that the subsequent action of the creditors to the filing of the various exceptions has waived them, and it is therefore unnecessary to notice them in detail beyond those that I have considered and disposed of.

For the reasons assigned, the court is of opinion to overrule the exceptions certified for review, as well as the other exceptions which were not certified by the referee for review.

In re ELK PARK MINING & MILLING CO.

(District Court, D. Colorado. December 26, 1899.)

No. 335.

INVOLUNTARY BANKRUPTCY—CORPORATIONS—MINING COMPANY.

A petition in involuntary bankruptcy cannot be maintained against a corporation engaged in the business of mining for precious metals; such a company not being "engaged principally in manufacturing, trading, or mercantile pursuits," within the meaning of Bankr. Act 1898, § 4b, and therefore not being amenable to the statute.

In Bankruptcy. This is a petition in involuntary bankruptcy against the Elk Park Mining & Milling Company, a corporation organized under the laws of the state of Colorado for the purpose of operating mining property in that state. The petitioning creditors allege that the debts set forth were contracted for mining supplies furnished to the respondent, and for and on account of labor and board of men employed in and about the mining property of the company.

Hartzell & Steele, for petitioning creditors.

W. C. Fullerton, for respondent.

HALLETT, District Judge (orally). I do not think a mining corporation can be regarded as a trading corporation, or that it is in mercantile pursuits. The mention of printing and publishing companies seems to limit the class of corporations which congress had in mind. They are manufacturing companies, in a sense, and congress thought it necessary to enumerate them. Certainly a mining company, which is organized for operating a mine and getting precious metals from it, cannot be said to be engaged in any species of trading. I think Judge Wellborn, in calling a sanitarium a trading corporation, was wrong. In re San Gabriel Sanatorium Co. (D. C.) 95 Fed. 271. I do not see how that can be said. Judge Phillips has a better idea of the meaning of the law when he holds that an insurance company is not of that class. In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co. (D. C.) 96 Fed. 756. No one would think, in an ordinary discussion, of calling an insurance com-

pany a trading corporation, although they do a sort of business which is connected with trade, as they insure people who are engaged in trade. I am inclined to think that counsel is correct in his position that a mining corporation is not a trading or manufacturing corporation, or one engaged in mercantile pursuits. To my mind, congress clearly intended to bring within the terms of this act those corporations which engage in the general business of buying and selling goods. A mining corporation is not of that character. I think the petition ought to be dismissed, as not coming within the terms of the act.

COTTIER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 2, 1900.)

No. 2,763.

CUSTOMS DUTIES—APPRAISAL—PROTEST.

A protest by importers, which fails to show whether the objection is to the valuation or the classification, is not sufficiently definite.

Appeal by the importers from a decision of the board of general appraisers, which affirmed the action of the collector of customs.

Howard T. Walden, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The appraiser noted on the invoices, "Add for goods in excess as noted; no evidence of intended fraud,"—and also, "Add manufactures of wood." The merchandise in question consisted of certain paintings, and the additional duty was for the frames thereon. The protest was as follows:

"We herewith protest against the assessment of \$328.65 duties on frames contained in cases 1,051/62, arrived per S. S. England from London, on the ground that the value of the same is included in the invoice amount as entered. We therefore respectfully request that the appraiser may reconsider his classification, we claiming that the same is erroneous as returned by him."

The opinion of the board of general appraisers was to the effect that the question was one of value, and not of classification, and that the remedy of the importers was by appeal for a reappraisement. The protest is not sufficiently definite, and the decision of the board of general appraisers is affirmed.

MICHEL v. NUNN, Collector of Internal Revenue.

STARK v. SAME.

(Circuit Court, M. D. Tennessee. April 28, 1900.)

INTERNAL REVENUE—SPECIAL TAXES—RECTIFIERS OF SPIRITS.

Under the provision of the internal revenue law (Rev. St. § 3244) which declares that "every person who without rectifying, purifying or refining distilled spirits shall, by mixing such spirits, wine or other liquor with any material manufacture any spurious, imitation or compound liquors for sale under the name of whisky, * * * cordials, or wine bitters, or any

other name, shall be regarded as a rectifier and as being engaged in the business of rectifying," a retail liquor dealer, who mixes whisky with water and sugar, or water and blackberry juice, and keeps the same in stock for sale, is a rectifier, and subject to special tax as such.

Actions against defendant, as collector of internal revenue, to recover back special taxes exacted from plaintiffs as rectifiers of spirits.

John Ruhm, for plaintiffs.

A. M. Tillman, U. S. Atty., for collector.

After hearing the argument of counsel, his honor, Judge C. D. CLARK, charged the jury as follows:

"Now, gentlemen of the jury, you have discovered that in the two cases before you, the facts of which are not disputed, the retail liquor dealer was in the habit of mixing whisky, sugar, and water, and putting that in jugs and bottles, and keeping it in his stock in that form, and selling it, when wanted, as he sold other whiskies and wines in his stock, when called for, by measuring out whatever the customer wanted, whether that was a drink or a small or large bottle. And in the other case the whisky was in like manner kept in stock in bottles, the proof of it reduced by mixing water, and the color restored by blackberry juice. That raises the question whether or not, under the statute, this man became, by this method of doing business, a rectifier, within the statutory definition; not whether he would be a rectifier in the ordinary acceptance of the term, because the statute has undertaken to give its own definition, which may, if congress chooses to give such a definition, differ from the ordinary understanding of what would be a rectifier. This is done in the recognized power of the legislature to classify for the purpose of subjecting the articles to revenue or taxation, and the question raised is whether these parties, suing the government to recover back the sum paid by them as rectifiers, have really conducted their business in such a manner as to subject themselves to the tax imposed on rectifiers. The statute is that: 'Every person who rectifies, purifies, or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete, and every wholesale or retail liquor dealer who has in his possession any still or leach tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits.' Rev. St. § 3244, subd. 3. Now, the statute thus enumerates classes who are actually engaged in modes of refining or rectifying, and, after having classified in this way, for the purpose of ascertaining when persons are subject to this tax, the statute passes entirely away from persons actually engaged in any process of distillation or refining, by saying, 'and every person who without rectifying,' going entirely away from those who have been purifying or refining, to the statement, 'every person who without rectifying, purifying or refining distilled spirits.' So there is here clearly the intent to include every person, the act passing to what may be called 'compounding.' Such persons are not rectifying, purifying, or refining, but compounding. 'Shall, by mixing such spirits, wine, or other liquor with any material,' are the words of the statute; 'with any material,' not by mixing wines or liquors of one kind with another, but with 'any material'; and thereby 'manufacture any spurious, imitation, or compound liquors for sale, under the name of whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as being engaged in the business of rectifying.' Now, it has not been asserted that that language, 'by mixing the liquors with any material,' has any technical or trade meaning, or that its meaning is other than in ordinary use, and, taking it in its ordinary use, in the popular sense, it certainly could not be said that, if it is mixed with either water or sugar or blackberry juice, it is not mixed with any material,—'any material.' And it strikes me that an interpretation that would undertake to say that certain materials are within the statute, and other materials are not within it, when the statute itself

uses the term 'any material,' would nullify the statute. The chief difficulty arises from the fact that the commissioner has not, as I think he undoubtedly has or would have the power to do, made a business regulation which gives effect to his interpretation of the law. I do not think there would be any doubt that he could regulate the mode of doing business, and require the retail liquor dealer, if he mixes with either water or sugar, to pay tax as a rectifier, but he has not exercised this power. We might, then, the more easily determine who is subject to this tax as a rectifier, but, notwithstanding the fact that he has not done so, my opinion is that the mixing here is within the language of the act in the absence of any special or trade meaning that would restrict the sense in which the words 'any material' and other like expressions are used in the statute. Now, if we begin to determine what sort of materials are meant, if we say that water and sugar and blackberry juice and orange juice and lemon juice are not materials within the sense of the act, the trouble is to find a stopping place, and say what will be a material within the meaning of the act. And, notwithstanding that the question is close, my impression is that to hold that 'any material' with which the whisky is mixed is not within the act is judicial legislation. There is not any question of forfeiture here, but the mode of business which may make a man a rectifier. I think, when an effort is made to except out of the terms of the act certain cases upon the ground that the mixing is not important, the act will be rendered nugatory in effect. So, without further comment on the act, I conclude that these persons were subject to the tax, and that the plaintiffs are not entitled to recover, and I direct you to so find."

The foregoing is a substantially correct report of my charge to the jury in the above-styled causes.

CLARK, District Judge.

DE BARY et al. v. SOUER.

(Circuit Court of Appeals, Fifth Circuit. April 24, 1900.)

No. 859.

1. INTERNAL REVENUE—TAX ON WHOLESALE LIQUOR DEALERS—PLACE OF MAKING SALES.

Where a wholesale liquor firm, having an office in New York, where it pays the internal revenue tax required of such dealers by Rev. St. § 3244, accepts orders at such office, and directs the delivery of the goods thereon from a public warehouse in New Orleans, in which they are stored, such sales are made in New York, and not in New Orleans, and do not render the firm subject to a second tax as a dealer at New Orleans.

2. SAME—CONSTRUCTION—STATUTE.

There is no reason requiring a statute imposing special internal revenue taxes to be construed liberally in favor of the government, but it should be construed fairly and judicially, with reference to both parties.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

John D. Rouse and Wm. Grant, for plaintiff in error.

J. Ward Gurley, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

BOARMAN, District Judge. This suit is against L. J. Souer, who is the collector of internal revenue at New Orleans, La. It is to recover from him the sum of \$100, with interest and costs. Plaintiffs allege that the said Souer, as such collector, assessed against

them, as wholesale liquor dealers at New Orleans, La., a special tax of \$100 for the year ending June 30, 1899, which they paid under protest to said Souer, collector. Plaintiffs allege that said assessment and collection of said sum was without authority in law, and they were in no way liable therefor. They allege, further, and the transcript shows, an admission by defendant, Souer, of this allegation, that they appealed in vain to the commissioner of internal revenue to have the said sum returned to them. Section 3244 of the Revised Statutes, under which the collector assessed, provides "that wholesale liquor dealers shall each pay \$100. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines or malt liquors, * * * in quantities not less than five wine gallons at the same time, shall be regarded as a wholesale liquor dealer." The contention of the plaintiffs in error was that they were importers of wines and liquors, and, as such, carried on the business of a wholesale liquor dealer at New York, where they paid annually the special tax imposed on such business by the revenue laws; that they never carried on such business in the city of New Orleans, nor in the state of Louisiana; that they never had an office or any place of business in the said state; that they never had any agent therein authorized to sell their goods, or to offer them for sale; that they never, in said city or state, sold or offered for sale, any foreign or domestic distilled spirits, wines, or malt liquors. In further support of the contentions of plaintiffs in error, they called two witnesses, the first being a member of the firm of Frederick De Bary & Co., to show that they had paid the government a wholesale liquor tax for carrying on business in the city of New York for the year ending June 30, 1899; that said firm did not, since June 3, 1895, either sell, or offer to sell, in the city of New Orleans, any foreign or domestic distilled spirits, wines, or malt liquors in any quantities; that they imported wines and liquors at the port of New Orleans, which they caused to be stored in a warehouse, and that, when sales were made in New York by the New York office direct to the trade at any place in the United States, deliveries of such goods were made to purchasers thereof on orders from the New York office to the warehouse people in New Orleans, with whom the imported goods were temporarily stored. Plaintiffs in error further offered the testimony of the warehouse keeper himself, at New Orleans, to show that they stored their goods with him since August, 1895, but that his (the warehouseman's) connection therewith was to enter the goods when imported, store and deliver them, or ship the same, as ordered by plaintiffs, in accordance with sales made by the plaintiffs' firm at New York; that the warehouseman himself never sold, nor offered to sell, or never had any authority to sell, any of plaintiffs' goods so stored with him; that the plaintiffs never had any place of business in New Orleans, or any agent there authorized to sell, or offer to sell, their goods. The defendant in error offered several witnesses to show a condition of things adverse to the state of case shown by the testimony of plaintiffs in error. Counsel for the plaintiffs in error asked the judge to charge the jury as follows:

"That unless the jury shall find from the evidence that the plaintiffs either sold, or offered to sell, foreign or domestic distilled spirits, wines, or malt liquors, in quantities not less than five gallons at the same time, in the city of New Orleans, they must find a verdict for the plaintiffs for the amount claimed. (2) If the jury shall find that the plaintiffs accepted, at their New York office, orders for their goods, and directed their delivery from a warehouse in New Orleans, then the sale thereon was made in New York, and not in New Orleans, and they must find a verdict for the plaintiffs for the amount claimed."

The defendant in error sought, in the trial court, to contradict the material testimony by which plaintiffs in error showed that none of their liquors were sold, or offered for sale, at New Orleans. The trial judge, proceeding on the theory that there was no conflict on the issues of fact, refused the charges tendered by the plaintiffs in error, and directed a verdict for the defendant in error. The refusal to give the two charges cited above is assigned as error.

The undisputed evidence, all of which we find in the transcript, seems to fully sustain the contention of plaintiffs in error that they never sold, or offered for sale, any of the wines or liquors which they kept on storage in the public warehouse at New Orleans; that they had their place of business in New York, where they entered into and made all the contracts for the sale of liquors and wines held on storage in the city of New Orleans; and that the liquors on storage in New Orleans, and so sold by them, were delivered by the warehouseman to the purchasers on orders in their favor. It was further shown that the said liquors, on their arrival at New Orleans, were often not put in the warehouse, but delivered to dealers, who had purchased them at New York, from the steamship landings; that the warehouseman delivered the goods to such purchasers in the original packages, and they never had an agent in New Orleans authorized to offer for sale, or to sell, the goods held for their account in the warehouse.

The government does not contend that the liquors were sold, or offered for sale, by plaintiffs in error at New Orleans. Its contention is that their acceptance of orders sent to them at New York, and the delivery or shipment of the goods there sold, by the public warehouseman at New Orleans, constitutes in law a sale at the latter place. Under the common law, a sale is a contract for the transfer of property from one person to another for valuable consideration, and three things are requisite to its validity, viz. the thing sold which is the object of the contract, the price, and the consent of the contracting parties. Under the law of Louisiana, a sale is considered completed as soon as there is "an agreement for the object and for the price thereof, although the object has not already been delivered or the price paid." Rev. Civ. Code, art. 2456. Where a sale results by the acceptance of an order, the sale is made where the order is accepted. *Shuenfeldt v. Junkermann* (C. C.) 20 Fed. 357.

Benjamin on Sales, speaking of the formation and completion of sales (page 1), says:

"By the common law, a 'sale' may be defined as a transfer of the absolute property in a thing for a price in money. * * * All that was required

to give validity to a sale of personal property, whatever may have been the amount of value, was the mutual assent of the parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed by mutual assent that one should transfer the absolute property of the thing to the other for a money price, the contract was completely proven and binding on both parties. If, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed, in the common law, 'a bargain and sale of goods.'"

A primary, material, and essential result which, by operation of law, flows from a completed sale, is that the title to the property in the thing sold passes, or has passed, out of the seller into the purchaser. It will be seen, from the authorities, that delivery is not an essential element in or to the completion of a sale of personal property. Delivery, in its legal sense, may denote a transfer of title to the thing sold, or it may mean a transfer of possession. In some cases between the parties, as well as between them and other persons affected by a completed "contract of bargain and sale of goods," it may become necessary to consider whether the reciprocal obligations imposed by the terms of the sale, on the seller and buyer, have been performed. In such cases, delivery, whether constructive or actual, may be an evidence of performance. In the case we are considering, there is no question at issue of performance by either the seller or buyer of the liquors stored at New Orleans. It does not seem necessary to discuss the incident of delivery, or its effect on the sales made at New York by the plaintiffs in error.

We have been referred by the counsel for the government, by way of an authority, to a letter emanating from Internal Revenue Commissioner Scott (1 Synopsis of Decisions Treas. Dept. vol. 1, p. 647). The letter relates to a subject-matter not dissimilar to the case we are considering. We quote from the concluding paragraph of the letter as follows:

"A distinct and separate special tax is required to be taken out by a liquor dealer at every place at which he completes sales by deliveries of liquors, without having made prior constructive deliveries thereof to his customers at his regular place of business for which he holds requisite stamp."

It seems to be conceded by the author of the letter we have just mentioned that, if a constructive delivery of the liquors in question was made at New York by the vendors, the license taken out by the plaintiffs in error covers their right to sell, without additional tax at New Orleans, under the statement of facts shown in the record. The facts in the record show clearly enough that there was a constructive delivery made at New York to the purchasers of such goods as were, at the time of the completed sale, in the warehouse at New Orleans.

We do not agree with the suggestion of counsel for the defendant in error that the statute imposing a license tax should be liberally construed in favor of the government. We think the language embodied in the statute should be fairly and judicially construed, as between both parties. It is true that the intentment of the statute is to impose and collect revenues for the government. It may be said, further, in reply to the suggestion of counsel, that the government, in the exercise of its legislative will, imposes all the

license taxes required of traders, and that in so doing the statutes relating to the collection of the revenues essential for its support contain language satisfactory and ample to state and make clear the extent of the liabilities it imposes on a licensee before he can enter into commerce at any place in the United States. The courts should hold the trader who enters competitive commerce to a full discharge of the obligations lawfully imposed on him, but the obligation should be measured and determined by judicial interpretation of the law.

The plaintiffs in error have paid a license tax for 1898 at New York for the privilege of selling and offering to sell liquors in the United States. The government, in stating the conditions under which a trader becomes a debtor for a license, says that whoever "sells or offers for sale liquors," etc., shall pay special tax. The words, "sells or offers for sale," are used in their legal sense, and we must give such fair, judicial interpretation to them in this case as we would or should in a case where the government was not a party. Presumably, so far as the evidence discloses the transaction between the seller and buyer, a transfer by operation of law of the title in the property sold was made by plaintiffs in error to the purchaser wherever he may have been. It may be, too, that the delivery order, which seems to have been transmitted to the warehouseman at New Orleans, designated and made certain the quantity and quality of the goods sold by plaintiffs in error at New York. If such should prove to be the case, it may follow, presumably by operation of law, that delivery, constructively, was thereby made at New York. Under the legal import of such orders, and a fair view of the facts, it may follow, too, that the warehouseman, as soon as the orders were transmitted from the seller to the buyer, ceased to be the bailee of the commercial house at New York, and became a bailee of the purchaser.

It will be seen that we have assumed, as it appears to have been assumed by the trial judge as well as by the counsel on either side, that the evidence is free from conflict upon material issues of fact. We do not think such is the case, nor are we able to discover any evidence, either direct or circumstantial, which makes it at all certain that plaintiffs in error ever sold at any place liquors in quantities of more than five gallons.

We have considered and passed upon the questions of law submitted in the charges refused by the court as if the evidence warranted certain presumptions of fact; but we do not mean, in disposing of the case adversely to the defendant in error, to say that such presumptions of fact, as we have suggested, would be authorized if all the facts illustrating the transactions, the legal import of the delivery order, and other issuable matters of fact had been given to the jury.

The whole question as to whether the sale was completed at New York, as well as to the matter of constructive or actual delivery, may depend on the delivery orders. The language of the orders is not given in the evidence. They might show that it was the intention of the parties to defer the completion of the sale and the mat-

ter of delivery until one or the other of them could or should or had done something provided for in their stipulation. The evidence disclosed in the record is faulty in its limitations on material issues of fact, but, however its meagerness may have made it difficult for the jury to satisfactorily determine the issuable matters, we think the trial court erred in directing a verdict for the defendant in error.

Applying the rules of law relating to sales which we have shown are well founded in the civil as well as in the common law to the evidence in the case, we think the jury, if the case had been given to it, might fairly have concluded that "the bargain and sale" of the goods sold was completed in, and constructive delivery was made at, New York. The charges refused were directed to the purpose of presenting the law applicable to the facts, and those facts, together with the presumptions of fact fairly deducible from them, forbade the government to collect a wholesale liquor tax at New Orleans from the plaintiffs in error, and the charges should have been given to the jury. The judgment of the circuit court is reversed, and the case is remanded, with instructions to grant a new trial.

WOLFSON v. UNITED STATES.¹

(Circuit Court of Appeals, Fifth Circuit. April 10, 1900.)

No. 770.

1. GRAND JURY—IRREGULARITY IN ORGANIZATION—WAIVER OF OBJECTION.

Objections to a grand jury, based on the ground merely of irregularity in its organization, from which fact defendant has suffered no prejudice, are not viewed with favor, and will not be sustained where only raised by a motion to quash, filed more than two months after the indictment is returned, although the defendant was placed under bond to await the action of such grand jury prior to the term at which it was drawn and impaneled.

2. CRIMINAL LAW—EVIDENCE—PROVING OTHER OFFENSES.

On the trial of a joint indictment charging an employé of a national bank with having unlawfully abstracted money from the bank, and the drawer of checks upon which the money was paid out with having aided and abetted in such abstraction, evidence to show that, while the second defendant had apparently a balance to his credit, as shown by the books, his account had in fact been overdrawn for years, is relevant and admissible, although it also tends to establish other offenses, prosecution for which is barred by limitation.

3. SAME—DEFENDANT AS WITNESS—TRIAL OF DEFENDANTS JOINTLY.

Under Act March 16, 1878 (20 Stat. 30), providing that in the trial of persons charged with criminal offenses in the courts of the United States "the person so charged shall, at his own request, but not otherwise, be a competent witness," one of two defendants jointly indicted and tried may, at his own request, be examined as a witness by the government.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

J. D. Rouse (W. O. Hart, Wm. Grant, and A. G. Brice, on the brief), for plaintiff in error.

J. Ward Gurley, U. S. Atty.

¹ For dissenting opinion, see 102 Fed. 134.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

SHELBY, Circuit Judge, delivered the opinion of the court. Three indictments were found against Frank B. Leefe, a bookkeeper of the Union National Bank of New Orleans, and Joseph N. Wolfson, the plaintiff in error. All of the indictments were for offenses committed under section 5209 of the Revised Statutes of the United States. In the first indictment Leefe was charged in 91 counts with the abstraction of moneys, notes, and credits of the Union National Bank of New Orleans, and Wolfson was charged with having aided and abetted him in such abstraction. In the second indictment Leefe was charged in 91 counts with having misapplied the moneys, notes, and credits of the Union National Bank of New Orleans, and Wolfson was charged with having aided and abetted him in such misapplication. In the third indictment Leefe was charged in 134 counts with having made false entries in the books of the Union National Bank of New Orleans, and Wolfson was charged with having aided and abetted him in such false entries. On motion of the district attorney the indictments were ordered to be consolidated, and tried as one case. The defendants were tried, and the jury returned a verdict of guilty. The defendants were then sentenced to imprisonment in the penitentiary for eight years. The defendant Wolfson thereupon sued out this writ of error, seeking to reverse the judgment against him. The record contains 457 printed pages. There are 24 assignments of error. It is conceded that several of the questions raised were decided adversely to the plaintiff in error by the circuit court of appeals for the Fifth circuit in recent cases involving indictments similar to those in the present case. *Gardes v. U. S.*, and *Girault v. Same*, 58 U. S. App. 219, 30 C. C. A. 596, 87 Fed. 172; *Gallot v. Same*, 58 U. S. App. 243, 31 C. C. A. 44, 87 Fed. 446. We have carefully examined and considered all the assignments of error. In this opinion, however, we shall comment only on questions which we deem important, and which have not been decided in the cases above cited.

1. It is assigned that the court erred in overruling the motion to quash the indictments, because the grand jury that found the indictments was not lawfully constituted and impaneled. It is not alleged in the motion, or claimed, that there was any unfairness, that a prejudiced grand jury was selected, or that any one of the grand jurors was incompetent, or in any way disqualified. The questions raised relate to the procedure by which the grand jury was selected and impaneled. The following is the statute which it is claimed was violated:

"Every grand jury impaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand jury is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court

shall make a like order to the marshal to summon a sufficient number of persons for that purpose." Rev. St. § 808.

The court ordered that the names of 23 persons be drawn to constitute the grand jury. The court also ordered that 10 additional names of persons be drawn to serve as grand jurors. The grand jury was organized by first calling the 23 persons first drawn. Sixteen of them appeared, and were sworn as grand jurors, together with 7 of the 10 ordered to be drawn and summoned. A grand jury composed of these 23 persons was organized and sworn. The contention of the plaintiff in error is that, as 16 of the 23 persons first drawn appeared, the court was without jurisdiction or authority to impanel a grand jury composed of more than 16. It is also contended that the court was without authority to order drawn and summoned the 10 in addition to the venire of 23 persons. The practical question to be decided by this court is whether the trial court committed a reversible error in overruling the motion to quash the indictment. It is well settled that a motion or plea challenging the organization of a grand jury should be made at the first opportunity. A defendant under bond, whose case is to be examined by the grand jury, should, if opportunity is presented, make his objections to the grand jury before it passes on his case. He should not be permitted, knowing that his case is to be presented to the grand jury, and having an opportunity to object to its competency, to wait, and take chances, and then object to it after an indictment is found. If no opportunity is had to object before indictment, it may be made the first opportunity after indictment is found. Wolfson was first arrested on these charges on September 21, 1896, and gave bond on October 6, 1896, to appear before the circuit court of the United States for the Eastern district of Louisiana on the 2d day of November, 1896. The order to draw the grand jury was made on November 26, 1896. The grand jury was drawn and the venire summoned on November 30, 1896. The indictments were returned and filed in court 4 months and 20 days later (April 20, 1897), and 2 months and 13 days afterwards (July 3, 1897) the objection was first raised, by motion filed that day, to the manner of the organization of the grand jury. No explanation or reason is given for the delay. Under these circumstances we are constrained to hold that the objections come too late. In *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624, the defendant filed a plea in abatement seeking to quash the indictment because the grand jury had not been drawn and impaneled in conformity to law. The original venire was issued on November 18, 1895, and the second venire was issued on December 2, 1895. The court opened on December 3, 1895, and the indictment was returned on December 12, 1895. The defendant filed his plea on December 17, 1895. The supreme court held that the plea came too late. Mr. Chief Justice Fuller, delivering the opinion, said:

"Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for, if he lies by until a bill is found, the exception may be too late. But where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash or by plea in abatement, the latter in all cases of contested fact being the proper remedy. * * * The

plea does not allege want of knowledge of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before; and, moreover, the plea is fatally defective in that, although it is stated that the drawing 'tended to his injury and prejudice,' no grounds whatever are assigned for such a conclusion, nor does the record exhibit any such."

When questions relating merely to the regularity of the organization of the grand jury are raised in time, they are not viewed with much favor. The courts would peremptorily check and punish an effort to corruptly organize a grand jury or would prevent any injustice or unfairness in its formation; but, when nothing of that kind is shown, or even alleged, the court is reluctant to grant a motion to quash the indictment on account of irregularities that work no hardship or injustice. In *U. S. v. Eagan* (C. C.) 30 Fed. 608 (one of the few cases that construe the statute in question here) it was insisted that there was an irregularity in the organization of the grand jury because five of the jurors were not drawn in the manner provided by the act of 1879. Judge Brewer said:

"But a challenge to a grand jury, based on the mere ground of irregularity in its organization, was never regarded with any favor; less so to-day than ever."

Judge Thayer, in a concurring opinion in the above case, conceding that there had been an irregularity in choosing five of the grand jurors, said:

"But this irregularity in choosing the five grand jurors will not avail (after the jury has been sworn, and have found indictments) as ground for quashing the indictment so found, either on plea in abatement or otherwise, when it appears that the jurors so irregularly chosen were competent and qualified jurors, residing in the district, and that the only irregularity consists in the method of selecting them. The plea in abatement does not, in my judgment, state any fact with respect to the five additional grand jurors that would amount to a disqualification, either at common law or under the statutes of this state, if the defendant had been present to challenge them before they were sworn."

It is unnecessary to express an opinion further on the question here raised. The trial judge was justified in overruling the motion to quash the indictment, because the objections to the procedure in organizing the grand jury were not made in proper time. To hold otherwise would be in conflict with *Agnew v. U. S.*, supra.

2. It is assigned that the court erred in admitting, against the objection of the defendant, the testimony of Edward P. Moxey, tending to show that the account of the defendant with the Union National Bank of New Orleans had been largely overdrawn, as appeared from alleged entries in the books of that bank prior to the 21st day of April, 1894, and as far back as February, 1892, covering a period of time more than three years prior to the filing of the indictments. It is insisted that the evidence of Moxey tended to show the commission of criminal offenses for which Wolfson was not on trial, and that these offenses were barred by the statute of limitations. One of the offenses charged in the indictment was the unlawful abstraction of money from the bank. The money was paid out on Wolfson's checks. Wolfson apparently had to his credit \$267.97. Some of the checks were drawn for sums less than the amount standing on the books to

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Wolfson's credit. If Wolfson really had the money on deposit, that would be a defense to the charge, because it would be no fraud to draw out his own money. It was, therefore, relevant for the government to prove, if it could, that he in fact had no money to his credit; that is, the government had the right to prove, if it could, that his account was overdrawn. When a defendant is on trial for one offense, irrelevant testimony of the commission of another offense should not be received. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, or, in cases where the intent is material, if it tends to show the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it. In *Wood v. U. S.*, 16 Pet. 342, 360, 10 L. Ed. 987, 994, the supreme court, Mr. Justice Story speaking for the court, said:

"Where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

In the case of *Moore v. U. S.*, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996, the defendant was indicted for the murder of Charles Palmer. The government relied mainly on circumstantial evidence. Some of this evidence tended to show that the defendant was also guilty of the murder of a man named Camp. Objection was interposed to that part of the evidence. Mr. Justice Brown, speaking for the court in that case, said (at page 61, 150 U. S., page 28, 14 Sup. Ct., and page 998, 37 L. Ed.):

"The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it, if it were otherwise competent."

The trial judge carefully limited the application of Moxey's evidence. The jury was instructed as to its purpose, and was informed that it was not offered, and could not be used, for the purpose of convicting the defendants of offenses for which they were not on trial. The fact that this evidence tended to prove another crime does not, as we have seen, exclude it. The fact that a prosecution based on the acts offered in evidence would have been barred by the statute of limitations is immaterial. If the evidence was relevant, it was not affected as evidence by the lapse of three years from the occurrences.

3. The trial had proceeded several days, when the attorney for the defendant Leefer offered him as a witness. Among other things, the attorney for Leefer, speaking for him, said, "I now ask that he be heard, and he himself requests to become a witness." The attorney for the government said, "If your honor please, if he requests it, I have no objection." The attorney representing Wolfson objected to Leefer as a witness, because he was a co-defendant with Wolfson, and on trial with him, and because he could not be heard to testify in any way to affect his co-defendant, and because Leefer was indicted as the principal, and Wolfson as his accomplice. The attorney for Wolfson also suggested that it was irregular to offer Leefer as a witness before the government had closed its case. The following proceedings were then had:

"By the Court: Has the government closed? By Mr. Theard, Attorney for Leefer: I have offered him freely to be used by the government, if the government sees fit. By Mr. Rouse, Attorney for Wolfson: Does the government call him? By Mr. Gurley, Attorney for the Government: The government accepts the request, and will examine him as a witness of the government at this time. By the Court: Swear the witness, Mr. Clerk."

Leefer was sworn, and examined and cross-examined. Wolfson reserved an exception to the ruling of the court in permitting Leefer to become a witness. The government rested at the conclusion of Leefer's examination. The ruling of the court on this point is assigned as error, as follows:

"The court erred in admitting the defendant Frank B. Leefer, called and examined as a witness on behalf of the United States, against the objection of this defendant, and in permitting his testimony to go to the jury upon the trial of this cause against this defendant's objection, he being joined with him in said indictments, and being then and there on trial jointly with this defendant before the same jury."

The common law excluded as witnesses parties to the record and persons interested in the result of the trial. The rule was applied in all its strictness to civil cases, preventing even a nominal plaintiff from testifying; and in criminal cases a defendant at common law could not be a witness for himself. He was permitted in capital cases, and, according to some authorities, in cases not capital, to make an unsworn statement to the jury, but not as a witness, and he was not subject to cross-examination. Whart. Cr. Ev. (9th Ed.) p. 359, § 427. A defendant, at common law, was ordinarily not permitted to be a witness for or against his co-defendant. The rule, however, was not applied with all the strictness of the similar rule in civil cases. If the co-defendant pleaded guilty, he was a competent witness, before sentence was pronounced on him to make him infamous, and to disqualify him, although nominally he was a party to the record. *Id.* p. 372, § 439, note 6. If he were acquitted, or if the government dismissed the case as to him, he was made a competent witness. The contention of counsel for the plaintiff in error is well stated in his own words:

"It is hornbook learning that, where two persons are jointly indicted and put upon trial before the same jury, neither can be a witness for or against the other unless the interest of the one so called has been terminated either by acquittal, conviction, or *nolle prosequi*."

Many authorities sustain this view. This statement of the common law is useful as showing the barriers to getting at the facts of a case, which modern statutes were intended to remove. Of the wisdom or the want of wisdom of these common-law rules we have nothing to say. They have been commended as preventing perjury and securing justice, and condemned as stopping the mouths of those who are often the only persons that know the facts of the case. The trend of legislation and judicial decision of the present day is to enlarge, and not contract, the sources of evidence. The question before the court is one of statutory construction. On March 16, 1878, the congress enacted the following statute:

"An act to make persons charged with crimes and offenses competent witnesses in the United States and territorial courts. Be it enacted," etc., "that in the trial of all indictments, informations, complaints, and other proceed-

ings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." Act March 16, 1878 (20 Stat. 30, c. 37).

This statute in terms makes a defendant a competent witness. The statute does not say "a competent witness for himself." It does not say "a competent witness for the government." He is made simply "at his own request, but not otherwise," a competent witness. It would clearly be improper for the government, while he was on trial, in the absence of a request on his part, to call him as a witness. The purpose of the law was to make defendants competent witnesses, but at the same time preserve to them the right to remain silent without prejudice. When any defendant chooses to testify, the statute permits him to do so. It does not matter whether his testimony is for or against himself, or for or against his co-defendant. The only limitation in the statute is that he shall not be made a witness except on his own request. Being sworn as a witness at his own request, he is amenable, generally, to the rules governing other witnesses. He could testify against or for his co-defendant on trial with him, because the only reason why he could not do so at common law was that he was a party to the record, and interested in the case. In other words, the only common-law reason for his exclusion was that he was a defendant also on trial. The statute clearly removes that objection. The fact that two defendants were on trial does not prevent the statute applying. There is nothing in it to confine its operation to cases where but a single defendant is named in the indictment. At the time the statute was passed, the law permitted two or more defendants to be jointly indicted. It was left in the discretion of the court to grant or refuse separate trials. *U. S. v. Marchant*, 12 Wheat. 480, 6 L. Ed. 700. The congress surely meant that this statute should be applied to cases where several defendants were indicted together, so as to make each of them a competent witness; otherwise, it would have been left in the discretion of the court, where more than one were in the same indictment, to abrogate the statute by refusing a severance.

We think the statute made Leefe a competent witness at his own request. To construe it otherwise would do violence to its plain words, and would defeat the legislative intent.

The authorities construing state statutes seem to sustain the view that Leefe was a competent witness. The statute in Iowa (Revision, § 3978) provides that all persons "are competent witnesses in all cases, both civil and criminal," with exceptions not material to be mentioned. Construing this statute, the supreme court, Judge Dillon delivering the opinion, held that, "where two or more defendants are jointly indicted and tried, each may call upon and use his co-defendants as a witness, the same as though separate trials had been granted." It would seem to be unreasonable, said the court, "to make the competency of a witness depend alone upon the fact whether the trial were joint or several, and whether it shall be joint and several dependent upon the discretion of the court. That is, a party accused

may or may not use a certain witness, in the discretion of the court. Such would be the result of a contrary holding in the case before us. Again, the rules of evidence adopted by the common law had, in many cases, the effect to bar out light. The tendency of modern legislation and modern decision is to remove the bars, and to let in the light." *State v. Gigher*, 23 Iowa, 318. This construction of the statute was followed in a later case. *State v. Stewart*, 51 Iowa, 312, 1 N. W. 646.

There is a statute in Massachusetts similar to the United States statute. The supreme court of that state, construing the statute, held:

"At the trial of an indictment against two persons jointly, if one of them offers himself as a witness, his testimony is competent against the other defendant, and may, by permission of the court, be introduced after the government has rested its case." *Com. v. Brown*, 130 Mass. 279.

In *Newman v. People*, 63 Barb. 630, the court construed the New York statute which allows a defendant to testify. That statute makes him a competent witness in his own behalf. It was shown in the court below that the defendant had been convicted of a felony. The court, on the trial, instructed the jury to wholly disregard his testimony. On appeal the supreme court reversed the decision of the lower court, and held that the law "intended to allow a prisoner the benefit and privilege of stating to the jury any matter which was calculated to explain the charge against him. This privilege was to be enjoyed irrespective of any matter which could disqualify a witness under ordinary circumstances." 29 Am. & Eng. Enc. Law, p. 663, notes 1, 2.

In construing the Maine statute the supreme court of that state said:

"The reason at first given for not allowing a party to testify was his interest. The old common law shuddered at the idea of any person testifying who had the least interest. But that reason failed sometimes. In many civil cases a party had no interest. Then it was decided that public policy or expediency prevented the reception of the testimony. A party to the record was not permitted to testify, whether interested or not. If only a nominal plaintiff, he could not testify, either for the plaintiff or defendant. *Kennedy v. Niles*, 14 Me. 54. Without much reasoning upon the subject, the law pronounced against it. The rule was general. But, as stringent as the rule was, it did not apply to indictments to its full extent. The parallel between civil and criminal cases was not kept up. If a man was indicted, and pleaded guilty, he could testify for his co-defendant. *State v. Jones*, 51 Me. 125. If, however, he was sued for the same cause, and became defaulted, he could not testify for his co-defendant. *Gilmore v. Bowden*, 12 Me. 412. Courts seem inclined not to regard a co-defendant in a criminal case as a party, unless 'a party to the issue on trial.' That distinction is taken in the English cases before cited. To be incompetent to testify, the defendants must be in charge of the same jury. Mr. Starkie struck the same key, who declared that 'an indictment against several is several as to each.' 2 Starkie, Ev. 11. It is plainly seen that there is much authority and reason for regarding an indictment of two or more persons as in effect a joint and several indictment; joint when the accused are tried jointly, and several when tried separately. But, as before intimated, we are not to look upon the question before us as exclusively one at common law. Our statutory enactments bear upon it. They have weakened, if not abrogated, the arrangement of public policy. It was, no doubt, the design of the legislature that the objection to the competency of parties as witnesses should be removed in both civil and criminal cases. In civil cases the door

is opened wide. In criminal cases the provision is this: 'In all criminal trials, the accused shall, at his own request, but not otherwise, be a competent witness. * * * The husband or wife of the accused is a competent witness.' Rev. St. c. 134, § 19. While this enactment does not cover the present question with literal exactness, it approaches it, affects and influences it, and requires us to examine the matter in the light of the legislative policy declared by it. If both defendants were on trial at the same time, either could testify. *Com. v. Brown*, 130 Mass. 279. If the argument for the defendant is sound; then the common-law rule has become reversed. Defendants can testify against each other when tried together, and cannot so testify when tried apart. We do not assent to such a proposition." *State v. Barrows*, 76 Me. 401.

Construing the Indiana statute, the supreme court of that state said:

"The appellant prosecutes this appeal from a judgment sentencing him to prison for the crime of manslaughter. He was jointly indicted with one George Melrose, and the latter was permitted to testify as a witness. In this there was no error. At common law the weight of modern authority is that an accomplice may testify for the prosecution, if he consents to do so. A recent writer says, 'A few cases decide that an accomplice who has not been indicted is competent, but the great weight of authority raises no distinction between accomplices who have been and those who have not been indicted.' Rap. Wit. § 21. But our statute dispels whatever doubt may have existed before its enactment. It radically changes the old and original common-law rule and establishes an essentially different policy. It permits the accused to be a witness in his own behalf. It declares that the conviction of an infamous crime shall not disqualify a witness. It goes further, for it declares that in criminal prosecutions 'the following persons are competent witnesses: All persons who are competent to testify in civil actions, * * * accomplices, when they consent to testify.' Rev. St. 1881, § 1798. In civil actions parties may be witnesses, and no witness is disqualified because he conspired with another to commit a tort, or assisted him in its commission; and it seems difficult to perceive why, even if the first provision quoted stood alone, an accomplice would not be competent. But it is not necessary to act upon that provision alone, for it must be taken in connection with the other that we have quoted, and, thus taken, no doubt can exist as to the meaning of the statute. The statute declares that all accomplices may testify. It imposes no limitations and creates no exceptions. The courts have no authority to do either. The question, however, is not a new one in this court, for it has always been held that an accomplice is a competent witness. *Johnson v. State*, 2 Ind. 652; *Stocking v. Same*, 7 Ind. 326; *Ulmer v. Same*, 14 Ind. 52; *Johnson v. Same*, 65 Ind. 269; *Ayers v. Same*, 88 Ind. 275. In *Ulmer v. Same*, supra, and in *Johnson v. Same*, supra, the witness was jointly indicted with the accused. In *Stocking v. Same*, supra, the court said of the testimony of an accomplice that: 'It is very true that the evidence of persons standing in such a relation to each other should be carefully scrutinized by the court and jury. Yet to exclude it altogether would often exclude the only means of disclosing guilt. For this reason the Revised Statutes abolished the distinction which the pronouncing of judgment formerly made in regard to a witness that was infamous. 2 Rev. St. 1852, p. 80, § 238, and *Id.* page 83, § 243. What before affected his competency under that enactment goes only to his credibility.'" *Conway v. State*, 118 Ind. 482, 484, 21 N. E. 285.

In *Benson v. U. S.*, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991, the supreme court held:

"When two persons are jointly indicted for crime, and a severance is ordered, one of the accused, whose case is undisposed of, may be called and examined as a witness on behalf of the government against his co-defendant."

In this case it will be observed that a severance had been ordered, and the co-defendant offered as a witness was not on trial. The supreme court, however, quoted the case of *Com. v. Brown*, 130 Mass.

279, approvingly. The court said (at page 336, 146 U. S., page 63, 13 Sup. Ct., and page 996, 36 L. Ed.):

"Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency, and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction. By congress, in July, 1864 (Rev. St. § 858), it was enacted that 'in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried,' with a proviso as to actions by and against executors, etc. And on March 16, 1878, it also passed an act permitting the defendant in criminal cases to testify at his own request (20 Stat. 30, c. 37). Under that statute, if there had been no severance, and the two defendants had been tried jointly, either would have been a competent witness for the defendants, and though the testimony of the one bore against the other, it would none the less be competent. *Com. v. Brown*, 130 Mass. 279. The statute in terms places no limitation on the scope of the testimony, for its language is, 'The person so charged shall at his own request, but not otherwise, be a competent witness.'"

The case of *Benson v. U. S.*, supra, is not strictly in point, because there had been a severance, and only one defendant was on trial; but the language of the opinion shows that the supreme court treats the statute as placing no limitation on the scope of the testimony, or the competency of the defendant as a witness, when he becomes a witness at his own request.

We find no error in the record to the injury of the plaintiff in error. The judgment of the circuit court is affirmed.

UNITED STATES v. DOUGHERTY.

SAME v. LAVIN.

(District Court, E. D. Pennsylvania. May 5, 1900.)

Nos. 20, 32.

1. CRIMINAL LAW—INDICTMENT—ILLEGAL SALE OF OLEOMARGARINE—CONSTRUCTION OF STATUTE.

Under 1 Supp. Rev. St. p. 505, c. 840, § 6, requiring retail dealers in oleomargarine to pack same in "suitable wooden or paper packages," marked or branded as the commissioner of internal revenue shall prescribe, and imposing the penalty of fine and imprisonment upon "every person" who knowingly sells, delivers, or packs oleomargarine in any other form than in "new wooden or paper packages" as therein prescribed, an indictment is good which charges a retail dealer with selling, delivering, and packing oleomargarine in packages which are not "new and suitable" wooden or paper packages.

2. SAME.

The sale or delivery of oleomargarine in packages that are not new, being an indictable offense, under 1 Supp. Rev. St. p. 505, c. 840, § 6, and the word "suitable" used in the statute, in respect to the kind of packages in which sales must be made, being indefinite, such word may be disregarded as surplusage in an indictment charging defendant with selling and delivering oleomargarine in packages not "new and suitable."

3. SAME.

Under 1 Supp. Rev. St. p. 505, c. 840, § 6, requiring oleomargarine to be packed in packages "marked and branded as the commissioner of internal revenue shall prescribe," and imposing a penalty for packing same "in any manner contrary to law," an indictment is good which charges defendant with packing oleomargarine "in packages not marked in accordance with the regulations of the commissioner," without regard to the kind of package used.

4. CONSTITUTIONAL LAW—POLICE REGULATIONS IN REVENUE LAW—TAX ON OLEOMARGARINE.

1 Supp. Rev. St. p. 505, c. 840, imposing a tax on manufacturers and dealers in oleomargarine, and regulating the sale of such article, having for its primary object the raising of revenue, and not protection to purchasers, is not unconstitutional, as being an infringement upon the police powers of the states.

Motions in arrest of judgment and for a new trial.

James M. Beck, U. S. Atty., and Francis F. Kane, Asst. U. S. Atty.

Francis B. Bracken, for defendant Dougherty.

Jno. A. Ward, for defendant Lavin.

McPHERSON, District Judge. Two positions are taken in support of the motion to arrest the judgment: First, that the indictment does not set out an offense under the act of 1886 (1 Supp. Rev. St. p. 505); and, second, that the statute is unconstitutional, in so far as it provides for the marking of packages used by retail dealers in oleomargarine,—the allegation being that in this respect it is not a revenue measure, but is a police regulation, which congress is said to have no power to enact.

The indictment charges the defendant with unlawful sale, unlawful delivery, and unlawful packing, and in each count the package is described as not a "new and suitable" wooden or paper package. The first position is based upon the contention that no such offense is created by the act as a sale, or delivery, or packing, by a retail dealer, in other than "new and suitable" packages, and therefore that the indictment does not set forth a criminal act. It is argued that the first penal clause of section 6, so far as it affects a sale or a delivery of oleomargarine, can only apply to the manufacturer or the wholesale dealer; because it is the manufacturer who is expressly required, by an earlier clause of that section, to pack in wooden packages "not before used for that purpose,"—that is, in packages that are "new"; and because all sales by manufacturers or wholesale dealers are directed by the same section to be made in "original stamped packages,"—that is, in new packages; while the retail dealer is permitted to sell in a "suitable" wooden or paper package, and (it is said) may therefore sell in a package that is not "new." It is further argued that the second penal clause of section 6, which forbids the packing of oleomargarine in any manner contrary to law, does not forbid the retail dealer to pack in a "new and suitable" package, but only forbids him to sell in a package not "suitable," because in his case no other manner of packing is contrary to law, and therefore that a packing charged to have been made not in "new and suitable" packages is not an indictable offense. The conclusion sought to be drawn is that as the indictments charge the defendant, as a retail dealer, with packing, selling,

or delivering in packages that were not "new," as well as not "suitable," wooden or paper receptacles, the acts thus set forth do not lay him open to a criminal proceeding.

The dispute at the trial was over the marking of the packages, and there was not a word of controversy concerning either their newness or their suitability. As a consequence, if the indictments are technically defective for the reason now urged, the defendant has already had one chance of escape before a jury in a trial upon the merits, and must now be given a second chance upon a trial of the same issue under new indictments framed to meet his objections; for I do not agree with the argument that section 6 has been so faultily drawn that a retail dealer is not within its provisions at all, and therefore that no subsequent indictment could be successfully sustained. On the contrary, I think that the duties of a retail dealer are described with sufficient plainness by the section in question, and that an indictment in some form or other is maintainable. The present question is whether the indictments now under consideration are good. Let us consider the obligations of a retail dealer. He must not remove the oleomargarine from the original stamped package that has been delivered to him by the manufacturer or by the wholesale dealer until he has agreed with a customer upon the terms of a sale at retail. (The regulations of the commissioner of internal revenue permit him to prepare the article in retail packages, but these must remain in, or at most upon, the original stamped package.) After such agreement to sell, the dealer must pack the pound, or other quantity less than 10 pounds, in a "suitable" wooden or paper package, and the sale becomes complete when delivery is made. What a "suitable" package may be is not defined by the act, but I think the meaning is that a suitable package is such as the dealer himself may reasonably find to be convenient and proper, according to the usages and demands of the trade. Thus far, the retailer's package is not described as "new,"—although I venture to affirm that no one would regard such a package as "suitable" unless it was also "new,"—but, when the statute comes to impose penalties for the violation of its provisions, it then declares that "every person"—and this inclusive phrase certainly embraces the retail dealer—must sell and deliver in a "new" wooden or paper package or suffer the consequences declared by the section. That "every person" includes the retail dealer appears clearly from the considerations that all who sell "in any other form than in new wooden or paper packages" are embraced by the express language of the clause, and that no other person than a retail dealer is allowed to sell in a package made of paper; the manufacturer and wholesale dealer being confined to sales in packages made of wood.

I think there is no inconsistency or contradiction between the two sentences now being considered. In one sentence, the package is described as "suitable,"—whatever this somewhat vague expression may include,—and in the succeeding sentence "suitable" is declared, at least in one of its aspects, to mean "new." When, therefore, the government used both these words in referring to the defendant's packages, I think it may fairly be said that the newness was only spoken of as one element of suitability, and that there was nothing

objectionable in such use of language, in view of the collocation of sentences in the section. Moreover, I think the very indefinite word "suitable" serves no purpose in the indictment, as it served no purpose at the trial, and may be properly disregarded as surplusage. If the pleader had described the package as not of a proper color or texture or size, no attention would be paid to such an immaterial averment, and, in my opinion, no more weight should be given to the averment of suitability. If the defendant is punishable for failure to sell or deliver in a new package,—as I think he is,—and is not punishable for failing to sell or deliver in a suitable package, the averment of suitability is wholly foreign to the charge, and may be disregarded. 1 Whart. Cr. Law (7th Ed.) § 622.

But, even if the counts concerning sale and delivery are defective, the counts concerning packing are, I think, unquestionably good. These counts charge him with packing in a manner contrary to law, namely, in packages not marked in accordance with the regulations of the commissioner. Where this is the charge, it is immaterial what kind of a package is used; for section 6 declares it to be an offense to pack in any package (without further describing it) any oleomargarine in any manner contrary to law, and therefore, if the package is not properly stamped or branded, the offense of unlawful packing is committed, whether the package be new or old, suitable or unsuitable. To describe the package as "new and suitable" in such counts is, to my mind, so plainly surplusage that I think nothing further need be said to show that these words may properly be treated as nonexistent. I am not deciding, of course, that the prohibition of unlawful packing may not include more than the use of unmarked packages, but merely that the use of such packages is, at least, one of the acts that are forbidden by the prohibition.

The defendant's second position may, I think, be sufficiently answered by quoting a short extract from the opinion of Chief Justice Fuller in a recent case arising under the act now in controversy:

"The act before us is on its face an act for levying taxes, and, although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. * * * The oleomargarine legislation does not differ in character from laws relating to distilled spirits and tobacco, and the object is the same in both, namely, to secure revenue by internal taxation, and to prevent fraud in the collection of such revenue. Protection to purchasers in respect of getting the real, and not a spurious, article cannot be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking and branding, must be regarded as means to effectuate the objects of the act in respect of revenue." In re Kollock, 165 U. S. 536, 537, 17 Sup. Ct. 447, 448, 41 L. Ed. 816, 817.

If the principal object of the act is the raising of revenue, and not protection to purchasers, as the supreme court has thus declared, the argument that congress has unlawfully invaded the police power of the states must fall to the ground.

The motions in arrest of judgment and for a new trial are both overruled. To the overruling of the motion in arrest of judgment an exception is sealed for the defendant.

UNITED STATES v. CHURCHILL.

(District Court, N. D. California. May 10, 1900.)

No. 3,788.

CRIMINAL LAW—UNLAWFUL OCCUPANCY OF PUBLIC LANDS—INDICTMENT.

An indictment charging defendant with unlawfully and knowingly maintaining a certain inclosure of public lands, without alleging that the inclosure was made without claim or color of title to any of the land inclosed, "made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States," in the language of the act of February 25, 1885 (23 Stat. 321), is fatally defective.

Frank L. Coombs, U. S. Atty.

Denson & Schlesinger, for defendant.

DE HAVEN, District Judge. The defendant is charged with unlawfully and knowingly maintaining a certain inclosure of public lands of the United States, in violation of section 1 of the act entitled "An act to prevent unlawful occupancy of the public lands," approved February 25, 1885 (23 Stat. 321). The indictment is fatally defective in not charging that at the time the alleged unlawful inclosure was made or erected the defendant or other person who constructed the same had no claim or color of title to any of the public land inclosed, "made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States." The demurrer will be sustained.

CHANCELLOR, ETC., OF OXFORD UNIVERSITY v. WILMORE-ANDREWS PUB. CO.¹

(Circuit Court, S. D. New York. April 28, 1900.)

UNFAIR COMPETITION—"OXFORD" BIBLES.

The name "Oxford" on Bibles has so long been used to designate the Bibles prepared and published by the University of Oxford, England, as to have become identified with such particular publications as denoting their origin, and the use of such name by another publisher, having no connection with the place or name, can have no purpose except to deceive purchasers, and constitutes unfair competition.

In Equity. Suit to enjoin the use of a trade-name. On final hearing.

Rowland Cox, for plaintiff.

Louis F. Doyle, for defendant.

WHEELER, District Judge. The University of Oxford, England, is a body corporate known by the name and style by which this suit is brought. Books appear to have been printed by it as early as the

¹As to unfair competition in trade, see note to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

fifteenth century, and letters patent for printing books of all kinds, including Bibles, to have been granted to it by King Charles I. in the seventeenth century. It has printed Bibles of many kinds, prepared by its officers and scholars with great care, which are generally known as "Oxford Bibles." No other Bibles are published at Oxford, and these are ordered, sold, and bought by that name. Among the kinds is the Teachers' Bible, first published in 1876, which contains, besides the text, a Manual of Helps to the Study of the Bible, full of reliable information respecting the authors and books of the Bible and Palestine, a concordance, indices, tables, and maps. This, with new editions, has since been published and sold by that name continuously in this country and throughout the world. The defendant has printed and published a Bible specified on the title page as an "Oxford Bible: The S. S. Teachers' Edition," and on the back as a "Holy Bible; Oxford, S. S. Teachers' Edition." This suit is brought against this use of that name. The defendant denies any right of the plaintiff to the exclusive use of the word "Oxford" upon Bibles, and alleges that this name, as applied to Bibles, is used to designate and describe a style of Bible otherwise known as the "Divinity Circuit," bound in soft, flexible leather, with overlapping edges; that the plaintiff has lost any right it may have had to the use of this word by permitting others to use it; that the Bible with which the defendant is claimed to interfere was printed in this country; and that the defendant has altogether ceased using it.

It is insisted for the defendant that the name of a place of origin cannot become a valid trade-mark of goods and products, and that "Oxford" here is merely the name of the city of the plaintiff, and could not be exclusively used to distinguish the plaintiff's Bibles. But this word is a part of the plaintiff's name, and as such has given name to the plaintiff's Bibles, and has come to be a means of showing their origin. The defendant has no connection with the place or name, and this use of the name by the defendant can be for no purpose but to represent the defendant's Bibles as coming from the plaintiff. The plaintiff has no copyright of this work, and any one would, of course, have a clear right to print and publish it, but no one would have a right in any false manner to represent such a product as the work of the plaintiff. The use of the name upon the defendant's Bibles had a tendency to so represent, and to confuse the plaintiff's use of its name in its business.

That the plaintiff prints and publishes this work in America as well as at the university makes it none the less the plaintiff's product, and confers no right upon others to publish it in the name of the plaintiff, or to use the plaintiff's name in publishing it in America or elsewhere. The evidence does not show acquiescence of the plaintiff in use by others amounting to an abandonment of right by the plaintiff, nor establish that the name has thereby or otherwise become merely descriptive of the Bibles, instead of representing their origin, nor that an Oxford Bible is merely the "Divinity Circuit." The case shows sufficient interference by the defendant to furnish ground for commencing the suit, and the ceasing of the interference by the defendant does not take away the right of the plaintiff to a decree, with

costs. Sufficient perception of profits does not, however, appear to warrant an accounting. *Rahtjen's American Composition Co. v. Holzapfel's Composition Co.* (C. C. A.; April 11, 1900) 101 Fed. 257. Decree for a perpetual injunction, with costs.

BENNETT v. BOSTON TRAVELER CO.

(Circuit Court of Appeals, First Circuit. March 16, 1900.)

No. 281.

COPYRIGHT—CUT OR ENGRAVING—ACTION TO RECOVER PENALTY FOR INFRINGEMENT.

An action under Rev. St. § 4965, to recover the penalties thereby imposed for infringement of a copyrighted cut, can only be maintained when the cut has been copyrighted as such. The copyrighting of a newspaper containing such cut, as a whole, gives no right of action under that section, but the remedy for infringement in that case is prescribed by section 4964.

In Error to the District Court of the United States for the District of Massachusetts.

George L. Roberts (Reuben L. Roberts, on the brief), for plaintiff in error.

G. Philip Wardner, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

COLT, Circuit Judge. This action was brought by the plaintiff, James Gordon Bennett, against the Boston Traveler Company, to recover the pecuniary penalty for infringement of a copyrighted engraving, cut, or print, imposed by section 4965 of the Revised Statutes, as amended by the act of March 2, 1895, c. 194 (28 Stat. 965). On June 15, 1898, the plaintiff published in the New York Herald a cut entitled: "William, You're Too Late." On June 21, 1898, the defendant published in the Boston Traveler a similar cut, entitled: "Willie, Keep Off the Grass. You're Too Late." The plaintiff took out a copyright in the issue of the New York Herald of June 15, 1898, but did not take out a copyright in the cut, except as such cut is a part of his paper of that date. The statute contains two distinct provisions respecting infringement. Section 4964 provides the penalty for infringement of a copyrighted book. Section 4965 provides a different penalty for infringement of a copyrighted engraving, cut, print, and other articles specifically enumerated. 26 Stat. 1109; 28 Stat. 965. The plaintiff contends that a newspaper is a book, within the meaning of the copyright law; and, assuming this to be true, it is admitted that he could have brought an action for infringement under section 4964, claiming that the cut in question was a material part of the subject-matter of his copyright. But this is not the plaintiff's case. He has brought suit under section 4965, for infringement of his copyrighted cut, and not under section 4965, for infringement of his copyrighted paper. In support of the maintenance of the present suit, the contention of the plaintiff is that

section 4965 is applicable to a cut which constitutes a part of a copyrighted book. His position is that in such a case it is only necessary to copyright the book, as such, and that it is not necessary to take out a separate copyright for the cut, as such, in order to bring an action under section 4965. In determining this question against the plaintiff's contention, and directing a verdict for the defendant, the court below said:

"This is a suit for the infringement of the copyright of an engraving. I hold with respect to the provisions of section 4965 that the Revised Statutes require that the copyright of an engraving, as such, shall be taken out separately and apart from the newspaper in which the engraving is contained, and that, if a party desires to copyright an engraving separately and apart from the newspaper in which it is contained, he must send a separate description of it to the librarian of congress, he must take out a separate copyright for it, and he must mark each separate engraving, 'Copyrighted, 1898,' etc. That it is admitted, has not been done in this case. I hold, therefore, that the copyright of the plaintiff in this case is only the copyright of the paper as a whole, and that if he, under these circumstances, desires to proceed for an infringement of copyright, he must proceed for the infringement of the copyright of the paper. This he would be entitled to do, for the copyright of the whole paper is infringed by reproducing any substantial part of it. But there are special provisions for the copyright of engravings, as such; and the provisions of the law as to the copyright of engravings, as such, I hold have not been carried out in this case."

We agree with this ruling of the court below. In view of the express provisions of the statute, we do not see how the court could have ruled otherwise.

Section 4952 of the statute provides as follows:

"The author, inventor, designer, or proprietor of any book, * * * engraving, cut, print, * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same."

Section 4956 declares:

"No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the librarian of congress, or deposit in the mail within the United States, addressed to the librarian of congress, * * * a printed copy of the title of the book, * * * engraving, cut, print; * * * nor, unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the librarian of congress, * * * or deposit in the mail, within the United States, * * * two copies of such copyright book, * * * engraving, cut, print."

Section 4962 declares:

"No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page, or the page immediately following it, if it be a book; or if a * * * print, cut, engraving, * * * by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to act of congress, in the year ———, by A. B. in the office of the librarian of congress, at Washington;' or, at his option, the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out."

Section 4964 provides the penalty for infringement of a copyrighted book:

"Every person who, after the recording of the title of any book and the depositing of two copies of such book as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of

the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, dramatize, translate, or import, or, knowing the same to be printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action in any court of competent jurisdiction."

Section 4965 excludes books, and provides the penalty for infringement of other copyrighted articles:

"If any person, after the recording of the title of any map, * * * print, cut, engraving, * * * shall within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, * * * either in whole or in part, * * * or * * * shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale."

By these provisions, to obtain a copyright upon a book it is necessary—First, to deliver, on or before the day of publication, at the office of the librarian of congress, or to deposit in the mail, a printed copy of the title of the book, and not later than the day of publication to deliver at the office of the librarian of congress, or deposit in the mail, two copies of such book; second, it is necessary to give notice of copyright by inserting such notice in the several copies of every published edition of the book, on the title page or the page immediately following. The plaintiff has sought to comply with these provisions with respect to his copyrighted newspaper. To entitle a person to a copyright for an engraving, cut, or print, it is necessary—First, to deliver, on or before the day of publication, at the office of the librarian of congress, or deposit in the mail, a printed copy of the title of the engraving, cut, or print, and, not later than the day of publication, to deliver at the office of the librarian of congress, or deposit in the mail, two copies of such copyrighted engraving, cut, or print; second, it is also necessary that he shall give notice of copyright, by inscribing such notice upon some visible portion of such copyrighted engraving, cut, or print, or of the substance on which the same shall be mounted. These provisions the plaintiff has not complied with, and he is therefore not entitled to a copyright in his cut, as such, or to bring an action for the infringement thereof under section 4965. He has not delivered to the librarian of congress, or deposited in the mail, a printed copy of the title of his cut; nor has he inscribed the notice of copyright upon the cut. Section 4952 expressly declares that no person shall maintain an action for the infringement of his copyright unless he complies with the provisions of this chapter, and the remedy provided by section 4965 cannot be invoked "until the recording of the title" of the article copyrighted.

The plaintiff asks us to construe section 4965 as if a book was included among the enumerated articles. This cannot be done, especially as the preceding section gives a specific remedy in the case of books. The fact is, the plaintiff has sought to take out a copy-

right on his paper alone, and he has not seen fit to take out a separate copyright on his cut. He may be entitled to the remedy provided by statute for the infringement of the thing which he has copyrighted. He is not entitled to another remedy provided by statute for the infringement of another thing, which he has not copyrighted. Whether congress should have extended section 4965 to the case of books, or whether the remedy provided by section 4964 affords an inadequate relief in the present case, are considerations which cannot affect the enforcement of the present statute, as long as it remains unchanged.

The determination of this question against the plaintiff in error renders it unnecessary to consider the other questions raised by the assignments of error. The judgment of the district court is affirmed, with costs of this court.

EXCELSIOR NEEDLE CO. v. MORSE-KEEFER CYCLE-SUPPLY CO.

MORSE-KEEFER CYCLE-SUPPLY CO. v. EXCELSIOR NEEDLE CO.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 128.

1. PATENTS—INVENTION—WIRE-SWAGING MACHINES.

The Dayton patent, No. 474,548, for a swaging machine, is void for anticipation and lack of invention in view of the prior art, and especially of the Miller patent, No. 364,274, and the Peck patent, No. 428,572, both for swaging machines, and the Brown & Sharpe machine for cutting screws.

2. SAME—INFRINGEMENT.

The Dayton patent, No. 492,576, for a swaging machine, acting in combination with an automatic feed and cutting device, as to the first four claims, covering broadly the application of feeding and cutting devices, properly timed, to swaging machines, and claim 6, is void for want of patentable invention, and anticipation by the Kaiser patent, No. 33,707, for a needle machine, and the Breedon machine, for making wire blanks. Claims 5, 8, and 9, in so far as they cover a variable connection between the cutter plate and pinchers for determining the position of the cutter, involve invention. Also *held* infringed by machines made under the Morse patent, No. 538,648.

Cross Appeals from the Circuit Court of the United States for the District of Connecticut.

This cause comes here upon cross appeals from a decree of the circuit court, district of Connecticut. 97 Fed. 627. The suit was brought upon two patents owned by complainant, viz. No. 474,458, May 10, 1892 (application filed October 12, 1891), to William H. Dayton, for a swaging machine, and No. 492,576, February 28, 1893 (application filed September 21, 1892), to William H. Dayton, for machine for swaging wire. The earlier patent contains three claims, all of which the circuit court held invalid for want of patentable invention; from which decision complainant has appealed. The later patent contains nine claims. The seventh was not declared on. The first, second, third, fourth, and sixth were held invalid for lack of invention, from which decision complainant has appealed. The circuit court, however, held that the fifth, eighth, and ninth claims of this later patent were valid, and infringed, from which decision defendant has appealed.

H. A. Seymour and Frederick P. Fish, for complainant.
 Alfred Wilkinson, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

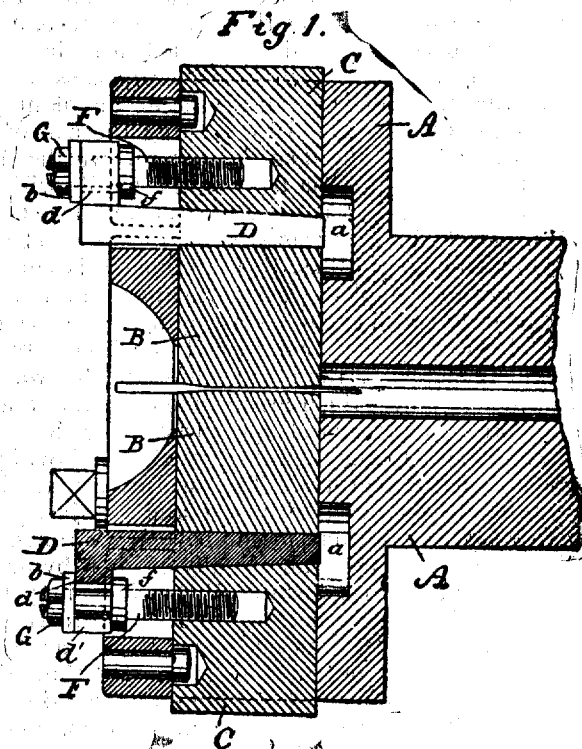
LACOMBE, Circuit Judge. The patentee has been connected for 35 years with the Excelsior Needle Company, the complainant, a manufacturer of steel articles such as needles, bicycle spokes, etc., and assigned both patents to it. The machines built under these patents have been used for the manufacture of double-butt swaged bicycle spokes, and, as the bicycle industry increased enormously during the period between 1893 and the taking of the proofs in this case, it is not surprising to find that the output of such spokes has run up into the millions. The double-butt swaged bicycle spoke appears to be an improvement upon those which preceded it, viz. the "straight," the "upset," the "drawn," and the "single-butt swaged"; but there is no indication that any effort was ever made to patent it. The patent in suit, No. 474,548, which, it is claimed, first made it practicable to swage by machine a spoke having a butt, or enlarged and unswaged portion, at each end, does not, from beginning to end, contain any reference to bicycle spokes. It is adapted to swage wire for needles or other purposes to different diameters without stopping the machine. A piece of metal, such as a wire blank, is swaged by subjecting it to repeated blows, and rotary machines for doing this work were well known before this patent. There is, of course, a general similarity between such machines. The blows are administered by suitable blocks of metal called dies, between which the wire is fed. These dies are arranged in a revolving head, power-worked to rotate at a very high rate of speed, and which is itself inclosed within a stationary shell. This rotation produces centrifugal motion in the dies, causing them to separate, until they (or additional "die blocks" or "followers," which contact with the dies) strike against projections, spoken of as "tappets" or "rollers" secured to the shell, and which protrude into the circular pathway, through which the dies or followers revolve. As soon as they come in contact with these projections, the dies are driven sharply in a centripetal direction, and their faces strike the wire. The high speed of rotation produces a very large number of blows per second, and, when the portion of the wire subjected to such action has been swaged, the blank is moved further along, and a new portion submitted to the strokes of the dies. The mode of operation will be readily understood from an inspection of an earlier patent to Dayton, No. 376,144, Jan. 10, 1888, for machine for swaging needle blanks. It had been found by experience with sewing machines that the needle sometimes became heated by friction. To avoid this, it seemed desirable to produce a needle of which the body above the eye should be reduced in size. To accomplish this result, Dayton reorganized an earlier machine so as to swage the needle "of a smaller diameter at one part than at another part." The following figure from No. 376,144 illustrates that machine, a being the rotating shaft, b the stationary shell, and l the rollers, of which there are a dozen, arranged around the interior of the shell.

chines, and reduced to the diameter of the needle at the point. Then the needle blank is placed in a holder that allows the cylindrical portion of the needle body to project the proper distance, and then the blank is passed in between the dies, *c*, which in their normal condition are sufficiently wide open for the needle to pass freely between their faces, so that the point portion of the needle blank projects inwardly beyond the die faces, and by pushing the end of the holder against the outer ends of the dies as they revolve the dies will be brought closer together, and the body of the needle will be reduced, leaving the point portion of the needle blank untouched." This machine having been devised, as was said before, to effect an improvement in sewing-machine needles, its terminology is confined to the manipulation of needle blanks. It is quite apparent, however, that it is, as its inventor asserted, capable of swaging to different diameters on the same blank, and, that being so, it can be easily adapted to deal with diameters greater than a needle's, and to swage a bicycle spoke with a double butt. Such arrangement would be a mere matter of adjustment of parts, and of appropriate insertion of the blank in the holder. This machine, however, would be slow, by reason of the lack of automatic features. The operative's hand and skill would be continually required to adjust and readjust the blank in the holder, to insert the thicker portion beyond the range of the dies' activity, and to make the dies functionally efficient by pressing back the springs and the dies with them until the roller tappets could impart to the latter the motion necessary to swage to the smaller diameter. What was needed was such mechanism as would enable the dies to be quickly thrown out of effective operation without stopping the machine, so as to permit a section of the wire to be passed through the dies without being acted upon by them, and also to enable the dies to be quickly thrown into effective operation while the machine is running, and cause them to swage any desired length of wire to a uniform diameter; and all this without the necessity of constant adjustment or readjustment in a holder. To make the machine efficient, it would seem to be necessary at least to reduce the function of the operative to the mere throwing in and throwing out of the dies by means of mechanism associated with the very machine in which the dies are located.

One other earlier patent should be considered before setting out the patent in suit. It is No. 364,274, June 7, 1887, to Miller, for machine for swaging needle blanks. The specification states that:

"In the machines of the class referred to, adjustment of the dies, either to compensate for the loss of metal by wear or resurfacing, or for swaging different sizes of needles, has heretofore been effected by inserting steel plates or 'filling pieces' of varying thickness between the dies and the contact blocks. [This patentee calls the die blocks or followers "contact blocks."] But this means of adjustment has been found objectionable, and unsatisfactory, and the object of my invention is to overcome the inconvenience incidental thereto. This object I accomplish by providing wedges, which are interposed between the dies and contact blocks, and may be adjusted as may be desired to adjust the dies. * * * The inner ends of the contact blocks are beveled to correspond to the bevel of the wedges."

A single figure from his patent will sufficiently display Miller's device:



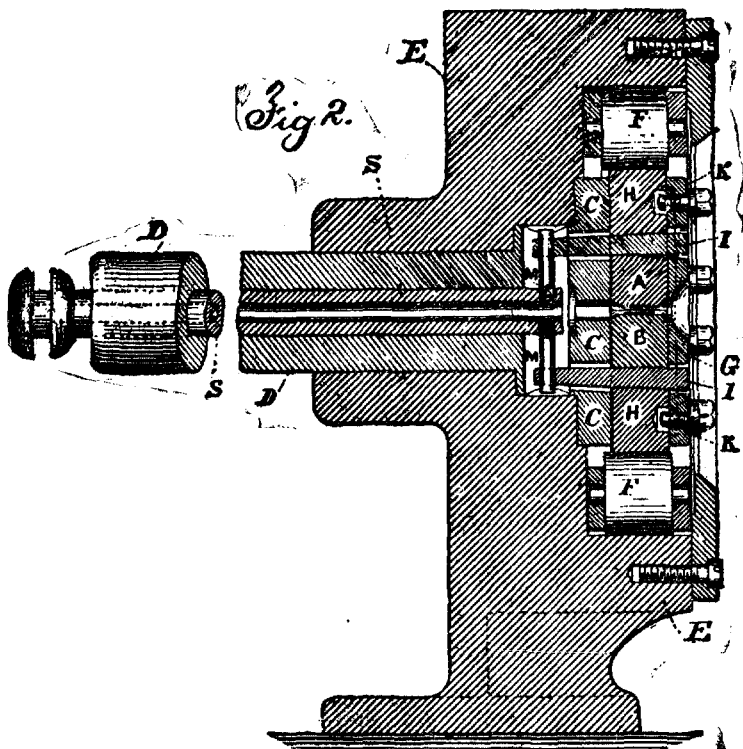
A is the rotary die holder, grooved or recessed for the reception of the dies, B, and contact blocks, C. The rollers or tappets are not shown in this figure; they impinge upon the outside of the contact blocks. The wedges are shown at D, D, and are arranged with an elbow through which runs the screw, F, in a slot, which gives the wedge play enough to and from the axis of rotation to partake of the centrifugal and centripetal motion of the dies and contact blocks.

The patent in suit, No. 474,548, refers to the patentee's earlier one, No. 376,144, in which "there are dies which can be moved in contact with inclined surfaces so as to cause these dies to approach nearer together, or the reverse."

"I find, however," says the patentee, "that in many swaging operations the dies as they revolve around the article to be swaged should remain in one position. [It will be remembered that in No. 376,144 the dies moved forward and back, and as they thus moved up or down the sloping surfaces upon which they abutted they came nearer together or receded further apart. The patentee's first suggestion, therefore, is to have the sloping surfaces on which the dies abut alone partake of the forward and backward movement, the result of which, because of the slope, will be the same as in 376,144, so far as the consequent approach or recession of the dies is concerned.] Swaging machines have also been made with wedges adjusted by screws for varying the

action of the dies; but these wedges could only be moved when the machine was at rest. [This is a reference to the Miller patent, *supra*.] The object of the present invention is to give a movement to the inclined devices in a direction parallel, or nearly so, to the axis of rotation of the dies, and during their rotation, in order that the inclined surfaces may cause the dies to come closer together, or the reverse, and thereby, with the same dies, forge or swage articles of different diameters without stopping the machine, or forge a round article that varies in diameter in different parts of its length."

The machine of this patent is best shown in Fig. 2.



The specification proceeds as follows:

"The dies, A, B, are adapted to slide radially [that is, to have centrifugal and centripetal motion] in the revolving head, C, of the shaft, D, and their adjacent faces are recessed semicircularly, and more or less tapering, so as to be adapted to swaging the intended article; and around the head, C, is a stationary shell, E, and within this shell are the rolls, F, or equivalent devices, for pressing the dies towards each other as the shaft, D, and head, C, are revolved. I provide an inclined surface that is movable endwise in relation to the dies, so that the die-actuating devices may act more or less upon the dies,—that is to say, to bring them nearer together, or allow them to be further apart; and the end motion is given to the inclined surfaces in any suitable manner during the operation of the machine, the dies themselves revolving in a fixed position relatively to the movable inclined surfaces. Several devices for effecting these objects have been devised by me, and will be the subject of separate applications; but in the drawings I have represented convenient devices for use, and which illustrate the features of this invention."

"The dies, A, B, are represented as within a cross groove in the revolving

head, C, and held therein by the removable cap plate, G, and there are die blocks, H, H, in line with the dies, A, B, and against which the rolls, F, act, and these are held in position by the cap plates, K. The wedges, L, L, intervene between the dies and die blocks, and they are movable, endwise, so that, when the thicker portions of the inclined surfaces of the wedges are between the die blocks and dies, the dies will be brought closer together than they will be when the thinner parts of such wedge are in operative positions. The cross pin or key, M, passes into holes in the wedges, and the pin is within a slot in the shaft, D, which slot is elongated in the direction of the length of the shaft, and the key, M, is connected to or formed with the adjusting tube, S,—that is, within the shaft, D,—and such tube, S, is provided with a grooved head that is acted upon by a forked lever or other convenient device so as to move such tube, S, endwise in the shaft, and regulate the position and action of the wedges."

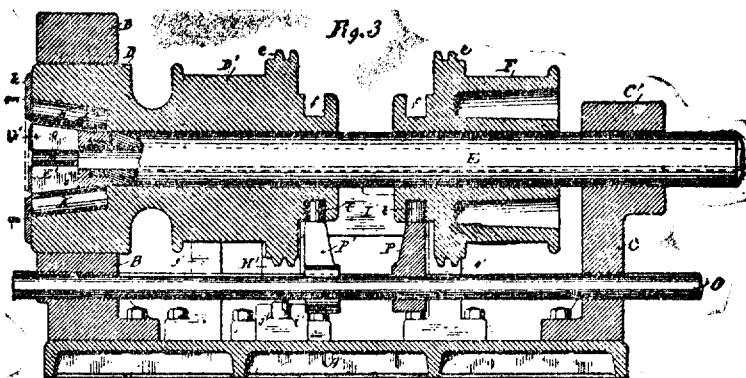
The claims are:

"(1) The combination, with the swaging dies and means for closing the same, of inclined surfaces and mechanism for moving the inclines during the action of the dies for causing the dies to perform the swaging operation when either nearer together or further apart, substantially as set forth. (2) The combination, with the swaging dies and the revolving shaft and head carrying the same, of wedges, means for moving the wedges endwise during the swaging operation, and die-actuating mechanism controlled in its action on the dies by the wedges, substantially as set forth. (3) The combination, with the revolving shaft and its head, of dies and die blocks and mechanism for closing the dies, and wedges intervening between the dies and die blocks for varying the action of the dies, and the adjusting tube within the revolving shaft, and the connections to the wedges for moving the same, substantially as set forth."

It will be observed that this first claim is a very broad one. It is not confined to the wedges which are made a characteristic element of the third and fourth claims, but covers "inclined surfaces" generally. The swaging dies are old, and the same is true of the "means for closing the same," being the tappets or rollers which impart centripetal motion to the dies. "Inclined surfaces" were old. We find them in Dayton, 376,144, where the dies and contact blocks engage, motion up or down the slope bringing the dies nearer together or further apart. In this last-cited patent it is an endwise motion of the dies which causes them to mount or to descend the incline, while in the patent an endwise motion of the contact blocks produces the same result; but there is no more invention in such an exchange of function between engaging parts than there was in the glove-fastener case, where an earlier patentee had inserted a resilient stud into a rigid socket, and a later one made the stud rigid and the socket resilient. *Fastener Co. v. Hays* (C. C. A., 2d Cir., Feb. 28, 1900) 100 Fed. 984. That a movement of the inclines would "cause the dies to perform the swaging operation when either nearer together or further apart" is shown in both of the earlier patents *supra*. In Dayton, 376,144, the inclines were moved during the action of the dies, but that operation was effected by the hand of the workman pressing the end of the holder against the outer ends of the dies, or withdrawing such pressure. The one element in the claim not already found in prior combination is the substitution of "mechanism" (any suitable mechanism; its details are no part of the claim) for the hand of the operative. The particular "mechanism" shown in the patent is not automatic. It is itself operated by the workman's

hand, but it is a part of the machine, combined with the other old elements, thereby producing a combination not found in No. 376,144. The only ground, therefore, on which this first claim of 474,548 can be sustained must be the finding that Dayton was the first to introduce into a swaging machine mechanism whereby inclined surfaces located at the base of the dies could be reciprocated endwise while the machine was running, thereby causing the dies to perform the swaging operation when either nearer together or further apart. But the record in this case will not warrant such a finding.

On May 20, 1890, United States patent No. 428,572 was issued to F. A. Peck for a machine for reducing wire. It is a complicated apparatus, but is sufficiently shown in the annexed Fig. 3, from which certain continuous feeding mechanism located to the left of the drawing has been eliminated.

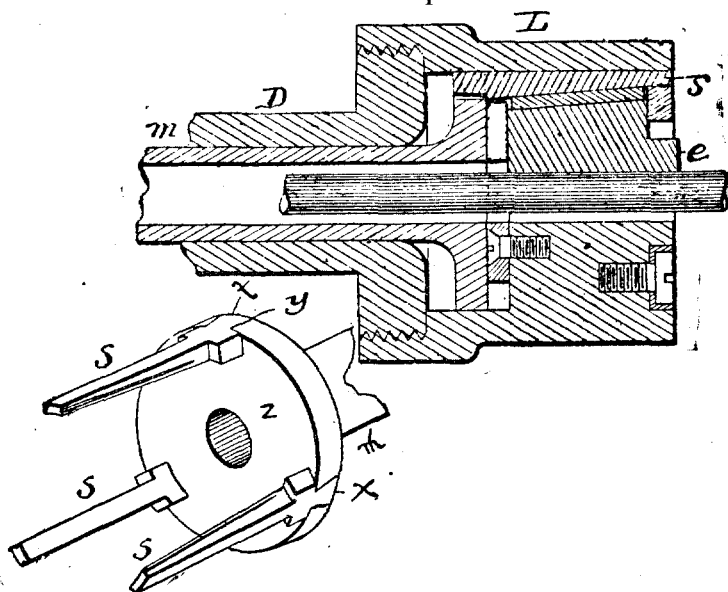


D is the "beater holding head" or shell. K, K, are the "beaters,"—the rollers or tappets of other patents. Their surfaces are inclined, and so are the surfaces of the dies, O, O, which engage with them. As shown in the drawing, the die head, E', is thrust forward, and, mounting the surfaces of the inclines on K, K, the dies have separated so as to give clearance for the largest size of wire the machine is adjusted to receive. It is manifest that, if the die head be retracted, the dies will descend the slopes, and be brought nearer together, and the rotating of the die head at any particular part of the endwise motion would swage to the particular diameter. The specification states that in the operation of the machine the beater holding head, D, may be clamped, and held stationary. "Upon revolving the pulley, F, the arbor, E, and die head, E', will revolve therewith, and the action of the worm, e, of the pulley, F, upon the worm-gear, G, will cause the revolution of the crank, H, and the consequent reciprocation of the die head, E', within the beater head, D, and as the die head, E', is carried onward, the inclined position of the beaters, K, K, will allow the dies to open outward to receive a new length of wire, which length of wire will be reduced in size as the head, E', is being drawn back within the head, D, by the continued action of the crank, H, the dies being carried nearer and nearer to each other until the head, E', has reached its inner limit, and then

the continued action of the crank, H, will again carry the head, E', forward, causing the dies to open, so as to receive another length of wire," etc. It is true that the complicated mechanism employed causes the die head to reciprocate rapidly and constantly, and the whole machine is organized to feed wire continuously, and reduce it to a diameter proportioned to the closest approach of the dies; but these details, which secure constant feed and quick reciprocation, may be discarded. When discarded, the "inclines" are left with mechanism forming a part of the machine, and adapted to give them endwise motion forward or backward while the machine is running at full speed. So much being accomplished, it would seem to require but the ordinary skill of the mechanic to add "a forked lever or other convenient device" to start or to check the mechanism which imparts such motion. In view of the Peck patent, it cannot be found that Dayton was the first to introduce into a swaging machine "mechanism" (kind not specified) whereby inclined surfaces located at the base of the dies could be reciprocated endwise during the action of the dies. The first claim of No. 474,548 is, therefore, void for lack of invention.

The second and third claims may next be considered. The revolving shaft, and its head carrying the dies, are therein enumerated, but they were certainly implied in the first claim by the statement that the dies were to perform a swaging operation. In both of them we have instead of the broad phrase "inclined surfaces" the more concrete word "wedges"; in the second claim wedges so placed that their movement will control the action of die-actuating mechanism on the dies, and in the third claim wedges intervening between the dies and die blocks. The presence or absence of die blocks or followers would seem to make no difference in the novelty of the combination. The prior art knew of them. Sometimes it used them and sometimes it dispensed with them. In Miller 364,274, *supra*, we have wedges intervening between dies and die blocks, which bring the dies nearer together when pushed in, and further apart when retracted, and which thus "control the die-actuating mechanism in its action on the dies," or "vary the action of the dies." Moreover, these wedges are held in place by an arrangement of pin (the screw, F) and slot, which not only adjusts them longitudinally, but permits them to vibrate centrifugally and centripetally in unison with the dies when the machine is in operation. Moreover, we have in the prior art wedges inserted and retracted during the operation of a machine. They are found in the Brown-Sharpe machine, a slight modification of a device shown in United States patent 51,257, November 28, 1845, to Joseph R. Brown for a screw-cutting machine. The blank to be cut is gripped and held at the end of a revolving spindle, an operation performed by combining with suitable gripping jaws a set of wedges at the end of a rod or tube within the spindle, and a rotating screw for imparting a sliding motion to the said rod or tube and the wedges thereon, so that the wedges are made to force the gripping jaws together to gripe the rod or piece of metal, and afterwards to liberate the same while the spindle is revolving.

The Brown and Sharpe Machine.



We have here, as defendant contends, "a rotating head carrying dies operated by a tubular shaft, a second tube within the shaft, wedges elastically, but not rigidly, secured to the end of said tube, and arranged back of die blocks, means for moving said tube and wedges longitudinally while the whole mechanism is rotating to force the dies nearer together or to permit them to fly further apart." That the wedges operate back of the die blocks, and not between them and the dies (as shown in Miller 364,274), is immaterial. The gripping device shown in this screw-cutting machine is a proper reference within the rule followed in *Briggs v. Duell*, 36 C. C. A. 40, 93 Fed. 972, and in view of it, and of the wedges shown in Miller, with their vibratory motion, secured by a slot playing on a pin, there would seem to be no patentable invention in the second and third claims of Dayton 474,548, with the wedges, adjusting tube, and connections therein set forth. We therefore concur in the finding of the circuit court as to the invalidity of this patent.

Dayton Patent No. 492,576.

The patent we have already discussed was for a "hand" machine. The will of the operative, acting through his hand, fed in the material to be swaged, divided it into appropriate lengths, and regulated the times during which the dies should remain near together, swaging to the smaller diameter, and during which they should remain sufficiently far apart to accommodate the passage of the wire when of the larger diameter. It was, of course, highly desirable that that mechanism should be devised to perform all these functions, and thus largely increase the output. Patent No. 492,576, the second one declared upon in the complaint, covers such mechanism. It de-

scribes in full detail a complicated system of cams, levers, rockers, and all the other well-known mechanical contrivances whereby motion is timed, applied, withheld, and translated. The machine of the patent is an ingenious one, and discloses patentable invention. The patentee, however, has endeavored in some of the claims to embrace a field of invention far wider than he was entitled to occupy. A prior patent (No. 33,707, to Kaiser, November 12, 1861, for an improvement in machinery for making needles), and a prior machine, known as the "Breendon Machine," for producing short and straight wire blanks for needles, show what might have been expected, viz. that it was old to supplement machines for performing some particular operation on wire with automatic devices for feeding the wire and cutting it into appropriate lengths, so timed as to work in unison with the rest of the machine. The specification states that:

"By the present improvement the wire or rod is passed in at one end of the machine, and subjected to the swaging operation, and it is drawn along through the swaging dies as the proper reduction is accomplished, and one or more complete articles are thus swaged, after which the articles are cut off successively, and delivered from the machine. In carrying out the invention, any suitable swaging apparatus may be made use of,—such, for instance, as that represented in letters patent No. 474,548, granted to me May 10, 1892,—and the wire as fed into the machine is preferably passed through a straightener, and the longitudinal movement is given to the wire by pinchers that grasp the partially or entirely finished blank, and draw the same along, together with the wire that is being swaged; and the wire is then held in a stationary position while the pinchers are opened, and returned to the point of beginning to take a fresh hold; and the completed article is cut off, and drops away from the machine."

The first four claims of the patent read as follows:

"(1) The combination, with the swaging mechanism, of pinchers for grasping the article to be swaged, mechanism for giving motion to the pinchers to draw the article through between the swaging dies and a holding clamp for holding the article operated upon, and mechanism for opening the pinchers, and returning then to take a fresh hold for drawing through another length, substantially as set forth. (2) The combination, in a swaging machine, of dies for effecting the swaging mechanism, for actuating such dies, pinchers for holding the article to be acted upon, mechanism for opening and closing the pinchers and moving them longitudinally for drawing the article to be swaged through between the dies, substantially as set forth. (3) The combination, with rotary swaging dies and mechanism for opening and closing the same, of pinchers for grasping the article to be acted upon, and mechanism for moving the pinchers, and drawing the article along between the swaging dies, a clamp for holding the article when the pinchers are opened, and a cutter and mechanism for actuating the same to separate the swaged article from the wire or stock, substantially as set forth. (4) The combination, in a swaging machine, of swaging dies, rotary mechanism for actuating such dies, a moving wedge or backing for varying the closing of the dies, pinchers and mechanism for opening and closing the same and for moving the pinchers longitudinally for drawing the article to be swaged along between the dies, a clamp for holding the material when the pinchers are opened, and a cutter for separating the swaged article, substantially as set forth."

That these claims were intended to be just what they appear to be—a far-sweeping dragnet to cover the application of feeding and cutting devices, properly timed, to swaging machines—is manifest from the language of the specification. "This invention," says the patentee, "is especially intended for the swaging of wire in the manufacture of spokes for wheels, but is available in the manufacture of

other round articles, and especially those that can be made from a continuous wire." By the use of this language the patentee expressly extends the confines of the art, of which his machine is to form a part, so as to include the needle-making machine of Kaiser and the wire needle blank machine of Breedon. Later on in the specification we find:

"By the foregoing description of this apparatus as adapted to the manufacture of wire spokes, it is not to be understood that the improvement is limited in this particular, but that the devices may be employed for swaging other articles, and the swaging action may be either continuous or intermittent. I have described the present improvements in connection with a revolving swaging device, but it will be apparent that in cases where the device that is being manufactured is not circular, the improvements are available with any character of swaging device whether it revolves so as to act all around the circular article, or whether it may remain stationary, and only act at opposite sides of the article being swaged."

The patentee assumed that in No. 474,548 he had a valid patent for a swaging machine, which would swage wire to one diameter for a certain length, and then open the dies to allow a part of the wire, fed in by hand, to pass unswaged. The field of further invention was open to him. He could devise mechanism whereby the feeding and cutting should be automatically performed in connection with the swaging operation of the machine itself; and, if the mechanism thus devised possessed patentable novelty, he could patent it. Precisely this he did. He devised such mechanism. It is novel and ingenious, and he has patented it. But by these four claims he has sought to go much further, and to foreclose any one else from adding either to the machine of No. 474,548, or to any other swaging machine capable of doing its work, devices for feeding, drawing, holding, and cutting, well known in the prior art, even though the mechanism whereby they are connected and operated should be unlike that which he himself devised. This he was not entitled to, and, having thus enlarged his claims, the court should not be astute to restrict them by reading in the real invention which he has failed to include within their terms. We concur with the circuit court in the conclusion that the first four claims are void for lack of patentable invention.

The sixth claim reads:

"(6) The combination, in a machine for swaging wire spokes, of revolving swaging dies and mechanism for moving and regulating the action of said dies, pinchers, and mechanism for opening and closing the same, a cam and variable lever mechanism for regulating the longitudinal movement given to the pinchers and varying the length of the spoke, substantially as set forth."

This claim differs from claim 2 by the addition of the "cam and variable lever," etc. We concur with the circuit court that these are sufficiently shown in the Breedon machine.

The remaining claims of the patent (except the seventh, which is not declared on) are:

"(5) The combination, with swaging dies, of pinchers, mechanism for opening and closing the same, and for moving them longitudinally, and carrying the article longitudinally between the swaging dies, a cutter for separating the swaged article, and a connection between the cutter and the pinchers, whereby the cutter is brought into position by the movement of the pinchers, substantially as set forth." "(8) The combination, with the swaging mechanism, of

the revolving shaft through which the wire to be swaged passes, and which shaft carries the swaging mechanism, pinchers, and means for opening and closing the same to grasp or relieve the wire, a cam and intervening connections to the pinchers for giving motion to such pinchers to move the wire between the swaging dies, a cutter plate and cutter movably supported upon the machine, and a variable connection between the cutter plate and the pinchers for determining the position of the cutter, and mechanism for giving motion to the cutter, substantially as set forth. (9) The combination, with the swaging mechanism, of the revolving shaft through which the wire to be swaged passes, and which shaft carries the swaging mechanism, pinchers, and means for opening and closing the same to grasp or relieve the wire, a cam and intervening connections to the pinchers for giving motion to such pinchers to move the wire between the swaging dies, a cutter plate and cutter movably supported upon the machine, and a variable connection between the cutter plate and the pinchers for determining the position of the cutter, mechanism for giving motion to the cutter, and a clamp for holding the wire during the return movement of the pinchers, substantially as set forth."

These claims were sustained by the circuit court because they cover, *inter alia*, "a variable connection between the cutter plate and pinchers for determining the position of the cutter." The soundness of this conclusion is not disputed, the defense relied on being non-infringement. This presents substantially a question only as to the meaning of the word "variable," as used in the claims. We do not deem it necessary to add anything to the brief discussion of this question in the opinion of the circuit court, and concur in its conclusion that defendant's machine infringes these three claims. The decree of the circuit court is affirmed, without costs.

NEW JERSEY WIRE-CLOTH CO. v. MERRITT et al.
(Circuit Court of Appeals, Third Circuit. February 21, 1900.)

No. 17.

PATENTS—INFRINGEMENT—FIREPROOF CEILINGS.

The Orr patent, No. 456,202, for a fireproof ceiling, consisting of metallic lathing embedded in a plastic material, construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 96 Fed. 216.

C. J. Sawyer and M. B. Philipp, for appellant.

Ernest Howard Hunter, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. The complainant and appellant in this suit is the assignee of letters patent of the United States No. 456,202, granted to William Orr, and dated July 21, 1891, relating "to the construction of ceilings or walls formed of metallic lathing, to which is applied cement, concrete, plaster, or other suitable plastic material"; the object of the invention being to obtain increased strength and fireproof qualities in such ceilings at reduced cost. The bill charges the defendants with infringement of the first and second claims of the patent, which are as follows:

Claim 1: "A fireproof ceiling, consisting of metallic lathing extending from beam to beam, and having upon its under side offsetting portions projecting from its body, and a body of plastic material applied from above, and in which the body of the lathing and projections are embedded, substantially as described." Claim 2: "An arch formed of metallic lathing bent to the required form, and having upon its under side offsetting portions projecting from its body, and a body of plastic material applied from above, and in which the body of the lathing and projections are embedded, substantially as described."

The two claims differ hardly at all, except in words. The first is made to apply to "a fireproof ceiling, consisting of metallic lathing," and the latter "to an arch formed of metallic lathing bent to the required form"; the latter being merely a limitation of the former. A reference to the second clearly shows that the construction of a fireproof ceiling by the use of metallic lathing or woven wire embedded in concrete or other plastic material was well known to the art long before patent No. 456,202 was granted. As early as June 4, 1883, an English patent was granted to Richard W. Hirschins for "a ceiling composed of plaster of Paris or cement * * * in combination with open meshed wire netting embedded therein." The means employed he describes as follows:

"I construct my improved ceiling without the use of ordinary lathing, and in its place I use wire netting. * * * I mold the plastic composition upon the wire netting by casting it upon a molding table or center fixed beneath the netting, by pouring the composition onto the netting from above. The ceiling is thus constructed of plastic composition with wire netting embedded in it to strengthen the plastic."

It is self-evident that, in order to embed the wire netting in the plaster, it was necessary that there should be a space between the wire netting and the table or center upon which the plastic material was molded. Reference has been made to other patents antedating the patent in suit, which show similar constructions effected by embedding a metallic frame in plastic material. We do not think it necessary to examine them in detail, since it is not our purpose to show that any of them embody the particular means employed by Orr, the patentee of patent No. 456,202, for raising the metallic lathing to the desired height from the "center." We advert to them merely for the purpose of showing the prior state of the art, and illustrating the fact that the only novel feature in the device of complainant's patent was the provision that, in combination with the then well-known devices, "the metallic lathing should have upon its under side offsetting portions projecting from its body, substantially as described." These "offsetting portions" are fully described and set out in the drawings and specifications of the patent. They are positive, and definite, and intended to elevate the entire body of the lathing above the surface of the "centering," in order that a layer of plaster of substantial depth may be formed on the under side. The defendants' construction consists of metallic lathing made of "expanded metal," a form of lathing well known to the art before the grant of complainant's patent. It is a kind described in a patent of the United States granted to John F. Golding, and dated June 16, 1885 (No. 320,240), the use of which is free to the world for all the purposes to which it may be applied. This lathing, while irregu-

lar in shape, has no "offsetting portions projecting from its body," in which characteristic, as we have said, lies the sole claim of novelty in complainant's device. It is laid directly upon the centering, so that it cannot be entirely embedded in the plastic material poured in from above, nor can it have a coating of concrete of any desired thickness upon the under side. A ceiling or arch constructed with a lathing of expanded metal cannot obtain the peculiar advantages pointed out in the complainant's patent, and intended to be secured thereby. For these reasons we are of the opinion that, inasmuch as the defendants, in their construction, do not employ the particular means to which the complainant's patent must be limited, they do not infringe the first and second claim of the patent in suit. The decree of the circuit court dismissing complainant's bill will be affirmed.

HANIFEN v. LUPTON et al.

(Circuit Court of Appeals, Third Circuit. February 26, 1900.)

No. 25.

PATENTS—INFRINGEMENT—DEFENSES.

A license given by the owner of a patent to import and sell in this country the fabric of the patent on payment of a royalty of two cents per yard thereon, contained a covenant by the licensee not to handle or serve as commission agent for any goods of such description made in this country by any person, firm, or corporation not licensed under the patent, "unless he pays the royalty thereon himself, it being understood, however, that but one royalty shall be paid on such goods or any fabric coming under this license, whether paid by manufacturer or seller." *Held*, that such provision was for the benefit of the licensee alone by permitting him to handle the fabric made in this country without payment of royalty, when, but only when, the manufacturer's royalty had been paid thereon, and that an unlicensed manufacturer, having no connection with the contract, could not avail himself of such provision as a defense against a suit for infringement on the ground that his product was sold by the licensee as his agent.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Joseph C. Fraley and W. P. Preble, for appellant.

A. B. Stoughton, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. This is an appeal by John E. Hanifen, trading as John E. Hanifen & Co., the complainant in the court below, from a decree dismissing his bill of complaint in a suit in equity brought on March 24, 1898, against Oliver Lupton, Edward A. Lupton, and Walter W. Watson, trading as Oliver Lupton & Co., charging the defendants with the infringement of letters patent No. 374,888, dated December 13, 1887, for an improvement in knitted fabrics, granted to Levi Bywater, assignor of the complainant. 95 Fed. 465. In their answer the defendants set up in defense the alleged invalidity

of the patent, and also denied infringement. After replication filed, the complainant proceeded to take his evidence in chief, and he made out a clear prima facie case. Upon the question of infringement, the record, under date of July 25, 1898, shows an admission and proof as follows, namely:

"Complainant's counsel produces a piece of cloth, which is marked 'Complainant's Exhibit Defendants' Fabric.' It is admitted on behalf of defendants that the said piece of cloth was manufactured by them and sold by them at Philadelphia, Pa., subsequent to the date of the patent in suit, and prior to the filing of the bill of complaint in this cause. The said exhibit is therefore offered in evidence on behalf of complainant."

The complainant then proved by a competent witness that this exhibit was the same as the knitted fabric of the patent in suit. The defendants offered no counter proof. They introduced no testimony whatever in support of their original answer. In due course, the case, in this state of the proofs, was set down for final hearing. The complainant was entitled to a decree against the defendants, as the record stood upon February 8, 1899, and on that day he made a motion therefor. The defendants immediately moved "for leave to amend the answer by setting up a certain license to Jean Bry, and the sales of defendants' goods thereunder." Such leave was granted, and subsequently, on February 18, 1899, the defendants filed such amendment, and put in evidence a license, of which the following is a copy:

"Memorandum of agreement made and concluded this twenty-sixth day of May, 1897, by and between John E. Hanifen & Co., of Philadelphia, party of the first part, and Jean Bry, of 20 Greene street, New York City, party of the second part.

"(1) Said John E. Hanifen & Co., in consideration of the faithful performance and discharge by the said party of the second part of the agreements hereinafter set forth by him to be performed, hereby license and empower said Jean Bry to deal in, import, use, and sell the knitted fabric described and claimed in the second claim of letters patent of the United States No. 374,888, issued Dec. 13th, 1887, to Levi Bywater, assignor to said John E. Hanifen & Co., at a royalty of two cents per yard.

"(2) Said party of the second part hereby accepts said license, and agrees, in consideration of the granting thereof, to make monthly returns in writing to W. P. Preble, Jr., attorney for said John E. Hanifen & Co., within the first ten days of each and every month, of all such knitted fabrics imported or sold by him during the previous month, and to pay the above-mentioned royalty thereon at the time of said returns, and also covenants and agrees not to handle, deal in, take orders for, or serve as commission agent for any goods of this description made in this country by any person, firm, or corporation who is not licensed under the above-mentioned patent, unless he pays the royalty thereon himself; it being understood, however, that but one royalty shall be paid on such goods, or any fabric coming under this license, whether paid by manufacturer or seller.

"(3) This license shall last, unless sooner terminated, until the expiration of the above-mentioned patent, and shall take effect from the fifteenth day of March, 1897, and apply to all goods ordered after such date, and shall only be terminated by mutual consent or for failure on the part of said parties of the second part to make proper returns and payments; but either party may terminate this license on one year's notice, not to be given, however, November 1, 1897.

"(4) Said party of the second part further covenants and agrees when called upon to satisfy said Preble, and furnish such data as may be necessary to verify the accuracy of said monthly reports.

"(5) It is, further, mutually agreed that the suit now pending against H. A. Caesar & Co. shall be disposed of without costs to either party, and by such entry or order as the parties may hereafter agree would be for the best interests of the parties hereto.

"In witness whereof, the parties hereto have hereunto set their hands and seals this twenty-sixth day of May, 1897. John E. Hanifen & Co."

In connection with the offer of this license, the defendants called and examined the licensee, Jean Bry, who resided and did business in the city of New York. Whatever sales the defendants effected through Bry were made in the city of New York. The defendants were and are manufacturers in the city of Philadelphia. It is shown that they began to manufacture this knitted fabric at Philadelphia in August, 1897. By letter of September 10, 1897, the complainant's attorney notified the defendants that they were infringing the Bywater patent, but offered them "a license at regular rates." To this letter no reply whatever was made. When sued afterwards, the defendants, as we have seen, by their answer, which was filed June 20, 1898, not only challenged the validity of the patent, but denied infringement generally. That they were acting under license was not suggested until February 8, 1899, when the case was ripe for a decree against them. Now, they had already put on the record the above-quoted admission in respect to the infringing exhibit, namely, "that the said piece of cloth was manufactured by them and sold by them at Philadelphia, Pa." The defendants have never offered any explanation of this admission, nor attempted to break its force. The learned judge who sat at the final hearing of this case, it would seem, overlooked this admission. It was by no means met by the testimony of Jean Bry. He did not even fix the date when he became sales agent for the defendants. Moreover, his statements were not only indefinite, but manifestly rested in part on mere hearsay. The defendants' books, to which he referred, were neither proved nor produced. None of the defendants took the stand. In the absence, then, of evidence which the defendants could have produced if the facts were, as alleged by them, that all their sales were made under license, no presumption in their favor can be indulged in. Their own admission on this record to the contrary of their allegation is decisive against them. We are of opinion that the learned judge below fell into error in dismissing the bill, even if the license to Bry affords protection to the defendants in respect to their dealings with and through him. We are not, however, able to read the complainant's license to Jean Bry as giving any sanction to the manufacture by the defendants of the patented fabric. The defendants are neither parties nor privies to that instrument. That they themselves are not bound by any of its provisions is too plain for argument. The licensee thereunder is Jean Bry, and as to him it is a nonassignable personal license. There is no contract relation whatsoever between the complainant and the defendants; hence no accounting on that basis is enforceable by the complainant against the defendants. If, then, the Bry license is, as claimed, a defense to a bill for infringement, the complainant is remediless as against the defendants in respect to their transactions with Bry. Upon the defendants' theory, by their own simple election to resort to Bry's license they acquired,

as against the owner of the patent, a right to manufacture without liability to account to him. But, if Bry's license is thus available to the defendants, it is equally available to every other unlicensed manufacturer in the country. A construction of a license which leads to such results is not to be lightly adopted. In this instance the license, we think, ought not to receive an interpretation which would leave the owner of the patent without any adequate protection. The license to Jean Bry is "to deal in, import, use, and sell the knitted fabric" of the patent "at a royalty of two cents per yard." It is to be noted that by the terms of the instrument the right to manufacture is not conferred upon Bry himself. Yet these unlicensed defendants deduce authority to them to manufacture the patented fabric from the provisions of a covenant on the part of Bry which really was restrictive of the personal license granted to him. This whole covenant of Bry reads:

"And also covenants and agrees not to handle, deal in, take orders for, or serve as commission agent for any goods of this description made in this country by any person, firm, or corporation who is not licensed under the above-mentioned patent, unless he pays the royalty thereon himself; it being understood, however, that but one royalty shall be paid on such goods, or any fabric coming under this license, whether paid by manufacturer or seller."

The royalty referred to by the words "unless he pays the royalty thereon himself" clearly is the manufacturer's royalty. Now, manifestly, these words were introduced in relief of Bry, and, it seems to us, for his relief only. These words import, however, we think, a condition precedent to any sale forbidden by Bry's restrictive covenant. Upon no reasonable interpretation of this provision of the license can Bry sell goods made by an unlicensed domestic manufacturer unless he himself has first paid the manufacturer's royalty thereon. The goods here referred to are not taken out of the monopoly of the patent until the manufacturer's royalty is paid. This construction gives effect to every part of the license agreement, and it is alike just to both the parties to the contract.

The soundness of the construction which we have thus given to the Bry license from a consideration of its terms finds confirmation if regard be had to the circumstances which surrounded the granting of it. Suits for infringement of this patent were pending against several importers in New York, including the firm of H. A. Caesar & Co., with which Jean Bry was connected. A settlement was effected under which these importers respectively took license in the form of the one here in question. The established rates of royalty to domestic manufacturers then were (as they have been since) three cents per yard on goods selling at one dollar and a half per yard or less and five cents per yard on goods selling over that price, and this was known to all these importers, or to their counsel, who acted for them in this matter. The express understanding of all the parties to the settlement was that these rates to domestic manufacturers were to be maintained; but these particular importers, as one of the terms of the settlement, were to have a slightly reduced royalty on their imported goods only.

We are not able to discover from the evidence that the complainant has done anything to estop him from maintaining this bill. Nothing inequitable can result from decreeing an account against the defendants. If the complainant has received from Jean Bry any payments justly applicable to royalties with which the defendants were chargeable, a proper credit therefor may be allowed to them in stating the account. The decree of the circuit court dismissing the complainant's bill is reversed, and the case is remanded to that court with direction to enter a decree in favor of the complainant in accordance with the prayer of the bill.

KOENEN v. DRAKE et al.

(Circuit Court of Appeals, First Circuit. April 26, 1900.)

No. 321.

PATENTS—INVENTION—DESIGN FOR EYEGLASS CASE.

The Koenen design patent, No. 29,485, for a design for an eyeglass case, is void for lack of patentability of the design shown, which discloses no new or original features.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity for infringements of design patent No. 29,485, issued to complainant for a design for eyeglass cases.

H. Albertus West, for appellant.

Alexander P. Browne, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

COLT, Circuit Judge. This is an appeal from a decree dismissing a bill for alleged infringement of a patent for a design. The circuit court rested its decision mainly on the question of infringement, although it doubted the patentability of the design. We are clear that the design does not show any patentable features. The prior art discloses eyeglass cases having substantially the characteristics or distinctive marks of this design, as set forth in the specification of the patent. To entitle a person to a patent under section 4929, Rev. St., the design must be new, useful and original, in shape or configuration. A comparison of the patented design with the old forms of eyeglass cases shows that it does not meet the requirements of the statute. It is not shown to be either new or original, and such changes in outline as are visible to the eye relate merely to details, and do not involve any invention. The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.

GOLDMAN v. FURNESS, WITHY & CO., Limited.

(District Court, S. D. New York. April 30, 1900.)

ADMIRALTY JURISDICTION—SUIT BETWEEN FOREIGNERS—EFFECT OF ASSIGNMENT OF CLAIM.

Where a court of admiralty, in the exercise of its discretion, has refused to entertain jurisdiction of a suit between foreigners for the breach of a contract of carriage made in Canada, and no part of which was to be performed within the United States, it appearing that the controversy could more properly be determined by the courts of Canada, by the laws of which the contract was governed, it is not required to entertain a second suit on the same cause of action by an assignee of the former libellant, who is a citizen and resident of the district where the suit is brought, when the assignment was merely colorable, and made for the purpose of enabling the suit to be brought in such court.¹

In Admiralty: Libel in personam to recover damages for breach of contract. On motion to dismiss. Granted.

Charles Howard Williams, for libellant.

Convers & Kirlin, opposed.

BROWN, District Judge. The libel in the above cause was filed to recover damages for the alleged breach of a contract to carry a large quantity of wood pulp from Quebec, Canada, to Manchester, England, during the summer and autumn of 1899. The defendant is an English corporation having its principal place of business at West Hartlepool, England, with an agent in the United States, and also an agency in Montreal, Canada, where the verbal contract (confirmed a few days afterwards by letters) was made with the libellant Goldman in person, as agent of Sally Wertheim, merchant of Hamburg, Germany, doing business under the name and style of A. Wertheim & Co. of Hamburg, of which Goldman is the New York agent.

Upon a former libel filed February 15, 1900, by Sally Wertheim, as libellant, against the present defendant, upon a special appearance of the defendant and affidavits showing that both parties were non-resident; that the contract was in fact made between the agents of the parties in person in Montreal; that no part of the contract was to be executed within the United States; that it had been partly performed; that it was governed by the law of Canada, and that nearly, if not quite all, of the witnesses were there, and that the convenience of parties would be greatly subserved by the trial of the cause in Canada, rather than within this jurisdiction, it was held that the court should not exercise its discretionary power to enforce a trial of the cause here, but should remit the parties to the more appropriate forum of Canada. Four days after the decision of the court to that effect was made known, namely, on March 16, 1900, and three days before the order dismissing the former action was entered, said Wertheim, according to the present libel, assigned the cause of action for the alleged breach of contract to the present libellant, "for a valid and sufficient consideration"; and on the 21st of

¹ As to admiralty jurisdiction of suit between foreigners, see note to *Fairgrieve v. Marine Ins. Co.*, 37 C. C. A. 193.

March, the present libel was filed to the same effect as the former, stating the assignment of the cause of action, and that the libelant is a citizen and resident of this city and district. The defendant, upon a special appearance only, now again moves to dismiss the libel upon the same affidavits as before.

It is impossible to suppose that the assignment alleged is anything else than a colorable assignment, made for no other purpose than to present an American citizen as libelant, and thereby remove one of the grounds upon which the former libel was dismissed. Aside from this circumstance, all the substantial reasons for prosecuting the suit in Canada rather than in this jurisdiction, remain as before; and if the court was not required to take jurisdiction of the former libel, and if Canada was the proper forum for the trial of the cause, it would seem manifest that an assignment that can only be deemed colorable should make no difference. It has long been settled that where the court has no jurisdiction of the cause in fact, a colorable assignment for the mere purpose of giving it jurisdiction is ineffectual. *Barney v. Baltimore City*, 6 Wall. 280, 288, 18 L. Ed. 825.

By the eleventh section of the judiciary act, moreover, continued by the Acts of 1875 (18 Stat. 478) and 1888 (1 Supp. Rev. St. p. 612) it is provided:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of an assignee * * * unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

The terms "chose in action" as there used include actions for damages growing out of "rights of action founded on contracts, which contain within themselves some promise or duty to be performed." *Bushnell v. Kennedy*, 9 Wall. 387, 392, 19 L. Ed. 736; *Fountain v. Town of Angelica*, 20 Blatchf. 448, 12 Fed. 8; *Jackson & Sharp Co. v. Pearson*, 60 Fed. 113; *Fost. Fed. Prac.* § 24; *City of New Orleans v. Quinlan*, 173 U. S. 191, 19 Sup. Ct. 329, 43 L. Ed. 664.

Referring to the act of 1875, the supreme court in *Hawes v. City of Oakland*, 104 U. S. 450, 26 L. Ed. 827, say:

"This statute strikes a blow at improper and collusive attempts to impose upon this court cognizance of cases not justly belonging to it." Page 459, 104 U. S., and page 831, 26 L. Ed.

This language seems to me precisely applicable to the present case. I do not doubt that this court has discretionary power to exercise jurisdiction under the present libel, as it had upon the former one; but jurisdiction is not obligatory I think under the present circumstances.

The cases cited by the libelant are quite different. In *Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964, the contract was to transport to the city of New York, and it was therefore to be partly performed in this country. In *Chubb v. Packet Co.*, 39 Fed. 431, the interests of the parties so far as respects the conveniences of witnesses on the trial were balanced, the collision being between an English and a German vessel, and the tort was upon the high seas and not governed by the law of either nation. Here the

circumstances are all different. Every circumstance opposes the trial of the cause within this jurisdiction and makes that of Canada more appropriate, except apparently the choice of the German company and its agent, the present libellant. This court is overburdened with causes which must be tried within this jurisdiction; and it ought not voluntarily to entertain jurisdiction of other causes which on all grounds are more appropriately triable elsewhere, to the neglect and prejudice of its own proper and necessary business.

The libel is dismissed.

THE ST. JOHNS.

In re CENTRAL R. CO. OF NEW JERSEY (SEA INS. CO. et al., Interveners).

(District Court, S. D. New York. April 24, 1900.)

1. ADMIRALTY JURISDICTION — CONTROVERSY BETWEEN CLAIMANTS TO FUND IN COURT.

A court of admiralty, which has in its possession a fund arising from the sale of a vessel in proceedings for limitation of liability for collision, has jurisdiction to determine conflicting claims to such fund between the owners of the injured vessel and her insurers, who claim to be subrogated to their right to the fund by reason of having paid a policy of insurance on the vessel.

2. MARINE INSURANCE—ABANDONMENT OF VESSEL TO INSURER.

The collection from an insurance company of the full amount at which a vessel was valued in the policy, on account of injury by collision, does not import an abandonment of the vessel by the owners to the insurer, where she was undervalued in the policy, and the owners refused to abandon. Abandonment must be the voluntary act of the insured.

3. SAME—PAYMENT OF LOSS BY COLLISION—SUBROGATION TO DAMAGE CLAIM.

The right of subrogation in favor of marine insurers on payment of a loss resulting from collision, whether partial or total, is independent of any abandonment, and exists without it.

4. SAME—VALUED POLICY—CONCLUSIVENESS ON PARTIES.

Where a vessel is valued in a marine policy, neither party can be heard to allege a different valuation, whereby the rights, remedies, or liabilities of either can be prejudiced; and, on payment by the insurer of the full amount of such valuation on account of loss of the vessel by collision, the owner cannot allege a larger valuation, uncovered by insurance, for the purpose of entitling him, as constructive insurer of such uninsured excess, to a fund recovered from the wrongdoer, to which the insurer would otherwise be entitled by subrogation.

5. SAME—DAMAGES RECOVERED FOR COLLISION—PRIORITY OF CLAIMS TO FUND.

The right of subrogation of an insurer, who has paid a policy on account of collision, to a fund recovered from the wrongdoer, is subordinate to the rights of damage claimants against the injured vessel, growing out of the collision, where she has been surrendered by the owner in proceedings for limitation of liability.

In Admiralty. On distribution of fund recovered as damages for collision, as between the owners and the insurer of the injured vessel.

Shipman, Larocque & Choate, for interveners.

Benedict & Benedict, for the Catskill, opposed.

BROWN, District Judge. This controversy arises between the Sea Insurance Company and the owners of the passenger steamer Catskill as respects the sum of \$7,073.06, the remnants and surplus of the proceeds of the sale of the steamer St. Johns in the above pro-

ceedings for limitation of liability, after the payment of the claims against her for loss of life, injuries to person and damage to the property of third persons, as provided for by the decree adjudging the St. Johns and the Catskill both to blame for a collision on the Hudson river on September 15, 1897. 92 Fed. 1010; 95 Fed. 700. The fund in question remains in the hands of the trustee appointed in the St. Johns proceeding for limitation of liability. The fund is claimed by the owners of the Catskill because it is less than the unpaid moiety of the damage and loss sustained by the Catskill by reason of the collision. The Sea Insurance Company claims to have become subrogated to the Catskill's rights in the fund through the payment in full of the sum of \$20,000 insured by that company upon the Catskill by a marine policy in which the steamer was valued at the same sum. The fund being subject to the disposition of the court, the court would have jurisdiction to determine the rights of the conflicting claims of title thereto, even if the claims sprang from nonmaritime contracts (*Andrews v. Wall*, 3 How. 568, 572, 11 L. Ed. 729; *The J. E. Rumbell*, 148 U. S. 1, 15, 13 Sup. Ct. 498, 37 L. Ed. 345); here the right of subrogation, if it exists at all, is a legal incident and part of the maritime contract of insurance (*Andrews v. Insurance Co.*, 3 Mason, 6, Fed. Cas. No. 374); and on both grounds it is the duty of the court to determine to whom the residue of the fund belongs.

The policy of the Sea Insurance Company was dated April 27, 1897, and insured the Catskill in the sum of \$20,000 for one year against loss or damage by collision and other risks of navigation, the value of the steamer being also fixed by the policy at \$20,000. In September following the Catskill was sunk by collision in mid river and shortly afterwards raised by the Merritt & Chapman Derrick & Wrecking Company and towed to Hoboken. Some repairs were there put upon her, for which she was libeled in admiralty by the shipwrights in the district of New Jersey and sold under a decree, netting over and above the repair bill and costs and expenses of the sale, the sum of \$747.62. No other claim being filed in that court to these moneys, the owners of the Catskill petitioned therefor, and by order of the court received, less expenses, the balance of \$734.83 on December 15, 1897.

On October 22, 1897, the assured served notice of the loss upon Chubb & Sons, agents of the insurers, stating the fact of the collision and that the Catskill had been "damaged to an extent far exceeding the amount for which she was insured"; and that she had been libeled in the district of New Jersey and was about to be sold by the United States marshal. In the ensuing correspondence the insurers expressed their readiness to pay the whole amount of the policy upon an accounting for the salvage and an assignment of all rights of recovery against the St. Johns. The assured replied that their loss was much greater than the policy value; that they had not abandoned and should not do so, and that they would not transfer any of their rights in the wreck or its proceeds or against the St. Johns. Neither party being willing to waive these conditions, early in January, 1898, suit was brought by the assured against the

insurers in the state court, and on the 27th of January, judgment having been obtained by default for the amount of the policy, less \$200 deducted according to its terms in lieu of average, the judgment was paid by the insurers and canceled of record.

Several months before, on October 5, 1897, the Catskill Company as owner of the Catskill, filed its petition in this court for a limitation of its liability arising out of the collision. Eighty-five cents was paid into court, representing the prepaid freight, and upon a subsequent reference to a commissioner to make an appraisement of the value of the wreck of the Catskill, the company acknowledged its receipt of the sum of \$734.83 aforesaid, but proved by its witnesses that the bill of the Merritt & Chapman Derrick & Wrecking Company for salvage services rendered to the Catskill would be reasonably worth more than that surplus, and the company was therefore allowed to retain said surplus on that account, and the vessel was reported a total loss. On January 20, 1898, the Central Railroad Company of New Jersey, owner of the St. Johns, in consequence of several suits for damages, also filed its petition for a limitation of liability, and surrendered the vessel to a trustee appointed by the court by whom she was sold, and the proceeds, amounting to \$23,944.52, were retained in his hands subject to the order of the court. In each proceeding the petition alleged the collision to have occurred without the fault or negligence of its own vessel; and in each, answers were interposed contradicting that contention. The causes were tried together; each was held to blame as above stated, and the amounts due the claimants were determined. Out of the proceeds of the St. Johns in the trustee's hands, the various claims for loss and damage have been paid, except for the damage done to the Catskill, leaving as first above stated, the sum of \$7,073.76, the subject of the present controversy.

In the St. Johns proceeding for limitation of liability, the owner of the Catskill filed its claim against the St. Johns for the sum of \$60,000, its alleged damages from the sinking of the Catskill. The commissioner to whom the claims were referred, found that the Catskill had been a total loss, and fixed her value at the sum of \$48,719.66. The damage to the St. Johns was slight, so that upon an equal division of the entire damage (*The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, Adv. S. U. S. 595, 44 L. Ed. —), the balance remaining would be payable, as between those two vessels, to the owner of the Catskill.

On May 9, 1899, some two months after the trial and decision holding both the Catskill and the St. Johns in fault, the Sea Insurance Company upon its petition was granted leave to intervene in the proceedings in the St. Johns limitation proceedings, for its own interest in the claim of the Catskill Company for its damages against the St. Johns, and a year previously it had filed notice of its claim thereto; and thenceforward the insurance company participated in the litigation, both as respects the proof of the amount of claim in behalf of the Catskill before the commissioner, and also in the determination of the amount of damages to be awarded to the various other damage-claimants out of the fund. 95 Fed. 700. Upon the

latter hearing the question was reserved as to the party to whom the balance of \$7,073.06 should be paid; and this hearing is upon the question so reserved.

1. If the title to the moneys in question depended upon any voluntary abandonment of the Catskill to her insurers, the latter plainly could not succeed. For it is manifest from the correspondence, that abandonment was expressly and persistently refused by the assured. Abandonment, it has always been held, must be the voluntary act of the assured. The demand and receipt of the full amount of the policy value on a policy undervaluing the ship does not of itself import any abandonment. It has been expressly held by the house of lords that in such a case the owner may repair and retain his ship, and recover of the insurers for the repairs up to the full policy valuation. *Aitchison v. Lohre*, 4 App. Cas. 755. This rule is of great importance on largely undervalued policies, since otherwise on partial losses the assured would often be unable to recover his full insurance without a sacrifice of the ship. There is no doubt that the damage to the Catskill in this case was much greater than the insurance and the fund in question combined, so that no question of strict abandonment here arises.

The title of the insurers, if any, must rest, therefore, upon their claim to subrogation to the right of the Catskill Company against the St. Johns or her proceeds through payment of the full policy value, independent of any abandonment express or implied, and notwithstanding the intent and endeavors of the assured to retain this claim for their own indemnity. The right of subrogation, though often treated as merely one of the consequences of an abandonment to insurers, is in reality in some important respects essentially different. The *Potomac*, 105 U. S. 630, 26 L. Ed. 1194. Abandonment proper is a transfer of some remnants of the subjects of insurance, whether ship, cargo or freight; subrogation includes rights of action against third persons liable for the same loss. Abandonment, therefore, is not necessary when the loss is actually total, nor can abandonment be made unless the loss is at least constructively total; subrogation, on the other hand, arises without reference to these conditions, and whether the loss is large or small, and whether partial or actually total. Abandonment is never obligatory upon the assured, but operates only as a voluntary transfer of title; subrogation works in invitum, by operation of law, from the mere act of payment of the loss, whether the loss is total or partial; and so far from depending on any voluntary act of the assured, the latter cannot invalidate or destroy it, without becoming answerable to the insurer for the loss. *Insurance Co. v. Storrow*, 5 Paige, 285; *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399; *U. S. v. American Tobacco Co.*, 166 U. S. 468, 474, 17 Sup. Ct. 619, 41 L. Ed. 1081; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 320, 6 Sup. Ct. 750, 1176, 29 L. Ed. 873; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154; *Clark v. Wilson*, 103 Mass. 224.

2. The contract of insurance being a contract of indemnity only, insurers on payment are subrogated to the rights of the assured to any

other remedies for the same loss. The question may arise whether such remedy over is the primary obligation, as respects the insurers, as in one of the earliest cases before Lord Mansfield, where the liability of the hundred for a loss by fire being found to be the primary liability, the insurers were upon that ground held entitled by subrogation, upon paying the loss, to maintain an action for their own recoupment in the name of the assured against the hundred. *Mason v. Sainsbury*, 3 Doug. 61. To the same effect are *Clark v. Inhabitants of the Hundred of Blythinc*, 2 Barn. & C. 259; *Pentz v. Receivers, etc.*, 9 Paige, 568; *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99; *Hall v. Railroad Co.*, 13 Wall. 367, 20 L. Ed. 594; *Clark v. Wilson*, 103 Mass. 219. See *Darrell v. Tibbitts*, 5 Q. B. Div. 560. Where, on the other hand, the outside liability is made superior to the rights of insurers, there is no such subrogation. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 321, 6 Sup. Ct. 750, 1176, 29 L. Ed. 873; *Wager v. Insurance Co.*, 150 U. S. 99, 108, 14 Sup. Ct. 55, 37 L. Ed. 1013.

Yates v. Whyte, 4 Bing. N. C. 272, is a leading case to the same effect in the law of marine insurance, where after payment by insurers of a partial loss on a vessel damaged by collision, an action in the name of the assured was upheld against the wrongdoer. This has been followed by a multitude of similar cases, where it is held that if the assured recover before payment by the insurers, the recovery stands as a credit against the insurance; if recovery is after payment by the insurers, the assured holds it as trustee for the latter. 2 Phil. Ins. §§ 1723, 1724; 1 Pars. Mar. Ins. pp. 2, 551; 2 Pars. Mar. Ins. pp. 492-499, and notes. See *Lown. Ins.* § 215; *The Potomac*, 105 U. S. 630, 634, 635, 26 L. Ed. 1194; *Simpson v. Thompson*, 3 App. Cas. 279, 292; *U. S. v. American Tobacco Co.*, 166 U. S. 468, 474, 17 Sup. Ct. 619, 41 L. Ed. 1081.

These general principles are not contested. The only question is concerning the application of them in a case where the actual loss is from two to three times the amount at which the vessel was valued in the policy. The inquiry then is whether the owner must lose not only what was uninsured, but all benefit of his remedy over against the wrongdoer as well. This vessel, it is said, was worth \$60,000 instead of \$20,000; and if the insurers are allowed this fund of \$7,073.06, the result will be, that the assured upon a loss of \$48,700 will recover but \$19,800 and lose nearly \$29,000; and though the insurers were paid for an insurance of \$20,000 they will in fact through this recoupment lose less than \$13,000. These considerations, however, cannot enter into a legal decision of a question like the present. The *spes recuperandi* is a long-settled and well-known incident of insurance, and forms part of the contract.

3. Upon losses by collision wholly through the fault of another vessel, the insurers ought by the very nature of their contract of indemnity to find a complete recoupment in their remedy over against the wrongdoer; and except where the assured undervalues his vessel in the policy, he suffers no loss thereby. He cannot complain in such a case that the insurers through recoupment have suffered no loss. If then, for his own supposed advantage, the owner insures

the ship at a large undervaluation, by what equity can he claim that the rule ordinarily applied and known to belong to the contract of insurance, should be modified in his favor to save him from a part of the loss caused by the undervaluation alone?

The assured having agreed upon the value of the ship in the policy of insurance, in effect now asks the court to take notice that the ship was actually worth much more, and that he has a large interest uncovered by the policy, of which he is virtually the insurer. If this recognition could be granted, the assured would at most be entitled to share pro rata with the insurers in the fund in question, the same as any additional actual insurers would share in it, had additional policies been taken out up to the actual value of the vessel, and her full value declared in all of them, or had they all been open policies (see *The Potomac*, 105 U. S. 630, 635, 26 L. Ed. 1194, per Gray, J.; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 321, 6 Sup. Ct. 750, 1176, 29 L. Ed. 873; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154). But in that case the assured would be obliged to bear, as constructive insurer, the same proportion of the original loss; the final result of which in this case would be that upon a valuation of \$60,000 the insurers on paying one-third of the damage to the Catskill, i. e. about \$16,250, and recouping one-third of the fund in question, would sustain a loss of a little less than \$14,000, a difference only of about \$1,000, or much less than might at first be supposed.

But I know of no principle of law or equity, by which the owner upon a settlement under a valued policy can be heard to allege a larger valuation of the ship uncovered by insurance, for the purpose of letting him in as constructive insurer, so as thereby to share in another remedy for the same loss to the insurer's prejudice. If the owner makes any claim upon the insurer under the policy, he must abide by its terms. The valuation stated in the policy is a part of the basis of the contract. It is a very material condition affecting in various ways the rights and liabilities of both parties. The premiums paid are presumably in part at least based upon it. Both parties are, therefore, equally bound by the valuation, and neither can change the contract in this respect, or the legal rights springing from it, without the other's consent. *The Potomac*, ut supra. But to open the valuation for the purpose above stated, would manifestly be to reject the contract as made, and in place of a valued policy to substitute an open one to the detriment of the insurer. This is never permissible, except upon some grounds of mistake or fraud, which here do not exist. To grant the contention of the assured would not only materially change the contract, but reopen the doubtful question of value, which it was one of the objects of the agreement on value to foreclose. *Irving v. Manning*, 6 Man., G. & S. 391. Neither party, therefore, can be heard to allege a different valuation whereby the rights, remedies or liabilities of either can be prejudiced.

If the amount recoverable from the wrongdoer, after payment of the damage-claims of third parties, were in excess of the amount paid by the underwriters to the assured, no doubt that excess would

belong to the latter; since the insurer's right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured. As was stated by Mr. Justice Gray in *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 235, 11 Sup. Ct. 557, 35 L. Ed. 157:

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss."

Where there has been an actual abandonment to the assured, however, the result might be different; since an abandonment, operating as a transfer of title, might possibly include the whole right of recourse against third persons. If so, that would constitute another distinction of some importance, between abandonment and subrogation. But in this case the sum recoverable from the *St. Johns* being insufficient to recoup the insurers for their payment upon the policy, the owner under the agreed valuation has no standing to assert any claim to that fund in his favor until the insurers' claim is satisfied.

The right of the owner to be treated as constructive insurer of any uninsured excess of value above that stated in the policy, was involved in the recent case in this court of *International Nav. Co. v. Atlantic Mut. Ins. Co.* (D. C.) 100 Fed. 304, although the interests were there reversed. In that case the *St. Paul* was valued and insured at one-third less than her value; upon stranding, certain salvage charges were incurred and paid by the owner, and on suit therefor against the insurers the latter claimed that the owner should bear one-third of the salvage charge as constructive co-insurer by reason of his uninsured one-third interest in the vessel. In the similar case of *Providence S. S. Co. v. Phoenix Ins. Co.*, 22 Hun, 517, the appellate division had allowed the insurers a ratable deduction on that ground; but this was reversed in the court of appeals (89 N. Y. 559) because the insurers were there held estopped from setting up this claim by the valuation in the policy. And upon the same view this court held that the insurers of the *St. Paul* must bear the whole salvage charge, being estopped from alleging that there was any uninsured interest in the vessel bound to share the loss with them. Amid some conflicting decisions, it was there considered that the sounder opinion at the present day is, that as respects all matters affecting the measure of compensation or the rights of either party growing out of the insurance contract, the valuation fixed by the policy operates as an estoppel upon both parties alike. There the estoppel was in favor of the assured, here it operates to the advantage of the insurer; but the same rule is applied to both. 3 Kent, *274; *Irving v. Manning*, 6 Man., G. & S. 391; *Insurance Co. v. Hodgson*, 6 Cranch, 206, 3 L. Ed. 200; *The Potomac*, 105 U. S. 630, 635, 26 L. Ed. 1194. The question is substantially the same that arose in the case of *Association v. Armstrong*, L. R. 5 Q. B. 244, where the vessel insured was sunk and totally lost by collision, being worth £9,000, but insured and valued in the policy at only £6,000; nearly the whole amount of the insurance having been

recovered and paid into court, by action against the owners of the other vessel, as solely in fault for the collision, the question submitted to the court was, whether the insurers, having paid the whole amount of the policy, were entitled to the whole proceeds in court, or whether the insured owner was entitled "to participate in the amount recovered, or any part thereof." The court held the insurers entitled to the whole. In delivering judgment Cockburn, C. J., says (page 249):

"It has always been considered as a settled rule in insurance law, as I started with observing, that where there is a total loss the underwriters, who pay upon a total loss, whether it is actual or whether it is constructive, are entitled to anything that remains of the vessel, and to anything which would otherwise have accrued to the owner of the vessel by reason of his ownership. Where the policy is an open policy, and simply a policy of indemnity as to the actual value of the vessel, no difficulty would arise in such a case as this. It is only because it is a valued policy that these difficulties present themselves. I think we must still apply the old rules, and not make new; and if a party chooses to have his vessel or his goods, as the case may be, taken at a fixed value, instead of leaving the contract, as in an ordinary policy, simply one of indemnity to the extent of the real value, and if thereby any benefit accrues to the underwriters, the underwriters must be entitled to it."

Mellor, J. says:

"I am of the same opinion. I think Mr. Smith fairly states the question which determines the matter, viz., what is the effect of the agreement as to the value? The basis of the contract is the agreed value of the vessel, and when, to avoid all questions as to the real value, the parties come to an agreement as to the value, it appears to me to follow as a matter of course that all those rights, which spring out of the payment by an underwriter for a total loss, must be governed by the agreed value."

Lush, J., says:

"A person effecting an insurance may either agree upon the amount which is to be considered as the sum forming a complete indemnity, or he may leave it open. If he fixes the amount which he is to be paid in the case of a total loss, and the underwriter accepts that amount, then that amount must be binding upon both parties. If each of the parties agrees that a certain sum shall be deemed to be the value of the thing insured, the underwriter, in the case of a total loss, is not to be at liberty to say the thing is not worth so much; he is bound to pay the amount fixed upon, whether it is the proper amount or not. And, on the other hand, the assured is not at liberty to say it is worth more; he is bound by that amount. It is for the purpose of avoiding all question about the value that the parties agree to fix that amount, and for all purposes, therefore, of adjusting the rights under that policy both the parties are bound by that value."

The decision in that case has been repeatedly cited by the supreme court with apparent approval and to some extent followed. The *Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527.

The only point in which the *Armstrong Case* differs from the present is, that the loss there was apparently total; while here the truth seems to be that the loss of the *Catskill* was not total, though the legal proceedings have been such as to make it appear so. She was sold in admiralty, and netted less than a fair salvage compensation for raising her; and on that ground she was reported a total loss in her proceeding to limit liability. In her proof of claim against the *St. Johns*, she was again reported as a total loss. Yet the record shows that at the admiralty sale she was bought in by a third per-

son with the money of her former owners and on their account; that she was subsequently repaired at an expense of \$21,127.57 and is now running. In the Case of Armstrong no express mention of abandonment is made; but some of the language in the opinions, particularly in that of Lush, J., seems to assume a situation of abandonment, which might include the right of action against the wrongdoer. Here there was no intention to abandon anything. The owners had the right to keep and repair the Catskill and still recover the full amount insured, without any abandonment, the same as upon a partial loss. But I do not perceive how this circumstance can make any difference as respects the insurers' right of subrogation, as in any other case of partial loss; or how it can affect the nature of the estoppel arising from the valuation in the contract. So far, therefore, the insurers are entitled to recover.

4. It is further urged that by reason of the insurers' laches and inaction in the litigation brought to establish the liability of the St. Johns for the collision, they should be held to have forfeited their right to the fund thereby secured. The cases cited in support of this doctrine (*The Saracen*, 6 Moore, P. C. 73; *Woodworth v. Insurance Co.*, 5 Wall. 87, 18 L. Ed. 517; *Insurance Co. v. Corcoran*, 1 Gray, 75; *The Battler* [D. C.] 67 Fed. 251; *Newcomb v. Insurance Co.*, 22 Ohio St. 382) seem to rest on peculiar circumstances and not to be fairly applicable to the present case. Here the owners of the Catskill cannot plead any surprise. The insurers had claimed the benefit of any recovery against the St. Johns from the first. Though the liability of the St. Johns was doubtless the first thing to be established, the reduction of the damage claims against both vessels, was equally important; and in that litigation the insurers took their fair share of the work. All the damage claimants also took part in establishing the St. Johns' liability. Considering, however, the uncertainties and difficulties of the situation, and that the benefit of the original establishment of the liability of the St. Johns is due to a very considerable extent to the attorneys and counsel of the Catskill, though not wholly to them, I think an allowance should equitably be made to the attorneys and counsel of the Catskill for their services in the recovery of the fund.

The right of the insured owner, upon a surrender of his vessel in proceedings to limit his liability, to retain the insurance moneys for his own benefit (*City of Norwich*, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134); and his obligation to surrender to creditors any claim he may have for damages to the vessel, or the proceeds of any recovery thereon (*O'Brien v. Miller*, 168 U. S. 287, 303-307, 18 Sup. Ct. 140, 42 L. Ed. 469; *Id.* [D. C.] 59 Fed. 621; 1 Valroger, *Droit Mar.* p. 327, § 271); and the insurers' right of subrogation on the other hand, upon payment of the insurance to the owner, to the same claim, which is also required to be surrendered in the limited liability proceeding, produce complex and apparently conflicting relations. But in the case of *The City of Norwich*, 118 U. S. 468, 506, 6 Sup. Ct. 1150, 30 L. Ed. 134, it is in effect stated that the insurers' right of subrogation is subordinate to the rights of the damage claimants, who must first be paid in full (*The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, *Adv. S. U.* 595, 44 L. Ed. —); so that the insurers, with the rights only of the as-

sured, take what is left of the indemnity fund after the damage claims are satisfied. *Wattson v. Marks*, Fed. Cas. No. 17,296; Boul. P. Dr. Com. 203-205. These rules having been observed and followed, I find that the insurance company is entitled to the residue of the fund, subject to the payment of a counsel fee, as above provided.

Decree accordingly.

THE ISAAC H. TILLYER.

THE DUDLEY PRAY.

FRENCH v. PRESIDENT, ETC., OF DELAWARE & H. CANAL CO. et al.

(District Court, D. New Jersey. April 23, 1900.)

1. COLLISION—STEAM AND SAIL VESSELS MEETING—DUTY OF TUG WITH TOW.

It is the duty of a tug with a tow, on meeting a sailing vessel, to take all necessary precautions to keep both tug and tow out of her way, and where, by reason of its length, the tow is unwieldy, the care required is correspondingly greater.

2. SAME—DUTY OF SAILING VESSEL.

A sailing vessel, on meeting a tug with a tow, is bound to keep her course, that the tug may not be misled in taking measures to avoid collision.

3. SAME—FAULT—FACTS CONSIDERED.

A schooner came in collision with the second of three barges in tow of a tug on a single line, the whole extending a length of 3,300 feet. The vessels met on nearly parallel courses, and came within sight of each other when two miles apart. The schooner was sailing closehauled, and the tug passed to the leeward of her at a distance of about 300 feet. The schooner held her course, but, owing to her leeway, passed the first barge at a distance of not more than 75 feet, and came in collision with the second. *Held*, that the schooner was not in fault for holding her course, but that the tug and the barge were both in fault for the collision,—the former for not changing her course so as to pass with her tow to the windward of the schooner, which she could readily have done; and the latter because, when the schooner passed so close to the first barge, which was 160 fathoms in front, she must have known, if she kept a proper lookout, that the tug had placed her in a position where collision was inevitable, if she kept her course, and should have cut her hawser, and by using her helm sheered out of danger.

4. SAME—WEIGHT OF EVIDENCE.

Testimony from a steamer, clearly in fault for a collision with a sailing vessel, that the latter was guilty of contributing fault by changing her course, will be viewed with suspicion; and when the evidence from the sailing vessel is to the contrary, and accords with the probabilities, it will be accepted in preference.

In Admiralty. Libels and cross libel for collision.

Stewart & Macklin and Frank B. Colton, for libelants.

Curtis Tilton, for claimant the Isaac H. Tillyer.

Carpenter & Park, for claimant the Dudley Pray.

KIRKPATRICK, District Judge. It appears from the evidence in these causes that on the 10th of April, 1895, at about half past 10 o'clock at night, a collision occurred between the schooner Isaac H. Tillyer, bound from Boston to Philadelphia, and the coal-laden barge Oneonta, in tow of the steam tug Dudley Pray, bound from

New York to Boston, about midway between the Pollock Rip and Shovelful lights. When the schooner rounded the Pollock Rip light the wind was ahead. In order to make the Shovelful lightship, and clear the shoals, she was closehailed on the starboard tack, and her course set W. by N. $\frac{1}{2}$ N. She had not proceeded far when she sighted, about two miles away, the lights of the tug Dudley Pray and her tow, which consisted of three barges, Alice, Oneonta, and Binghampton, in the order named; all of which were laden with coal. The total length of the tow, including the length of the tug and barges, was about 3,300 feet, the hawser between each vessel being about 150 fathoms in length. The lights on the schooner as well as on the tug and barges were lighted, and the collision is not attributable to the failure of any of the vessels to see the lights of the other. At the time the tug and tow sighted the schooner, their course was E. S. E., or about parallel with that of the schooner, and it is not claimed that either the schooner, or the tug, or any of the barges changed their course from the time they sighted each other until after the tug had passed the schooner. The distance between the tug and schooner in passing is stated in the tug's answer to be 300 feet, and this is the distance fixed by Risley, the mate of the schooner. All of the witnesses say that the schooner and the barges still held their respective courses, so that, as the schooner passed the barge Alice, which was about 150 fathoms astern of the tug, as has been stated, the distance between the schooner and the barge was, at the highest estimate, 75 feet, while others say but 25 or 50 feet. As the barge and schooner approached each other upon their respective courses, the schooner had drifted to leeward about 150 or 175 feet. With the barge Oneonta, which was about 160 fathoms astern of the barge Alice, the schooner collided about head on, according to the testimony, whereby the barge was sunk and the schooner injured.

A libel has been filed on behalf of the owners of the barge Oneonta, claiming damages from the schooner and the tug. A cross libel has been filed on behalf of the schooner, claiming damages from the barge Oneonta, and a libel on behalf of the schooner against the tug. Both the barge and the schooner charge that the tug Dudley Pray was in fault, that she was negligent in the manner of making up and navigating the tow, that the tow was too long, the barges too far separated, and that, considering the length of the tow and the direction of the wind, she did not give the schooner a sufficiently wide berth to enable her to pass without colliding with the tow. The obvious duty of the tug, under the circumstances as detailed, upon sighting the schooner, was to take the necessary precautions to get out of her way, not only with the tug, but with the tow. Her duty in this regard was not changed by reason of her having a tow in charge. *The Maverick*, 28 C. C. A. 562, 84 Fed. 906. In order that the captain of the tug might not be misled, the schooner was bound to hold her course. *The Marguerite* (D. C.) 87 Fed. 955. The captain of the tug should have considered the length of his tow, and the increased hazard occasioned thereby. As was said in *The John H. May* (D. C.) 52 Fed. 884, "the tow, by reason of its length, was dangerous and unwieldy"; and he was

bound to the "extremest care" in its management. The *Gladiator*, 25 C. C. A. 32, 79 Fed. 445. The evidence shows that there was plenty of water for the tug and her tow to the southward, that the schooner was sighted in time for the tug to avail herself of it, and that the failure of the tug to change her course and go further to the southward was the primary cause of the collision, for which the tug was at fault, and on which she must be held answerable. Was the barge *Oneonta* at fault? If she had had a proper lookout (and, if she had not, she is in fault), the perilous position in which she was placed by the action of her own tug (which itself passed the schooner but 300 feet away) must have been apparent to her. In fact the libel filed in behalf of the barge owners alleges this fault of the tug. She must have seen that the schooner was drifting to leeward, so that she cleared the barge *Alice* by about only 75 feet. At the time the schooner passed the *Alice*, she was still 160 fathoms distant from the *Oneonta*. Collision was inevitable if the barge held her course. Change was possible. She might have cut her hawser, put her helm to port, and sheered out of danger. By her own account, she did nothing. By the exercise of proper care, she could, notwithstanding the fault of the tug in crowding the schooner, have avoided the collision. The *Oneonta* should be condemned. Was the schooner in fault? That the schooner, as was her right and duty, held her course from the time she was sighted by the *Oneonta* until she passed the barge *Alice*, is asserted by the crew of the schooner, and not denied, but admitted, by all the parties to this controversy. The barge *Alice* was, at the time she was abreast of the schooner, but 75 feet distant. The *Oneonta* was about 160 fathoms astern of the *Alice*. There was no hope for the schooner to avoid a collision with the *Oneonta* except to continue to hold her course. This the captain and all her crew say she did. There was no change of the helm until, being in extremis, and almost immediately before the ships struck, it was put up to ease the force of the blow. A change made at such a time and under such circumstances, not tending to cause the accident, was immaterial. The *Robert Holland* (D. C.) 59 Fed. 200. The people of the tug and barge deny these statements. They say that as soon as the schooner passed the barge *Alice* she put her helm to starboard, and tried to cross the towline connecting the *Alice* and *Oneonta*; that, failing in this, she slid along the line, and that the collision was the consequence. In considering this contradictory evidence, I am satisfied with the truth of the statement made by the captain and crew of the schooner. The reasons given by them for their conduct seem reasonable, and cause this testimony to far outweigh the assertions of witnesses for the tug and tow. "Courts view with suspicion the allegations of a steamer that a sailing vessel changed her course." The *George L. Garlich* (D. C.) 88 Fed. 554. "It is," say the supreme court, "the stereotyped excuse made by a steam vessel to justify a careless collision, and is always improbable, and generally false." *Haney v. Steam Packet Co.*, 23 How. 291, 16 L. Ed. 563. The schooner, under the circumstances, was justified in holding her course, and must be held blameless. Let a decree be prepared in accordance with these views.

SIDWAY v. MISSOURI LAND & LIVE-STOCK CO., Limited.

(Circuit Court, S. D. Missouri, W. D. April 2, 1900.)

1. FOREIGN CORPORATIONS—JURISDICTION OF COURT OF EQUITY TO DISSOLVE—APPOINTMENT OF RECEIVER.

A court of equity in the jurisdiction where a foreign corporation has a situs for the transaction of its business, and where its property is situated, is without jurisdiction, in the absence of a statute conferring it, to appoint a receiver for such corporation, with a view to winding up its affairs and distributing its assets, at suit of a resident minority stockholder, who complains alone of the internal management of its affairs, whereby the value of his stock has been diminished and is threatened with further prospective injury, where the corporation is solvent, and the directors and majority stockholders whose actions are complained of are nonresidents.

2. SAME—STATE STATUTE.

Such jurisdiction is not conferred by the Missouri statute of April 21, 1891 (Laws 1891, p. 75), which, after prescribing the conditions on which foreign corporations may do business within the state, and requiring them to maintain an office where legal service may be made upon them, declares that "such corporation shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character, organized under the general laws of this state, and shall have no other or greater powers." The object of such provision is to subject such foreign corporations to the same liability to actions against them as domestic corporations, and to the same restrictions and duties respecting their operation and conduct, but does not confer upon courts of equity within the state visitatorial jurisdiction over their internal affairs, or the power to wind up their business and distribute their property.

3. SAME.

Rev. St. Mo. 1889, §§ 2790-2792, which give the courts of the state jurisdiction, on petition by an officer or stockholder of a corporation, to require an accounting by its directors as to their official conduct; to remove them for gross misconduct, and require the election of others in their places; and, incidentally, to appoint a receiver to take charge of the business of the corporation,—do not confer authority to wind up a solvent corporation and distribute its property.

In Equity. On demurrer to bill.

W. Cloud, for complainant.

Geo. Hubbert, for respondent.

PHILIPS, District Judge. This is a bill in equity by a stockholder against a foreign corporation, the general purpose of which is to have a receiver appointed for the corporation, to conduct and manage its affairs for the protection of the complainant, who is a citizen of the state of Missouri. The defendant is an alien corporation, organized under the laws of the United Kingdom of Great Britain and Ireland, with its principal office located at Edinburgh, Scotland, where its directors and all its stockholders, except the complainant and perhaps one or two others, holders of about 2,500 shares,—the complainant representing 1,000 shares,—reside. The company was organized principally for the purpose of acquiring and selling lands in the state of Missouri and adjacent states, with its local business office and manager located in Newton county, in this district. The original capital stock of the company was \$500,000, which was increased to \$750,000, of which \$450,000 was paid in; and in addition to this it raised in cash upon its debentures the sum of \$300,000, making a capital equal to the face

value of its stock. With this capital the defendant purchased about 370,000 acres of land situate in counties lying in the southwestern part of the state of Missouri. The bill sets out with some particularity the history of the management of this business by the board of directors through its general manager, and claims that its affairs have been so managed and conducted as to show wasteful extravagance and unaccounted for expenditures, the lack of good business judgment and administration, so as to greatly depreciate the value of the stock, and that the course of management persisted in by the board of directors, with the approval of a majority of the alien stockholders, threatens to continue to depreciate the value of the complainant's stock, and that this course of conduct is actuated by a desire and purpose on the part of said nonresident majority stockholders to acquire the complete management and control of the complainant's interest, so as to destroy the value of his stock. The complainant specifies certain grievances as to the management of the corporation, some of which he admits theretofore had been corrected by the board, but that the most objectionable matters complained of were not remedied. The bill also sets out in detail the complaint formulated by the complainant and the other domestic stockholders, which was addressed to the alien majority stockholders, giving a summary of all the grievances of these minority stockholders respecting the bad business management of the properties of the company, in useless and wasteful expenditures, and the refusal of the directors to admit the complainant to an inspection of its books, and their failure to render to him any satisfactory account of an expenditure of about \$300,000 claimed by the board to be covered under the general head of "Expenses"; that, at the annual general meeting of the stockholders prior to the institution of this suit, he laid all these matters before the stockholders at Edinburgh, Scotland, and that instead of said stockholders, thus assembled, heeding his complaints and rectifying the alleged wrongs, they approved of the course of management, and, in effect, authorized the continuance thereof, by the re-election of the same directors who are pursuing the same course of conduct in the management of the properties and business of the corporation. There are other averments and detailed statements contained in the bill, which it is not deemed essential to recite, as they do not affect the questions of law raised by the demurrer to the bill interposed by the defendant. The bill concludes by averring:

"That the corporation has wholly failed of the purpose for which it was organized, and the business should be wound up, and its assets distributed among the shareholders equitably; and, to that end, your orator prays that a receiver may be appointed to take charge of the property, books, accounts, and evidences of debt, all of which are within the jurisdiction of the court; that an account be taken of the assets of the company, and that the accounts and debts due to said company be collected and brought into court, and that its liabilities be paid off; and that its assets be equitably distributed among its shareholders in such manner as may to the court seem equitable and just,—and such other and further relief as to the court may seem meet."

This suit was instituted in the state circuit court of Newton county, where service was had upon the defendant corporation through its local managing officer; and upon the petition of the defendant, as

an alien, the case was removed into this court, where the defendant appeared and demurred to the bill.

There is no allegation of the insolvency of the corporation. On the contrary, it is distinctly admitted, and stated in the brief of complainant's counsel, that the company is solvent, with ample assets and resources, if properly managed, to not only meet its outstanding obligations, but yield large dividends to the stockholders. The important question, therefore, to be decided, is, has this court the right to interpose, at the relation of a single resident minority stockholder, to take charge of the business and property of this foreign corporation, and run it, through a receiver, with a view to winding up its affairs, and distributing its assets among its creditors and stockholders? There is no disguising the fact that the practical effect of such interposition would be to put an end to the active life of the corporation. Anything short of this would be ineffectual to afford the complainant the relief he seeks. It does not meet this contention to say that the mere appointment of a receiver and the administration of the business of the corporation do not ipso facto dissolve the corporation, as its franchise would nevertheless be left intact, and it would continue to exist as a legal entity. It is a recognized principle of corporation law that an act which to all intents and purposes terminates the corporation, by taking from it the means to fulfill the purposes of its organization, is inconsistent with the purposes of its constitution, because such act would work a practical dissolution of the corporation. *Abbot v. Rubber Co.*, 33 Barb. 578, 21 How. Prac. 193, 20 How. 199. High, in his work on Receivers (section 288), holds that courts of equity, in the form of a visitatorial power over corporations, will not seize their assets and take away the management of their affairs from the hands of its managing officers, through a receiver, on the application of a creditor or shareholder, "since such interference would necessarily result in the dissolution of the corporation, and the court would thus accomplish indirectly what it has no power to do directly." Therefore the remedial power to be exercised by such courts should go no further than the granting of an injunction to restrain and prevent the misdeeds and misconduct of such managing officers, and the like. In *Neall v. Hill*, 16 Cal. 146, which was a bill against a corporation and its officers, etc., charging the officers with combining with the majority of the stockholders to have themselves elected as trustees, in violation of the by-laws, and that as such trustees they were guilty of fraud, collusion, and mismanagement, with a view to the depreciation of the value of the stock and to obtain the control thereof, the bill prayed for the removal of said officers, and for an accounting and winding up of the corporation. The corporation in that case was a domestic corporation, and the officers were made parties to the bill. It was held not only that the officers could not be removed by a court of equity, but that a receiver could not be appointed to sell all of said property and to settle up the affairs of the company. The court said:

"This decree, if permitted to stand, must necessarily result in the dissolution of the corporation, and in that event the court will have accomplished in an indirect mode that which in this proceeding it had no power to do directly. It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up

their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring jurisdiction. There is no doubt that in the present case the court had jurisdiction to compel the officers of the corporation to account for any breach of trust, but the jurisdiction for that purpose was over the officers, and not over the corporation."

The question, therefore, arises whether or not a court of equity in the jurisdiction where the foreign corporation has a situs for transacting its business, and where its property is situated, and without the presence of its nonresident directors, has jurisdiction, at the suit of a minority stockholder, who complains alone of the internal management of its affairs, whereby the value of his stock has been diminished and is threatened with further prospective injury, to appoint a receiver for such corporation, and thereby assume the management of its business, with a view to winding up its affairs and distributing its assets. While there are persuasive reasons which appeal to a chancellor to exert to the utmost his powers to come to the relief of the resident stockholder, and save him the trouble, expense, and possible unequal chances of seeking redress in a distant foreign jurisdiction, it is sufficient for this court to say that, in the absence of a statute conferring such jurisdiction, the settled rules of equity seem to answer this question in the negative.

In *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401, the general doctrine was announced that:

"A stockholder in a corporation has a remedy in chancery against the directors to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital or profits which might lessen the value of the shares, if the acts intended to be done amount to what is called in law a 'breach of trust or duty.' So, also, a stockholder has a remedy against individuals, in whatever character they profess to act, if the subject of complaint is an imputed violation of the corporate franchise, or denial of right growing out of it, for which there is not an adequate remedy at law."

Mr. Justice Miller, in *Hawes v. City of Oakland*, 104 U. S. 450, 26 L. Ed. 827, gave this general statement of the law its proper limitation and application to the particular facts of that case, and, in discussing the general rule, formulated the following postulates: That there must exist as the foundation of the suit—

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter, or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity."

It will be observed that in all these instances it is contemplated that the proceeding is against the directors or wrongdoers, and necessarily implies that the court acquires jurisdiction in personam over the directors or wrongdoers, and consequently that it is some act of omission or commission of theirs that is to be corrected, restrained, or controlled, such as where these officers are acting ultra vires, or

fraudulently, either to their individual advantage or in subservience to the majority of the stockholders, "as will result in serious injury to the corporation or to the interests of the other stockholders." Some color to the present action of the complainant might seem to arise from the last paragraph of the foregoing quotation. It may be that where the bill discloses a state of facts such as that the governing body, acting under the direction or control or in complicity with the managing stockholders, are doing some wrongful act to the injury of the minority stockholders, or in some way or fashion are illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, the restraining and corrective power of a court of equity could be appealed to. But this implies that the offending majority are employing the corporation, through the directory, to work out some forbidden fraudulent purpose, to the injury of the minority stockholders. But the utmost that can be drawn from this is that the wronged stockholder would have a standing in a court of equity only in a suit against the directors and other stockholders to restrain them from further pursuing the course of conduct complained of, where they can be brought within the jurisdiction of the court; and this, as already stated, would be essentially a proceeding in personam against the offending stockholders and their supple instruments, the directors. The sum and substance of the matters complained of in this bill pertain to improvident and wasteful administration by the board of directors. And while there is in the conclusion of the bill the general averment "that divers persons, whose names and residences are unknown, have combined and confederated together, and have gained control of the property and assets of said company, and are wrongfully and purposely diminishing the value of the stock," etc., this is not more than the general confederacy clause in pleading, which might well have been omitted from the bill without affecting its sufficiency. It does not amount to a substantive averment of a specific charge of fraudulent conspiracy between the majority stockholders and the board of directors, so as to present an issuable fact. The bill, however, does distinctly allege that the matters of mismanagement by the board of directors and their managing agent in charge of the property were laid by complainant before the stockholders at Edinburgh, at their annual regular meeting, with a request that they be rectified, and that the convention of stockholders, on the contrary, ratified or approved the course of conduct pursued by the directors. If this be so, why does it not bring the case within the rule recognized by Mr. Justice Miller, on page 455, 104 U. S., and page 830, 26 L. Ed., in *Hawes v. City of Oakland*, as deduced from the holding of the vice chancellor in *Foss v. Harbottle*, 2 Hare, 461?

"That it was the duty of the plaintiffs—the two shareholders who complained of what had been done—to have called a meeting of the shareholders, or attended at some regular annual meeting and obtained the action of the majority on the matters in issue. The majority, he says, may have been content with what was done, and may have ratified the action of the board, in which case the whole body would have been bound by it."

In the case at bar, if the allegations of the bill were conceded to be sufficient to authorize an injunction against the offending stockhold-

ers and directors, they are not before the court, nor can they be brought in by process. Consequently only the corporation and its property are present to be acted upon. Therefore this action, to be effectual and conformable to the relief sought, must be by the court taking charge of this property through a receiver and administering it. It may be conceded that if it were alleged that this corporation is insolvent, and that these directors are threatening to proceed in the management of its assets so as to endanger the interests of the stockholders, the implied trusteeship of such directors to hold and conduct its affairs for the use and benefit of the creditors and stockholders would then become what may not inaptly be termed an "active trust," which would invite the interposition of a court of equity to appoint a receiver, and take charge of its assets and administer them for the benefit of the creditors and stockholders. But that is not this case. In *Silver Mines v. Brown*, 7 C. C. A. 412, 58 Fed. 644, the court of appeals of this circuit has given such clear expression to its judicial mind upon this question as to conclude the judgment of this court. It limits the power of a court of equity to interpose at the instance of a stockholder, where the company refuses to move, to a bill—

"To restrain the officers or directors of a corporation when it appears that in their capacity as agents or trustees of the stockholders they have committed acts that are tantamount to a breach of trust, where such acts consist of the fraudulent dealing with the corporate property or funds, or where they consist in engaging the corporation in enterprises that are beyond the scope of its charter powers. * * * But a court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors relative to the proper mode of conducting the corporate business, as it may do in cases of similar controversies arising between members of an ordinary partnership. Corporations are, in a certain sense, legislative bodies. They have a legislative power, when the directors or shareholders are duly convened, that is fully adequate to settle all questions affecting their business interests or policy; and they should be left to dispose of all questions of that nature without applying to the courts for relief. A stockholder of a corporation cannot successfully invoke the power of a chancery court to control its officers or board of managers, or to wrest the corporate property from their charge, through the agency of a receiver, so long as they neither do nor threaten to do any fraudulent or ultra vires acts, and so long as they keep within the limits of the by-laws which have been prescribed for their governance. If in either of the cases last specified the stockholder is nevertheless dissatisfied with the business policy that is being pursued, or the methods of corporate management, he must seek redress within the corporation, in the mode prescribed by its charter and by-laws, rather than by an appeal to the courts. Moreover, the doctrine is very well established that a court of equity has no power, at the suit of an individual, to decree the dissolution of a domestic corporation, and the winding up of its affairs, unless such extraordinary power has been conferred upon it by the term of some statute. The better view entertained is that at common law no such power to decree a surrender or forfeiture of the corporate franchises was vested in courts of equity, to be exercised at the suit of an individual, although some courts have upheld the right of a court of chancery to exercise that power when invoked by the state through its attorney general."

Further on the court said:

"It is hardly necessary to remark that if courts of equity, at the suit of a shareholder, and in the absence of a statute, have no jurisdiction to dissolve a domestic corporation and to wind up its affairs, much less can they exercise such powers with respect to foreign corporations."

In *Stafford & Co. v. American Mills Co.*, 13 R. I. 310, the court was asked to appoint a receiver for a New York corporation doing business in Rhode Island, where the larger part of the corporate property was located. Although the corporation entered its appearance, the court dismissed the bill because such jurisdiction was not conferred by their statute.

In *Redmond v. Manufacturing Co.*, 13 Abb. Prac. (N. S.) 332, a stockholder sought to compel a foreign corporation to divide the assets among the stockholders. The court said:

"To attempt by a judgment of this court to compel a foreign corporation to distribute its assets among the stockholders because some of the directors are resident here, or because some of the funds were within the jurisdiction of the court, would be to assume a power which the court ought not to exercise, and render judgment which could not be enforced against the company in the place of its existence."

This doctrine is recognized and applied in *Leary v. Navigation Co.* (C. C.) 82 Fed. 775, where it was held that while, under certain conditions, a suit may lie against a corporation and the managing officers, in which a receiver may be appointed for the mere purpose of conservation, as incidental to the main object of the suit, "the principle does not apply to a case where the officers, being beyond the jurisdiction, cannot be brought to account, nor compelled by court to restore ill-gotten gains, and where the appointment of a receiver for the protection of the complainant's interests is the main object of the suit"; that, in all cases where it may become necessary to inquire into and regulate the internal affairs of a foreign corporation, resort should be had to the courts of the residence of the corporation, having jurisdiction to enforce such decrees; and that a court of equity will not undertake the management and control of a corporation "with a view of experimenting to ascertain if the stockholders' investment may not be made more profitable by having the business conducted by a receiver." Solicitous to see if there is not within the compass of the equity powers of the court, consistent with the allegations of the bill, any relief for the complainant, short of putting an end to the corporation by winding up its affairs and disbursing its assets, the court is much impressed by the following observation of Judge Hanford in the case last cited:

"If a receiver is to be appointed for the mere purpose of extending protection to the complainant's interests, by taking the property of the corporation into custody, so as to prevent the officers of the corporation from using it fraudulently, when may the court relinquish its custody? Certainly not until the officers whose honesty is questioned shall have disposed of their interests as stockholders, lest after an indefinite time the present relations of the parties are re-established, leaving the complainant in as bad a situation as he is now with regard to the future operations of the corporation."

The further contention of complainant is that the jurisdiction to afford the relief sought is conferred over this foreign corporation by the act of the Missouri legislature approved April 21, 1891 (Laws Mo. 1891, p. 75). The first section of this act, after declaring that every such corporation formed in any other state, territory, or country, before it shall be authorized to transact business in this state shall maintain an office or place in this state for the transaction of its business,

where legal service may be obtained upon it, and where it shall keep proper books to enable the corporation to comply with the constitutional and statutory provisions governing such corporations, declares that "such corporation shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." This is followed with other provisions and limitations which are not material to the question here involved. This act in this particular is identical with the statute of Colorado (Sess. Laws Colo. 1893, pp. 88, 89, § 1) which was in force when the case of *Silver Mines v. Brown*, supra, on appeal from the state of Colorado, was considered; and, as no allusion was made thereto in the opinion of the court, the inference is that it was not claimed by the learned counsel engaged for the complainant in that case that the Colorado statute conferred the equity power contended for. On the contrary, it is to be assumed that the court of appeals did not regard this statute as in any wise enlarging the general equity doctrine in question, especially as the court cited approvingly the case of *Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039, in which was brought in review a like question of jurisdiction, as affected by the local statute of that state, which provided, among other things, that "any corporation not chartered by the laws of this state which shall transact business therein, shall be deemed to hold and exercise franchises within the state, and shall be liable to suit in any of the courts of this state on any dealings or transactions therein." In another section it was provided that "suits may be brought in any court in this state * * * against any corporation not incorporated under its laws, but deemed to hold and exercise franchises therein, or against any joint-stock company or association doing business in this state, for any cause of action," etc. It was held that even the language of this statute, broad and comprehensive as it is, did not have the effect to give the courts of Maryland jurisdiction over the internal affairs of nonresident corporations, or any visitorial power, nor the power "to exercise authority over the corporate functions, by-laws, or relations between the corporations and its members arising out of and depending upon the law of its creation. These powers belong only to the state which created the corporation." The general rule on this subject is that such statutes, prescribing the conditions and regulations under which foreign corporations may do business in the state, will not be construed as domesticating such corporations for all jurisdictional purposes unless such intention is clearly and unmistakably indicated by the affirmative terms of the statute, even where the original purpose of such organization was to do business chiefly in the particular state. *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673-683, 14 Sup. Ct. 533, 38 L. Ed. 311; *Railway Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Markwood v. Railroad Co.* (C. C.) 65 Fed. 817. The evident object of the provision above quoted from the Missouri statute was to subject the foreign corporation to such liabilities for actions against it as a citizen would have against a domestic corporation, as on contract, express or implied, or for its acts of omission or commission whereby an injury should be done to another person or corpora-

tion; and subjecting it to the same restrictions and duties respecting its operation and conduct, and its liabilities for taxation and the like, which are imposed upon corporations of like character organized under the laws of the state, and that it shall exercise in the state, while doing business here, no other or greater powers than those of like corporations created under the laws of the state. Neither by expression nor implication does the statute confer upon the local courts the power of visitation, or the right of a court of equity to seize the property of a solvent corporation, and proceed by receivership to administer, wind up, and distribute its property among its creditors and stockholders, especially in the absence of its board of directors outside of the jurisdiction of the court, and where it does not appear that even such managing directors are doing any act ultra vires, or are engaged in or are contemplating the doing of any fraudulent act within the province of a court of equity to prevent by injunction.

The final contention of complainant is that the above act of 1891, coupled with sections 2790, 2791, and 2792 of the Missouri Statutes of 1889, confers the necessary jurisdiction on this court to appoint a receiver, etc. Said section 2790 enumerates the conditions under which, and instances in which, the circuit court of the state shall exercise jurisdiction over directors, etc.: First, to compel the directors to account for their official conduct in the management and disposition of the funds, property, and business committed to their charge; second, to compel the payment by them to the corporation and its creditors of all sums of money and the value of all property which they may have acquired to themselves or transferred to others, or which they have lost or wasted, by any violation of their duties or abuse of their powers as such directors; third, to suspend any director or other officer from exercising his office, for abuse of his trust; fourth, to remove any such director upon proof of conviction of gross misconduct; fifth, power to direct new elections to be held by the corporation or stockholders to supply any vacancy created by such removal; and, sixth, to restrain and prevent the alienation of the property of the company by the directors when it may be threatened, or there is reason to apprehend that it is intended to be made in fraud of the rights and interests of the company. Section 2791 authorizes the appointment of a receiver in such instances, to take charge of the business, property, etc., of the corporation, and collect, sue for, and recover debts and demands; and section 2792 declares that "the jurisdiction conferred by this article shall be exercised as in ordinary cases on petition filed by or at the instance of any director, trustee or other officer of such corporation, having general superintendence of its concerns, or at the instance of any creditor or stockholder of such corporation." From which it is perfectly clear that the proceeding contemplated is one directed against the offending directors for their official misconduct in the management, etc., of the funds, property, and business of the corporation, and to make them account for the misappropriation or misapplication of the funds of the corporation coming to their hands, with power to suspend and remove such officers, and to restrain and prevent the disposition of the corporate property by the directors when threatened, or there is good reason to apprehend that it is about

to be done in fraud of the interests of the company. This is but little, if anything, more than the powers already conferred by general jurisprudence upon courts of equity. Under such a statute, as said by the court in *Bangs v. McIntosh*, 23 Barb. 591, "affecting liberty or property, the prescribed form for obtaining jurisdiction of the subject-matter must be strictly pursued." It confers no authority upon the court of the state, even in respect of domestic corporations, to wind up the affairs of the corporation, but is evidently restrictive and supervisory in its operation over the managing directors, as such, in the enumerated instances. It results that the demurrer must be sustained.

STOCKTON et al. v. WATSON et al.

(Circuit Court of Appeals, Seventh Circuit. May 7, 1900.)

No. 587.

PRINCIPAL AND AGENT—AGENCY CREATED BY COURSE OF DEALING—RIGHTS OF THIRD PERSONS DEALING WITH AGENT.

During some six years, complainants, who resided in New Jersey, made loans of trust funds in Chicago through one A., who took and forwarded to them applications, notes, mortgages, and abstracts of title, and upon whom they relied to examine titles, make valuations, and to disburse the loans, paying off prior liens therefrom when necessary. He also collected interest on such loans, and in some cases the principal, remitting the same to complainants. In the six years, 26 loans, aggregating over \$100,000, were so made. During such time defendant applied to A. for a loan for the purpose of paying off an existing incumbrance on his property. He furnished an abstract, and at A.'s request executed a note and trust deed to A., which the latter forwarded to complainants; first indorsing the note without recourse, as was the custom between them. Complainants accepted the loan, and remitted the amount to A., who converted it to his own use; stating to defendant, from time to time, that the money had not been received. After a year, A., at defendant's request, executed a release of the trust deed, which defendant recorded, and procured a loan from other parties, with which he paid off his prior mortgage. For two years A. continued to remit to complainants the interest on the note, representing it as having been collected from defendant. Defendant had no direct dealings with complainants, and had no knowledge for whom A. was acting, or that the note and mortgage, which A. claimed to have mislaid, had ever gone out of his possession. *Held* that, as between the parties, A. was the agent of complainants, who were bound by his acts, and that they could not enforce the mortgage, for which defendant received no consideration.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This appeal is prosecuted from a decree in favor of the appellees (defendants below) dismissing the bill of foreclosure filed September 12, 1893, against the principal defendant, Watson, and against Bliss and Hanscom, trustees, the active defendants, for want of equity; ordering cancellation of Watson's note for \$3,500, together with the trust deed sought to be foreclosed, as without consideration and void, and as a cloud upon the title of Watson's homestead. The bill prayed for the foreclosure of a note and trust deed for \$3,500, dated December 21, 1889, due two years after date, payable to the order of Isaac E. Adams, drawing 8 per cent. interest, payable semiannually, payable at such place in Trenton, N. J., as the legal holder might from time to time, in writing, appoint, or, in default of such appointment, then at the office of Isaac E. Adams, in Chicago. The note was indorsed to appellants (complainants below); trus-

tees, without recourse, by Isaac E. Adams, and secured by trust deed to Adams' trustee; Hamilton and Lynch being first and second successors in trust. The bill recited the assignment and transfer of the note by Adams for the consideration of \$3,500, and prayed foreclosure for nonpayment of principal, and for alleged failure on Watson's part to keep the premises insured. The bill alleged, also, that Adams, trustee, had released the trust deed without authority, and that it was only within a short time prior to the filing of the bill that complainants had discovered the release. The answers of Watson and Bliss and Hanscom admitted the execution and delivery of the note and trust deed to Adams, but alleged that the same had been left with him under such circumstances that Adams, by such execution and delivery, had acquired no legal or equitable title thereto, nor had complainants subsequently; that the delivery was made to Adams, as the agent of complainants, for the express purpose of effecting a loan wherewith to take up the existing incumbrance in a like amount, then held by the Home Building & Loan Association of Rockford, Ill., on Watson's homestead; that the money had never been paid to Watson, nor had the mortgage been paid off by appellants. In their answers and cross bills, appellees insisted that appellants never purchased the note and trust deed, in the ordinary acceptance of the term; denied that Adams or appellants had ever given to Watson consideration for the note; and insisted that Adams was at the time of the Watson transaction, and for a long time prior to the filing of the bill had been, the agent of appellants in Chicago, and that the note and trust deed were left with Adams, to be forwarded to appellants for inspection and approval by them, and, when inspected and approved, if funds were available, the loan would be completed, and the money paid over to the prior mortgagee in discharge of the mortgage; that Adams, as such sole Chicago agent of appellants, had invested large sums of trust moneys for appellants prior to the event in question, and that his opinion as appellants' agent and attorney, together with his recommendation of the security, was conclusive with appellants as to regularity, title, and value in all loans so made for them; and that Adams had full authority to act for appellants in the submission, preparation, consummation, and discharge of these loans, and was duly authorized to receive the money so sent by appellants, and properly disburse the same. It was also recited that appellants had notice of the existing incumbrance, and the use to which the money was to be put, both through their agent and of record; that the loan made by Bliss and Hanscom paid off the mortgage to the building and loan association, and while the trust deed to Bliss and Hanscom, trustees, was of record until 1893, it had never been questioned until the filing of appellants' memorandum and declaration. The cross bill of Watson prayed that the note and trust deed might be declared void and without consideration, and be canceled, and the trust deed decreed a cloud upon his title. The cross bill of Bliss and Hanscom prayed that theirs might be declared a paramount lien, and for a decree of foreclosure. The master reported in favor of appellees. The court overruled the exceptions filed by appellants, dismissed the bill for want of equity, sustained the cross bills, and decreed the relief asked by Watson, and that asked by Bliss and Hanscom, except that the latter elected not to press the foreclosure of their security; Watson not being in default as to interest, etc.

There is no dispute about the facts of the case, the only disputed questions relating to the proper conclusions to be drawn from the finding of facts by the trustee. These were as follows:

(1) That in the year 1889 the defendant Orson H. Watson was the owner of certain real estate in Cook county, Ill., described as follows: Lot 41 in block 4 in J. R. Wickersham's resubdivision of blocks 5 and 6 in K. K. Jones' subdivision of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 23, township 40 N., range 13 E. of the third P. M.; also, lot 22 and the S. $\frac{1}{2}$ of lot 23 in block 8, Cairnduff's addition to Edgewater. And the said lot 22 and S. $\frac{1}{2}$ of lot 23, last mentioned, were subject to a mortgage to the Home Building & Loan Association of Rockford, Ill., to secure a loan of the sum of \$3,500, which mortgage was dated October 15, 1888, and duly recorded in said Cook county on November 5, 1888.

(2) That in 1889 said Watson desired to take up the said \$3,500 loan, and was introduced to the defendant Isaac E. Adams by a man named Johnson, and stated to Adams the purpose for which he wanted the loan. That said

Adams stated to Watson that he (Adams) was agent for the parties in the East who controlled a large amount of money, and that he thought he could make the loan. That thereupon said Adams called for the abstract of title to Watson's property, and the same was delivered to him by said Watson for examination, and was kept by said Adams for some days, after which time he stated to said Watson that "they" would make the loan; that it was customary to make out the trust deed and notes, and everything; and that he would examine the abstract, and send the papers East for examination. And the master finds that this was in fact in accordance with the wishes and instructions of the complainants to said Adams, and in the course of dealing (i. e. that the money was forwarded by complainants only after examination and approval of such papers as were sent to them); that thereupon said Watson executed the note for \$3,500 to the order of said Adams, and the trust deed securing the same to said Adams as trustee, and W. A. Hamilton as successor in trust; said Watson's wife, who has since died, joining in the execution of said trust deed. That said note and trust deed were prepared by said Adams, or in his office, and that at his request an additional piece of real estate (being lot 41, above described) was included in said trust deed, but that said last-named piece of property was subsequently taken back by the person from whom said Watson had purchased it, being subject to a prior incumbrance.

(3) That, shortly before the time when said note and trust deed were executed and delivered to said Adams, said Watson also signed a certain application for loan, which was prepared by said Adams, and by him forwarded to complainants, which provided, among other things, that the cost of all papers, searches, etc., should be at said Watson's expense, and subject to the approval of said Isaac E. Adams. Said application also included an appraisal by C. E. Johnson and C. F. Ames, in which the land was valued at \$1,800 and the buildings at \$4,700. And that all of the papers named, together with the abstract, were left with said Adams by said Watson; said Adams stating that he would have to hold the abstract for examination, and have it brought down, with the trust deed entered on it.

(4) That at the end of two weeks said Watson called, and said Adams claimed that he had not had time to examine the abstract. That said Watson continued to call from day to day, and that it was several months before said Adams had the abstract examined. That some further time was consumed in correcting a slight flaw in the title. That in the meantime said Adams stated to said Watson that he had sent the note and trust deed East for approval, but did not say to whom he had sent them, or to what place. And that said Watson did not know whom Adams claimed to represent until the early part of the year 1893, as hereinafter stated.

(5) That after the delivery of said papers to Adams, and after the aforesaid defect in the title had been cured, said Watson made frequent calls upon said Adams, and the latter put him off from time to time upon various pretexts—First, that the parties who were to loan the money had not answered him yet; then, that they did not have the money; that they very soon would have it; that they had loans that were due, and some had not been paid; and that as soon as they got the money they would make the loan. These visits by Watson extended over nearly a year, during which said Adams stated one definite time at which the parties would make the loan, and had the Home Building & Loan Association draw on him at his bank, but stated that the money did not come forward, and so he could not pay it, and he did not pay the draft.

(6) That finally said Watson became impatient, and insisted upon having the money at once. That Adams said he would give the papers back, and a release. That he did execute the release, which is in evidence, and returned a part of the papers, including the abstract, but did not return the note or the trust deed. That he stated at the time that there were one or two of the papers mislaid, that he could not put his hands on just then; but he had them somewhere in his office, and he would give them to said Watson when he found them. That said Watson afterwards continued to call from time to time at Adams' office, and telephone him and write him, but said Adams stated that he could not find said trust deed and notes; that they were mislaid, and were of no value anyway.

(7) That said Watson was a bookkeeper employed by Parkhurst & Wilkin-

son, in Chicago, and knew of said Adams only as a lawyer in good standing, and a friend of the senior member of the firm by which he (Watson) was employed; that he had no suspicion, or reason for suspicion, of said Adams' honesty; that he never paid any money to said Adams or to complainants for interest or insurance, and was never called upon by them, or either of them, for any money for any purpose, except in 1893, as hereafter stated, or for the production of tax receipts; and that he never knew or had reason to suspect that the complainants held his note and trust deed until on or about May 17, 1893, when he received from complainants' attorneys in Chicago a letter demanding payment of said note.

(8) That at the time of executing said release said Adams stated to Watson that he had complete authority to transact all his principal's business, execute releases, and everything.

(9) That said Watson, for the purpose of taking up the building and loan association mortgage above mentioned, made a written application, which appears in the evidence, dated October 20, 1890, to the defendants Bliss and Hanscom, for a loan of \$3,400, which was accepted, and afterwards, and on the 8th day of November, 1890, said Watson and his wife executed and delivered to said Bliss and Hanscom the note for \$3,400, and the trust deed securing the same, upon the said Edgewater property, both of which appear in the evidence herein. That Watson informed Bliss and Hanscom, through their lawyer, that he had attempted to get the money through Adams, but his parties could not make the loan. That said trust deed was duly recorded in said Cook county on the 13th day of November, 1890, and on the same day said Bliss and Hanscom paid to said Home Building & Loan Association of Rockford, Ill., the sum of \$3,346.60 upon their draft for that amount, and thereupon, also on the same day, said Home Building & Loan Association executed and delivered to said Watson and wife a release of their said mortgage dated October 15, 1888, on said Edgewater property, which release was duly recorded in said Cook county November 24, 1890.

(10) The master further finds that no part of the principal of said Bliss and Hanscom note has been paid, and that the same is overdue and unpaid in whole or in part, together with interest thereon from and after May 8, 1896, according to the terms of said note.

(11) The master further finds from the evidence that the \$3,500 note of Watson, and the trust deed securing same, were forwarded by Adams to the complainants, Stockton and Anderson, on or about January 11, 1890. That they were duly received by complainants, and they thereupon forwarded the sum of \$3,500 to said Isaac E. Adams by a draft for that amount on the Union National Bank of Chicago, dated January 15, 1890, signed by both of said complainants, as trustees, and payable to the order of said Adams. That, in the same letter in which said Adams inclosed said note and trust deed, he stated he would send opinion the next week. A letterpress copy of an opinion on the Watson title was introduced in evidence from the books of the firm of Adams & Hamilton, of which said Adams was the senior partner, but there was no satisfactory evidence introduced that it ever came into possession of complainants. Said opinion was dated January 10, 1890, and was signed with the firm name in Adams' handwriting, but it was a false opinion, in that it made no mention of the existing mortgage to the Home Building & Loan Association, and falsely stated that the title to the Edgewater property was in said Watson in fee simple, subject only to the trust deed to Adams, dated December 21, 1889, securing said \$3,500 note.

(12) The master further finds from the evidence that the complainants were not aware of the existence of said prior mortgage until the early part of the year 1893, and consequently finds it to be the fact either that they did not receive the abstract of title to the Watson property, or else that, if they did receive it, they did not make a careful examination of said abstract, and that, if they had made a careful examination of said abstract, they would have discovered the existence of such prior mortgage, and that it did not appear to have been released.

(13) The master finds that the \$3,500 which was sent by complainants to Isaac E. Adams by draft dated January 15, 1890, was received by said Adams and appropriated by him, and that he never turned over any portion thereof

to said Watson, but, on the contrary, stated to said Watson that he (Adams) had not received said money; that, after so appropriating said \$3,500, said Isaac E. Adams himself paid to the complainants the semiannual installments of interest upon Watson's note for that amount which they held, representing to complainants that he (said Adams) was collecting such interest from said Watson; that such interest payments were made by said Adams semiannually until on or about February 24, 1893, at which time the said Watson note was more than 14 months overdue, and said Adams also kept said premises insured.

(14) The master further finds that the complainants never had any direct dealings or communication with said Watson concerning said loan or proposed loan; that all the business relating thereto was transacted by them through said Adams; that they made no demand upon said Watson for payment of said note, nor did they communicate with him in any way regarding the same until May 16, 1893; that said complainants shortly before that time discovered that said Watson trust deed had been released by said Adams, and they thereupon, on April 24, 1893, filed for record in said Cook county the memorandum and declaration which is in evidence herein,—stating, among other things, that said release was made without authority, and that they claimed that said trust deed was still a valid lien upon the premises therein described.

(15) As to the character of the business relations between the complainants and said Isaac E. Adams, the complainants testified in their depositions taken in Trenton, N. J., and the witness W. A. Hamilton, who is a defendant herein, testified before the master. There was also introduced a great mass of correspondence between the complainants and said Adams, most of which was objected to; but as complainants had testified that their relations with said Adams were only of a very restricted character, and had introduced a copy of one of their own letters in corroboration of such testimony, the master considered it proper to admit as much of such correspondence as either of the parties regarded as material, in order that the entire facts as to such business relations might appear. The master finds from the evidence that the defendants Isaac E. Adams and W. A. Hamilton formed a partnership for the practice of the law on January 1, 1888, which continued until the 1st of December, 1892, but that prior to said partnership, and from November 1, 1886, said Adams and Hamilton had been together, and sustaining relations almost those of co-partners.

(16) The master finds that the relations between said Adams and the complainants began in the fall of 1886, and continued without intermission until about April, 1893; that such relations were with Adams personally, and not with his firm, although the legal work required was performed by said firm, and by them charged to the respective borrowers; that the complainants were trustees of an estate, and had large sums of money to loan, and, desiring to make loans on property in the city of Chicago, they made arrangements for that purpose with said Isaac E. Adams; that all of the correspondence relating to the complainants' affairs in Chicago was carried on with and by Adams, excepting in a few instances when he was absent from the city or was ill; that all applications for loans were presented to the complainants by Adams; that all moneys sent by complainants to be loaned in Chicago were sent to said Adams; that those moneys were all disbursed by said Adams, excepting in one or two instances when he was absent from the city; that all collections of principal and interest due on complainants' loans in Chicago were made by said Adams, with a very few exceptions, and all matters of renewals of loans, insurance, and the payment of taxes were attended to by said Adams, and that as to all questions of title, values of securities, form and preparation of papers, removal of existing liens, and in fact all the details arising in connection with the loaning of money upon real-estate security, the complainants relied almost in every instance wholly and solely upon the judgment and advice of said Adams; that in some instances they required valuation by appraisers, but intrusted the selection of such appraisers to said Adams; and that this continued during a period of more than six years, extending from the latter part of 1886 to the early part of 1893.

(17) That during said period said Adams made 26 loans for the complainants, aggregating upward of \$110,000; that he collected and remitted to them large sums from time to time, and that as a usual thing when making loans he sent the securities, abstract, and opinion of title to the complainants before receiving the money for them, but in some instances the money was sent to him by complainants when they had received only a portion of the usual papers; that in making collections the usual course was for said Adams to forward the money to complainants before receiving the notes or interest coupons from them, but that in some instances the notes, coupons, etc., were sent by express or by mail to said Adams for collection before complainants had received the money, and that in several letters they expressed a willingness to send others of such coupons to said Adams in advance of collection; that in seven instances principal notes were intrusted by complainants to said Adams for collection, and in two instances for renewal, and that during the entire correspondence between them complainants had no letter books, and kept no copies of any of their letters to Adams, excepting one letter, dated December 24, 1886, which was the first letter in which they definitely accepted any Chicago loans, and is marked "Compl'ts' Exhibit C."

(18) The master further finds that said Adams represented the complainants as their attorney in two lawsuits to which they were made parties, and that this was known to the complainants, and that they referred to said Adams as their attorney in one or more of their letters.

(19) The master further finds: That in the fall of the year 1888 one Charles D. Seeberger called in person upon the complainants, at Trenton, N. J., and stated to them that said Isaac E. Adams had, in connection with the complainants' business, misappropriated two notes, for \$3,500 each, in which said Seeberger was interested as half owner; that said Adams had canceled a certain trust deed securing a note for \$7,000 belonging to complainants, and had, without said Seeberger's knowledge or consent, substituted therefor said two \$3,500 notes. That it was then made known to said complainants that said Adams, after releasing said \$7,000 trust deed, had left the complainants without any security for said \$7,000 for about five months, extending from September, 1887, to February, 1888. That said Seeberger also then called complainants' attention to a certain alleged misrepresentation in one of said Adams' letters relating to a loan to one Ryan, which consisted in a statement that the money borrowed was to be used in improving the property, whereas in fact it was already improved. That said Seeberger also then informed complainants of certain alleged misdoings of said Adams in connection with a certain building loan made by complainants to one O'Connor, where said Adams was accused of withholding funds from the borrower unjustly, and after the building had been completed. That said Seeberger then informed said complainants of two other matters in which said Adams was alleged to have been guilty of crooked and dishonest work, and to have embezzled large sums of money. That said Seeberger then stated to complainant Stockton that he would be very glad to have him make a personal investigation in Chicago. That said complainant Stockton thereupon expressed his surprise, and stated that he thought there must be some explanation; that he did not know why Adams should rob his friends at home, rather than rob him (Stockton), when he had so much better opportunity to.

(20) The master further finds that in October, 1890, said Seeberger presented to the complainants documentary proof that said Adams had released said \$7,000 trust deed (being the Bagley loan) on September 30, 1887; also, that at about the same time said Adams had, in consideration of such release, received a conveyance from said Bagley of a one-half interest in the property so released; and that said complainants were then informed that by such transaction said Adams had made a profit of about \$3,000; that they were then also informed of the fact that Adams had falsely represented to them that the land on which said two substituted notes, of \$3,500 each, were secured, was worth \$30,000, whereas in fact (so it was stated to them) said land had just been purchased for about \$12,500.

(21) The master further finds that said complainants made no personal in-

vestigation as to said matters of which they were informed by or through said Seeberger, but that said Stockton requested a friend who was going to Chicago to look into the question of value of the property, and talk to the owners, where he could reach them easily, and see if Adams had been doing anything that he (Stockton) might not approve of; that he gave to said friend a list of some or all of his Chicago loans, probably including Watson's, and that this was some time after said Stockton had the Seeberger story in full; that said friend's report was verbal, and probably through another man, and made no mention of his having seen said Watson.

(22) The master further finds that, in the case of all loans made by them through said Adams, the complainants invariably required that the securities should be in their hands, in Trenton, before they would advance the amount of such loan, and that it was in accordance with their rule and requirement in that regard that said Watson's note and trust deed were forwarded to them in advance of the payment of any of the money by them.

(23) The master further finds that, in their letters relating to a proposed settlement with Adams, the complainants accused him of having collected over \$1,000 of interest, and failed to account to them therefor, and evidenced the intention of holding said Adams responsible for the payment to them of such amount, but that this was long subsequent to the making of the Watson loan, and after complainants had discovered that the Watson trust deed had been released.

(24) The master further finds that both of the complainants are lawyers by profession, and that both of them have had large experience in the loaning of money and handling of trust funds, and had had such experience prior to their entering into any relations with Isaac E. Adams.

Upon the coming in of the master's report, and various objections being made to it by the complainants, the master made additional findings of fact as follows:

(1) That the mortgage to the Home Building & Loan Association of Rockford bore date October 15, 1888, and was given by the defendant Orson H. Watson, and Lelia A., his wife, to secure an obligation of the said Orson H. Watson, individually, to pay the said association, in monthly installments, \$17.50 on his stock subscription of \$3,500; \$23.33½ interest, at the rate of 8 per cent. per annum; and \$5.83½ monthly premiums.

(2) That in the months of November and December, 1886, the defendant Isaac E. Adams wrote the complainant Stockton several letters, soliciting the opportunity of placing loans in Chicago for complainants; and on December 20, 1886, he wrote Stockton, submitting several applications for loans.

(3) That both the complainants testified that neither of them, nor any one on their behalf, had ever employed or authorized the said Adams to act as their agent in the matters in controversy in this suit, or ever paid or agreed to pay him anything by way of commission or compensation for any services relating to the said matters. But both the complainants testified that they had never authorized Adams to release the trust deed sought to be foreclosed in this suit, and did not learn until April 1, 1893, that any deed purporting to release the same had been put on record.

(4) That in December, 1889, the firm of A. F. Seeberger, who were indebted to the complainants for a certain loan, known as the "Ryan Loan," which they had obtained from the complainants through Isaac E. Adams, declined to deal with said Adams in relation to the payment of their loan; and thereupon complainants forwarded their securities to the Union National Bank of Chicago for collection, and the loan was paid to the said bank as the agent of the complainants.

(5) That the defendant Watson never made any inquiry as to who were the persons whom Adams claimed to represent.

(6) That the only object of Charles D. Seeberger's visit to the complainants in Trenton during the fall of 1888 was to give the complainant Stockton full notice of whom and what Adams was, that he might bring pressure to bear upon Adams to compel him to take back certain securities held by complainants, and known as the "Hawkin's Paper," in which Seeberger claimed a half or a third interest, so that he (Seeberger) could recover it. That he did not state to Mr. Stockton that it was his purpose to compel Adams to make

restitution, but that he explained to Mr. Stockton the purpose of his visit was to get additional facts concerning what he termed the "misappropriation" of the securities in which he was interested.

(7) That said Seeberger wrote the complainant Stockton on August 17, 1888, that Adams had been his most intimate friend, and that the said notes were left in Adams' keeping. That Seeberger subsequently stated to the complainant Stockton that Adams had the said notes to sell, but had no authority to substitute them on his own transactions, and he then charged Adams with stealing the said notes.

(8) That Stockton testified, as to the stories told him by Seeberger, that there were two sides to them, and he heard them both; that there were other facts in connection with Mr. Seeberger's matters which made it very doubtful in his mind what was the true view to take.

(9) That, in all loans made by the complainants through Adams, the expenses of making the loans, of abstracts, and of recording, and the commissions and charges for examining the title, were charged to the borrowers.

(10) That, in the release deed offered by the defendants as releasing the trust deed belonging to the complainants, two alterations appear to have been made before it was recorded. The month of the date was originally "December"; the word being written in the handwriting of Isaac E. Adams, as is the rest of the deed, except the signature to the certificate of acknowledgment. Over the word "December" in the date of the deed is written in another hand (whose, it does not appear) the word "November." The month of the date of the certificate of acknowledgment was also originally "December," in Adams' handwriting, but has been changed to "October," written in a different hand,—whose, it does not appear.

(11) That the record of the pretended release of complainants' trust deed in the recorder's office of Cook county, Ill., does not, by its terms, refer to the complainants' trust deed, but purports to release to Orson H. Watson a trust deed bearing date December 21, 1887, but in the original release (trust deed) the date is December 21, 1889.

(12) That Adams never had possession of Watson's principal note and trust deed from the time he forwarded them to complainants, but they always remained in the possession of the latter.

(13) That, after the information imparted by Seeberger had been received by complainants, they sent no more principal or interest notes to Adams, prior to the date of the trust deed sought to be foreclosed in the original bill in this cause.

(14) That the complainants never intrusted any of their principal notes to Adams prior to the date of the trust deed sought to be foreclosed by the original bill in this case, except the Bagley note, which was sent to the said Adams for collection on or about September 21, 1887, with a letter of instructions as to making the release, signed by both the complainants as trustees.

Among other conclusions from the facts, the master found:

(1) That the complainants were guilty of negligence in paying the \$3,500 to Adams upon the receipt of the note and trust deed, without exercising reasonable care to assure themselves as to the condition of Watson's title. Either—First, they did not insist upon the delivery to them of the abstract of title; or, secondly, they received it, and failed to examine the state of the title as shown by it; or, thirdly, if they did receive it and examine it, they failed to discover matters there appearing which were sufficient to arouse suspicion and put any reasonable man upon inquiry, and that inquiry, if prosecuted, must inevitably have resulted in the discovery of the true state of facts. That it is uncertain from the evidence whether the complainants received the opinion of title or not. If not, there would seem to be additional negligence on their part. If, on the other hand, they received both abstract and opinion, the most cursory examination of the two would have shown the falsity of opinion, which would have induced even a careless man to make an investigation into the facts. That the principle applicable to the case is the one stated in the recent case of *Breyfogle v. Walsh* (C. C.) 71 Fed. 898, as follows: "Situations often arise where one of two innocent persons must suffer from the wrongs of a third, and where the courts, through compulsion, are obliged to impose a hardship upon one to save a loss to the other. The maxim decisive of such cases is that

the loss must fall upon the one who comes the nearer to responsibility for the wrong of the offender."

(2) That, under the undisputed facts and testimony, Adams, in making the loan, transmitting the securities, and in receiving from the complainants the money, was acting as the agent of the complainants. That the receipt of securities by Adams in accordance with complainants' instructions and demands was, in law, their receipt of such securities, and that the payment in money to Adams, or by him, was the same as payment to or by the complainants. That the long-continued course of dealing with Adams by complainants; their repeated intrusting him with money and valuable securities; their reliance upon his opinion as to values of property and as to title; their intrusting to him the clearing off of prior liens, and their protection from mechanic's liens; and, finally, their evident intention to hold him responsible for interest collected and not paid to them,—all tend to corroborate defendants' claim that Adams was complainants' agent, and that complainants regarded and treated him as such. The master's findings of fact and conclusions of law were confirmed by the court, and the complainants' bill dismissed for want of equity.

Azel F. Hatch, for appellants.

Frederick S. Baker, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts as above). There is practically no dispute about the facts in this case. The findings of the master are fully sustained by the testimony in the case, and were properly confirmed by the court. The full statement of the facts as above in the language of the master's report is equivalent to a decision of the case in favor of the appellees. We fully concur with the conclusions of the master in regard to the superior negligence of the appellants in being the occasion of the loss, and in Adams being the agent of the appellants in making the loan, and in receiving the money which should have been paid to Watson, or applied in payment of the prior incumbrance upon the homestead, but which was embezzled by Adams. There can be no question, from the testimony or from the findings of fact, that Isaac E. Adams, who pocketed the money sent by complainants, and intended for Watson, or to pay off the prior incumbrance, was, all the way through, acting as complainants' trusted agent, not merely for the purpose of submitting applications for loans, but for all purposes connected with the making of the loan, the examination of title, the making of abstracts, the transmission of papers and securities, and the receipt of the consideration. The fact that the note ran to Adams, and was indorsed by him to complainants without recourse, cuts no figure in the case. It is a very common way of doing such business. And the evidence all the way through shows that the loans made by Adams, amounting to some 26 in number, and \$110,000 in amount, of which this loan to Watson was but a small part, running through 6½ years of time, from the fall of 1886 to the spring of 1893, were conducted in the same manner in which such loans have been usually made in the West by capitalists residing in the East. They have their trusted agents, through whom applications are made and transmitted; who examine titles, and submit abstracts to be passed upon by the principals; who draw up the papers and securities for the perfection

of the loan, and present them to the lenders, to be approved by them, and to whom the money is at last sent when everything is ready to perfect the loan. Adams properly represented himself to Watson as being the agent of the parties residing in the East who were to furnish the money and make the loan. Watson did not know their names or where they lived. When this loan was applied for, Adams had been acting for the appellants in that same capacity since the fall of 1886,—some three years. During that time he had made loans, examined titles, procured abstracts, drawn up securities, collected and reinvested large sums of money, and had money sent to him by complainants. There was no intimation on the part of Adams that he was acting as agent for Watson, or otherwise than as agent for appellants, in the East. If he had been agent for Watson, there would have been some provision for payment for his services. How he was to be paid, does not appear. Perhaps his own thefts were considered sufficient compensation. At any rate, he seems to have been the only one that got anything out of this and some other loans. He could well afford to keep up a pretense of collecting interest from Watson and transmitting it to his principals, as though Watson had paid through several years, while Watson was constantly urging him to complete the loan, so long as he had the \$3,500 in his pocket. The payment of the interest served to postpone the day of the discovery of his defalcation, and which, in turn, enabled him to embezzle other moneys. It served for a time to put off the day of reckoning with his employers. And the evidence shows that it had the effect to put it off much longer than it should, or would if complainants had not been blindly negligent of his misdoings long after they had had good and sufficient warnings. It seems that the original contention on the part of complainants was that Adams was a mere broker, whose entire relation to them ended with his submission of applications, and that they were merely purchasers of the note and mortgage from Adams before maturity. Upon the testimony being taken, this position was abandoned, and it was admitted that the loan was made by them to Watson through Adams, but that Adams was acting as agent for Watson, and that payment to Adams was payment to Watson. In the judgment of the court, this claim is quite as untenable as the other. It appears quite clearly that, for three years before this loan was made, Adams had been acting as the agent of appellants in placing money, during which time he had prepared and submitted applications, prepared the securities, examined titles, and had received all moneys advanced upon these loans, and disbursed the same in such a way that theirs should be a first lien upon the mortgaged premises, and that in transmitting moneys, and reinvesting the same in new loans, Adams had been the sole medium and agency of appellants in Chicago, and this relation continued for several years after this loan was made. All this appears from the findings of the master, and from appellants' own testimony on the hearing, so that the claim that Adams was their agent only for the purpose of submitting applications has but little support in the testimony. We find no error in the record, but think the decree of the court was right, and must be affirmed.

COLBURN et al. v. HILL et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 756.

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—CREDITORS' SUITS.

A creditors' suit, the purpose of which is to obtain the administration of the property of an insolvent corporation, and incidentally to exclude certain of the defendants from participating in the distribution of such property, on the ground of the invalidity of a contract made by the corporation, on which their rights as creditors depend, is indivisible, and no one of such defendants can remove the cause on the ground that there is a separable controversy as to him, although their interests may be several, and their defenses different.

2. SAME—REMAND—EFFECT OF CONSOLIDATION.

The consolidation of a suit, after its removal into a federal court, with another suit between some of the same parties, subsequently commenced in said court, cannot affect the jurisdiction of the court over the cause removed, or its duty, or that of an appellate court, to remand such cause on determining that it was not properly removable.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

This bill was filed in the chancery court of Shelby county, Tenn. The complainants are all citizens of Massachusetts. The defendants and their citizenship are as follows: (1) The Hill Shoe Company, a corporation of the state of Tennessee; C. W. Edmonds, William R. Randolph, and David T. Porter, citizens of Tennessee. (2) Mary T. Hill, a citizen of the state of New York. (3) F. Brigham & Co. and Potter, White & Bailey, partnerships, whose members are citizens of Massachusetts; the Davis Shoe Company, a corporation of Massachusetts. Upon the petition of Mrs. Mary T. Hill, one of the defendants, the suit was removed to the circuit court of the United States, upon the sole ground that there was a separable controversy between the complainants and the petitioner, a citizen of the state of New York, which could be fully determined, as between the said Mary T. Hill and the said complainants, without the presence of any of the other parties to the said suit. Is the suit removable upon the petition of Mrs. Hill? Does the fact that some of the defendants joined with her were citizens of Massachusetts, and that others are citizens of Tennessee, prevent a removal by her? The answer to this must depend upon the existence of a separable controversy, within the meaning of the removal statute. A motion to remand to the state court was denied; the learned trial judge being of opinion that the suit embraced a number of distinct controversies, and that, so far as such controversies affected Mrs. Hill, they could be tried out without the presence of any other defendant whose citizenship was identical with that of complainants. The complainants are creditors of the Hill Shoe Company, and sue in behalf of themselves and all other creditors. That company is a Tennessee corporation, and was organized in October, 1889, for the purpose of taking over the assets and business of a mercantile firm known as Hill & Sons. In May, 1891, it made a deed of general assignment to one A. G. Mitchell. Mitchell partially administered the trust and died. The defendant C. W. Edmonds took possession of the remaining assets, claiming to have been appointed trustee under a proceeding in a state chancery court. The validity of this appointment is denied. Mitchell's accounts had not been settled, and complainants averred that he was heavily indebted to the trust, and had been guilty of misappropriating the assets by the payment of invalid obligations, known to be such by him. One object is to protect the trust assets by restraining Edmonds from acting as trustee, and to have them placed in the hands of a receiver for the purpose of administering the trust under the orders of a court of equity. The sureties upon the bond of Mitchell, and also his executor, were made defendants, and an account of his administration sought. Edmonds was also made a defendant,

and an injunction restraining him from acting as trustee was prayed. In the interest of the proper creditors of the corporation, the bill is framed, also, for the purpose of excluding certain persons, claiming to be creditors, and to be secured under the deed of assignment, and also by liens upon property of the corporation senior to the assignment, from participating in future dividends under the assignment, to cancel any liens or mortgages purporting to secure them, and to compel such fictitious creditors to refund dividends paid on their claims by Mitchell, the trustee.

The persons claiming to be creditors, whose claims are challenged, and against whom relief is sought, are the defendants Mrs. Mary T. Hill, a citizen of New York; the Davis Shoe Company, a corporation of Massachusetts; F. Brigham & Co., and Potter, White & Bailey, two mercantile firms, whose members are citizens of Massachusetts. The averments of the bill affecting these creditors who are made defendants, and upon which relief against them is sought, are complex, lengthy, and not altogether clear or consistent. That we may see whether the relief sought against Mrs. Mary T. Hill involves a distinct and separable controversy, which can be wholly disposed of without the presence of any of the other persons made defendants with her, it has been necessary to analyze the bill. Stated in narrative form, and as briefly as possible, its more important averments are substantially as follows: I. M. Hill, the deceased husband of Mrs. Mary T. Hill, was for many years a shoe merchant in Memphis, Tenn., and was a member of several firms who succeeded each other in the same business. At the time of his death he was the chief member of the firm of I. M. Hill & Sons; his partners being two of his sons, Louis P. and William V. Hill, neither of whom had any capital. His death occurred some time in 1888. By his will he devised his entire estate, real and personal, to his widow, Mrs. Mary T. Hill, and made her sole executrix. His estate consisted of his interest in the business of I. M. Hill & Sons, and certain real estate, his individual property. After his death, and before the organization of the Hill Shoe Company, the business of I. M. Hill & Sons was carried on by the surviving partners, L. P. and Wm. V. Hill, under the firm name of Hill & Sons. Whether Hill & Sons constituted a new firm, or merely continued the business for winding-up purposes, does not clearly appear from the bill. It is perhaps inferable that under some arrangement with Mrs. Hill they took the assets and assumed the liabilities of I. M. Hill & Sons. That I. M. Hill & Sons had assets, consisting of the stock of merchandise and book accounts, aggregating several hundred thousand dollars, is averred. But it is also distinctly charged that the liabilities of the firm exceeded the values of the assets very greatly. It is also charged that the estate of I. M. Hill was hopelessly insolvent, by reason of the large indebtedness of the firm of I. M. Hill & Sons and of former firms of which he was a member. In this state of affairs, the bill, in substance, charges that for the purpose of postponing the payment of the liabilities of I. M. Hill, and of securing to Mrs. Hill a settlement in money and property out of his estate, which in ordinary course of administration she could not secure, and for the purpose of carrying on the business with the assets of the former firm, the scheme of organizing a corporation was fallen upon. Accordingly the Hill Shoe Company was organized; the incorporators being Mrs. Mary T. Hill, three of her sons (two of them being the surviving partners of I. M. Hill & Sons), and A. G. Mitchell. It is charged that neither her sons nor Mitchell had any capital, and that Mrs. Hill contributed nothing except certain real estate devised to her under the will of I. M. Hill, and about which more will appear. These corporators, constituted the board of directors, who entered into the engagements and obligations now to be stated. To this corporation, by the consent of Mrs. Hill and the surviving partners of I. M. Hill & Sons, were transferred the assets, including book accounts, of I. M. Hill & Sons and of Hill & Sons, if the latter constituted a new firm. To that corporation Mrs. Hill conveyed the several parcels of real estate which passed to her under the will of I. M. Hill, by a deed which limited the effect of the grant to such title as she had received under the will. It is then, in substance, charged that, in consideration for these assets and real property, the Hill Shoe Company agreed to do certain things, namely: First, to issue paid-up capital stock to Mrs. Hill in an amount not definitely stated, but said to be enough to make her a dominating stockholder;

second, to issue to the three sons of I. M. Hill paid-up shares of stock in an amount not stated; third, to assume and pay all the indebtedness of the old firm of I. M. Hill & Sons; fourth, to assume and pay all the indebtedness of I. M. Hill, either individually, or as a member of any firm with which he had been connected; fifth, to indemnify Mrs. Hill, as executrix, against any liability as such; sixth, to pay to Mrs. Hill monthly, during her life, the sum of \$400, in lieu of any dividends upon her stock in the Hill Shoe Company; seventh, to permit Mrs. Hill to use and occupy the Hill residence, being a part of the realty conveyed to it under the plan and arrangement above set out, during her life, free from rent, taxes, and expenses of repair.

The complainants file with their bill an instrument, styled by the pleading a "mortgage," which was executed by the Hill Shoe Company to Mrs. Hill. A part of the relief sought by the bill is the cancellation of this instrument. It bears even date with her deed to the corporation, and recites that deed, and describes the property conveyed thereby. It is there stated that for the purpose of carrying out the contracts and agreements between Hill & Sons and the Hill Shoe Company, which are referred to as having been made December 24, 1889, the Hill Shoe Company "does hereby promise and agree to and with the said Mrs. Mary T. Hill, and bind itself, as follows: (1) That it will at the end of each month, beginning with the present month of January, 1890, pay to the said Mary T. Hill, for and during her natural life, the sum of \$400 in money for each month, which sum shall be taken and accepted by her in lieu of dividends on any stock she now holds or may hold in the Hill Shoe Company during such time. (2) The Hill Shoe Company hereby grants, bargains, sells, and conveys unto the said Mary T. Hill the right to occupy and use, and have the benefit of, the property at the northeast corner of Court and Third streets, Memphis, Tenn., fronting 74¼ feet on the east side of Third street, being one of the pieces of property heretofore conveyed by the said Mary T. Hill to the Hill Shoe Company, as hereinbefore stated, and the buildings and improvements thereon, and rights and appurtenances thereto belonging, for and during her natural life, as and for her homestead, free and discharged from any rent whatever, and free and discharged from all taxes and other charges and expenses, which taxes and other charges and expenses the Hill Shoe Company hereby binds and obligates itself to pay and discharge during the said time. (3) The Hill Shoe Company hereby assumes and agrees and obligates itself to pay any and all debts and liabilities whatsoever owing by the said Ira M. Hill, deceased, at the time of his death, or owing by the said Mary T. Hill, as executrix of his last will and testament, not already paid or in some way discharged, and to indemnify and save harmless the said Mrs. Mary T. Hill and the estate of the said Ira M. Hill, deceased, from any and against all such liabilities and debts. And for the purpose of securing the performance of each and all the stipulations and provisions of this contract, to wit, the payment of the \$400.00 per month stipulated in the first paragraph above, and the occupation and use of the property at the northeast corner of Court and Third streets, and the payment of the taxes and other charges and other expenses provided in the second paragraph, and the payment of all the debts and liabilities owing by the said Ira M. Hill at the time of his death, or the said Mary T. Hill, as his executrix, not already paid or in some way discharged, the Hill Shoe Company hereby gives, grants, conveys, and agrees to a lien and charge upon the said property so situated at the northeast corner of Court and Third streets, hereinbefore mentioned, and more particularly described in the deed made by the said Mary T. Hill to the Hill Shoe Company, before referred to, and that such property shall be charged and bound for the performance in every particular of this contract, and that should the Hill Shoe Company at any time fail to perform and fulfill, according to its true intent and meaning, each and all the stipulations thereof, then the said Mrs. Mary T. Hill may enforce such lien against the said property, and have the same sold, and the proceeds applied first to pay her any sums due or that may become due by reason of the breach by the Hill Shoe Company of the contract aforesaid, or any of its provisions." It is then charged that the said Hill Shoe Company proceeded to apply its assets in paying off large parts of the indebtedness of I. M. Hill & Sons, and that it gave its promissory notes in settlement of the claims of other such creditors. The two Massachusetts

firms and the Massachusetts corporation joined with Mrs. Hill as defendants are averred to have been large creditors of I. M. Hill & Sons, who obtained the notes of the Hill Shoe Company for their several claims, and who, it is averred, "acted for the Hill Shoe Company in securing other creditors of I. M. Hill and of I. M. Hill & Sons to take the obligations of said company for their debts."

Complainants attack the contract by which the Hill Shoe Company assumed the debts of I. M. Hill and of I. M. Hill & Sons upon two or more grounds. They aver that the agreement was in excess of the power of a Tennessee corporation, and therefore void. They aver that the contract was based upon no valid consideration, and is therefore unenforceable. They also charge that the agreement by which it issued its paid-up stock to Mrs. Hill and her sons, and obligated itself to pay her a fixed sum during life upon her stock, was in excess of the power of the corporation; that the corporation exceeded its power, in acquiring from her real estate not necessary for its business. Finally, they charge that the whole scheme by which the Hill Shoe Company entered into the obligations above set out was intended to hinder, delay, cheat, and defraud the creditors of the Hill Shoe Company, both existing and future. It is charged that the obligations to the creditors of I. M. Hill & Sons and to Mrs. Hill were illegal, void, and nonenforceable, as against the creditors of that corporation especially. The trustee, A. G. Mitchell, is charged with having been an active party in the execution of the original contract by which the Hill Shoe Company assumed obligations rendering it insolvent before it had commenced business, and with having knowledge of the void and fraudulent character and purpose of the whole scheme. It is charged that, as trustee, he had paid to such creditors of I. M. Hill & Sons and to Mrs. Hill large sums out of the trust estate in his hands. The prayer of the bill, particularly based upon this portion of the bill, is that the Massachusetts defendants be excluded from participation in further dividends; that the Massachusetts defendants be required to account for all they have received, either "as dividends or otherwise," and refund same; that the estate of A. G. Mitchell and the sureties on his bond be held to account for all moneys and property which came to his hands, and for all moneys misappropriated by payments on obligations of I. M. Hill or I. M. Hill & Sons, and for all payments to Mrs. Mary T. Hill on account of the void covenants in her behalf; that Mrs. Hill be compelled to account for and refund all sums paid to her under the covenants and obligations for her benefit, and to account for the reasonable value of the use and occupation of the Hill residence; that the appointment of the defendant Edmonds be held void and of no effect, and that he be restrained from further acting as trustee; that all the assets of the Hill Shoe Company be placed in the hands of a receiver, and administered under the orders of the court.

T. B. Edgington and George Gillham, for appellants.

Wm. M. Randolph and Luke E. Wright, for appellees.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The bill, as shown by the foregoing statement, is a general creditors' bill; having for its principal purpose the administration, under the orders and decrees of a court of equity, of the assets of an insolvent corporation, theretofore conveyed under a deed of general assignment. To this end the bill seeks to gather in the assets of the corporation, and to distribute their proceeds in payment of its valid and bona fide debts. The validity of certain contracts and agreements of the corporation is denied, and the bill seeks to exclude all claiming to be creditors by virtue of said contracts and agreements

from participation in the benefits of the deed of assignment, and to recover, for the benefit of bona fide creditors, all sums which have been diverted from the assets of the corporation by improper payments made to such claimants by the original trustee under the company's deed of assignment. Incidental to the elimination of all such illegal liabilities, and the restoration of moneys paid to them improperly, the bill seeks to annul the lien or charge fastened on certain of the property of the company for the purpose of securing the performance of the alleged illegal covenants and agreements. The alleged fictitious creditors against whom relief is sought are the defendants Mrs. Mary T. Hill and certain Massachusetts creditors of the firm of I. M. Hill & Sons, whose debts, it is alleged, were illegally assumed by the Hill Shoe Company. The agreement under which the debts due to the Massachusetts creditors by I. M. Hill & Sons were assumed by the Hill Shoe Company, and the agreement under which Mrs. Hill occupies a part of the corporate property and receives a stipulated monthly payment, have a common origin. They constitute in large part the consideration for the property conveyed to the corporation by the surviving members of the firm of I. M. Hill & Sons and Mrs. Hill. If that contract was neither fraudulent in fact nor illegal, as in excess of the company's power, the decree will be one way; if not, a different result will follow.

The bill attacks the contract as an entirety,—both as a fraud, in law and fact, against future creditors, and also as void, being in excess of the power of a Tennessee mercantile corporation. The beneficiaries under the contract assailed are the creditors of I. M. Hill & Sons, of Hill & Sons, if that was a distinct firm, and Mrs. I. M. Hill. Their interests may be different, and their defenses to the bill may be different, but the subject-matter of the suit is the contract by which the Hill Shoe Company acquired its assets, and in exchange for which it gave its capital stock, and assumed the obligations alleged to be illegal and void. The bill may be demurrable in whole or in part. It may be inconsistent. It may be a good bill as to part of the relief sought against Mrs. Hill, and bad as to the rest. The complainants may not have such a standing as will enable them to sustain such a bill. They may be estopped in whole or in part. We express no opinion as to the merits of the bill. To do so would be to assume and exercise jurisdiction. One thing is clear: There is no separable controversy between Mrs. Hill and the complainants, which can be wholly disposed of without the presence of the other defendants. She is one of others who are interested in maintaining the validity of the agreement under which the corporation acquired its property, and for which it entered into the covenants and obligations now assailed. The so-called mortgage to her is a mere security. If the engagement thereby secured is void for any reason, the security is at an end. But the so-called mortgage is not alone for the security of the obligations personal to her. Its object was to secure the performance of all the obligations of the corporation which were entered into as the price of the property it received. One of them was that it would assume and pay the debts of I. M. Hill, individual and firm. The creditors of I. M. Hill and of I. M. Hill &

Sons have, therefore, an interest in the mortgage. The Massachusetts creditors joined as defendants with Mrs. Hill have therefore an interest, not only in maintaining the general validity of the agreement under which their debts against I. M. Hill & Sons were assumed by the Hill Shoe Company, but in maintaining the validity of the mortgage to Mrs. Hill. The defense of the Massachusetts creditors may be different from that of Mrs. Hill, but it has been repeatedly held that separate defenses do not create separate controversies, within the meaning of the removal act. *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388; *Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898. The relief sought by the bill against both the Massachusetts creditors made defendants and against Mrs. Hill is incidental to the main purpose of the bill, which is to gather in all the assets, disincumber all of the property, eliminate all void or fraudulent obligations, and to distribute all of the proceeds of the corporate property between all its just and bona fide creditors. These results cannot be accomplished unless all of the defendants are parties. There is, therefore, but a single cause of action, and that is the equitable distribution of the assets of an insolvent corporation between its legal and bona fide creditors. This cause of action is not divisible. The suit is therefore not removable, for the citizenship of some of the necessary defendants is identical with that of the complainants.

In *Ayres v. Wiswall*, 112 U. S. 187, 192, 5 Sup. Ct. 93, 28 L. Ed. 695, the supreme court said:

"The rule is now well established that this clause in the section refers only to suits where there exists 'a separate and distinct cause of action, on which a separate and distinct suit might have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of the other parties to the suit as it had been begun. *Fraser v. Jennison*, 106 U. S. 191, 194, 1 Sup. Ct. 171, 27 L. Ed. 131. As has already been seen, this is not such a case. There is here but one cause of action. The fact that separate answers were filed, which raised separate issues in defending against the one cause of action, does not create separate controversies, within the meaning of that term as used in the statute. They simply present different questions to be settled in determining the rights of the parties in respect to the one cause of action for which the suit was brought. *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823; *Winchester v. Loud*, 108 U. S. 130, 2 Sup. Ct. 311, 27 L. Ed. 677; *Shainwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385, 27 L. Ed. 691."

The case is, in principle, governed by *Shainwald v. Lewis*, 108 U. S. 158, 161, 2 Sup. Ct. 385, 27 L. Ed. 691; *Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462; and *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528.

In *Shainwald v. Lewis*, cited above, the suit was brought for the dissolution and settlement of an alleged partnership. The court said there was no separable or removable controversy. "The main dis-

pute," said the court, "is about the existence of the partnership. All the other questions in the case are dependent on that. If the partnership is established, the rights of the defendants are to be settled in one way; if not, in another. There is no controversy in the case which now can be separated from that about the partnership, and fully determined by itself."

In *Deposit Co. v. Huntington*, cited above, the suit was a creditors' bill to subject incumbered property to the payment of the creditors' judgment, by sale and distribution of the proceeds among lienholders according to their priority. One lienholder sought to remove the suit, as to him, to a United States court, upon the ground that there was as to him a wholly separable controversy. The court said:

"There is but a single cause of action, and that is the equitable execution of a judgment against the property of the judgment debtor. This cause of action is not divisible. Each of the defendants may have a separate defense to the action, but we have held many times that separate defenses do not create separate controversies, within the meaning of the removal act."

In *Graves v. Corbin*, already cited, the suit was a bill in equity filed in a state court by a creditor of a partnership to reach its entire property. Certain judgments confessed by the firm, on which levies had been made, were attacked for fraud. One of the judgment creditors removed the cause to the circuit court upon the ground that as to him there was a separable controversy. After a final decree for the plaintiff, the supreme court, on an appeal therefrom, held that the case was not removable. That court, among other things, said:

"The case as made by the bill, and as it stood at the time of the petition for removal, is the test of the right of removal. The bill was filed to reach the entire property of the partnership. In order to do that, it was necessary to sweep away, not some, but all, of the confessed judgments, and all of the rights obtained by executions and liens thereunder, and to restore to the assets and moneys of the partnership in the hands of the court the assets and moneys which had been diverted therefrom by the members of the partnership, with the corporation of the various defendants."

The removing defendant was a citizen of a state different from that of the complainant, but the citizenship of other of the judgment creditors joined as defendants with the removing defendant was identical with that of complainant. The court held that under the averments of the bill there was but a single controversy as to all the defendants, and that the relief sought could not be obtained unless all who were made defendants were parties.

It is to be deplored that after years of litigation it should now become the duty of this court to reverse the decree, and direct that the suit be remanded to the state court from which it was improperly removed. We cannot escape the duty imposed by the fifth section of the act of 1875, which makes it the duty of the circuit court, when it shall appear "at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this

act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." This act has been repeatedly enforced by the supreme court, even to the extent of taking notice of the want of jurisdiction in the circuit court, although the point was not formally raised in either court. *Graves v. Corbin*, 132 U. S. 571, 590, 10 Sup. Ct. 196, 33 L. Ed. 462; *Turner v. Trust Co.*, 106 U. S. 552, 555, 1 Sup. Ct. 519, 27 L. Ed. 273; *King Bridge Co. v. Otoe Co.*, 120 U. S. 225, 226, 7 Sup. Ct. 552, 30 L. Ed. 623; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914.

The subsequent consolidation of the removal suit with a suit in which Mrs. Hill was sole complainant, and C. W. Edmonds, as trustee, the only defendant, is of no serious consequence. The jurisdiction of the court in respect to the issues made by the bill of Colburn, Fuller, and others, and over the parties thereto, was not widened by the consolidation. Mrs. Hill's bill was for the purpose of collecting arrearages due her under the agreement, and secured by the mortgage assailed by the bill to which she was a defendant. Subsequently she filed an answer and cross bill, and under the latter sought the same relief prayed under her original bill. None of the creditors interested in the lien or charge created by the so-called mortgage to Mrs. Hill were parties to her bill. If, as we have elsewhere said, the creditors of L. M. Hill, individual and firm, were also interested in the security provided by the so-called mortgage to Mrs. Hill, she could not appropriate to her exclusive personal benefit the advantages of that security.

The decrees appealed from are entitled under the style of the two consolidated cases and that of Mrs. Hill's cross bill. The decree allowing the appeal is entitled in the same way, and allows an appeal from specific decrees. The decrees appealed from must be reversed. The circuit court was without jurisdiction to render them. The suit of Colburn, Fuller & Co. and others must be remanded to the state court from which it was removed. This will leave the bill of Mrs. Hill against C. W. Edmonds pending and undisposed of, except in so far as distinct decrees have been entered therein, unaffected by the decrees here reversed. Mrs. Hill will pay all the costs of this court and of the circuit court incurred since date of removal.

BROADWAY INS. CO. et al. v. CHICAGO G. W. RY. CO. et al.

(Circuit Court, W. D. Missouri, W. D. May 7, 1900.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—NECESSARY OR FORMAL PARTIES.

Nonresident insurance companies, who had severally paid policies on property of a lumber company destroyed by fire, although not to its full value, brought a suit in equity in a state court against the lumber company, which was a domestic corporation, and a railroad company, which was a corporation of another state, through whose negligence it was alleged the fire was caused, to enforce the right by subrogation to recover pro tanto against the railroad company for the loss, the lumber company having re-

fused to bring action therefor or to join with complainants. *Held*, that the lumber company was an indispensable party to the determination and adjustment of the liability of the railroad company, and the latter could not remove the cause upon the ground that there was a separable controversy.

2. SAME—REMAND.

Where a suit has been improperly removed, the duty to remand it cannot be affected by a claim of defendant that no cause of action is stated on the merits; that being a question for the state court.

3. SAME—FEDERAL QUESTION.

To render a cause removable as one arising under the constitution, laws, or treaties of the United States, that fact must appear by the plaintiff's statement of his own claim; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in any subsequent pleading.

4. SAME—REMAND.

The fact that, subsequent to the removal of a cause, the parties have pleaded, and have taken depositions, does not affect the duty of the federal court to remand on discovering that the removal was improperly made; it being a matter for the determination of the state court what shall be done with the pleadings filed and the testimony taken.

In Equity. Considered on the question of jurisdiction by removal.

Fyke, Yates, Fyke & Snider, for complainants.

Frank Hagerman and W. E. Hall, for defendants.

PHILIPS, District Judge. This cause has been submitted on demurrer to the bill. But an examination of the bill raises the question of jurisdiction in the mind of the court. The complainants are all nonresident insurance companies. The defendant railroad company is also a nonresident citizen. The defendant W. D. Bennett Lumber Company (which for convenience will be designated as the "Lumber Company") is a Missouri corporation, as also the other defendant, the Farmers' Mutual Insurance Company. The controversy, in brief, grows out of the following state of facts, as disclosed by the bill of complaint: The Lumber Company took out policies of insurance in all of said insurance companies, in varying amounts, on its lumber and certain houses situated in the state of Missouri. The bill alleges that said lumber and houses, through the negligence of the defendant railroad company, were totally destroyed by fire communicated by its locomotive engine. The total loss amounted to about \$16,000. The complaining companies paid, on account of their policies, in settlement, sums aggregating \$14,000. The defendant Farmers' Mutual Insurance Company, whose policy was for \$1,000, has paid nothing. The object of this suit is to recover, by way of subrogation, from the railroad company, the sum so paid by the insurers, and for an adjustment of the equities of the parties. The bill alleges that the Lumber Company refuses either to sue the railroad company to recover from it any portion of the loss, or to join with the complainants in this action, wherefore it is made a party defendant, as permitted under the practice act of the state; and, as the Farmers' Mutual Insurance Company, under the allegations of the bill, is a party in interest, necessary to a complete determination of the controversy, it is also made a defendant. This suit was brought in the circuit court of Jackson county, Mo., from which it was removed into this court on the petition of the de-

fendant railroad company. The petition for removal recited the facts aforesaid respecting the citizenship of the parties, and predicated the right of removal on the grounds (1) that the cause of action, as among the defendants, is severable; (2) that the other defendants are joined merely for the fraudulent purpose of preventing the railroad company from removing the case into the United States court; and (3) that the complainants would insist, at the trial of the case, that if the fire complained of was communicated directly or indirectly by the locomotive engine of the petitioner, then there was absolute liability on the part of the railroad company for the loss, by reason of section 2615, Rev. St. Mo. 1889, notwithstanding the proof might show the highest degree of care on the part of the railroad, and therefore the defendant petitioner would insist that such statute is in contravention of the fourteenth amendment to the federal constitution, "wherefore this case is of a civil nature, arising under the constitution of the United States, all of which appears by petitioner's answer herein."

We will eliminate from this discussion any consideration of the allegation as to joining the other defendants with the railroad company in order to prevent it from removing the controversy into this court, as this is a mere *brutum fulmen*, unsupported by any proof, and contradicted by the necessary allegations of the bill. All of the defendants not being nonresidents of the state where the suit was brought, to entitle the nonresident defendant to remove the case, the suit must present "a controversy which is wholly between citizens of different states, and which can be wholly determined as between them." The petition for removal was framed to meet this provision of the statute. "The rule is now well established that this clause in the section refers only to suits where there exists a separate and distinct cause of action on which a separate and distinct suit might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side and citizens of other states on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun." *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131; *Ayres v. Wiswall*, 112 U. S. 187-193, 5 Sup. Ct. 90, 28 L. Ed. 693. The presence of the Lumber Company in this suit is indispensable. It appearing, as the demurrer of defendant to the bill asserts, that the loss of the Lumber Company from the fire is greater than the sums paid by the insurance companies, and as these companies are seeking to be subrogated pro tanto to the rights of the Lumber Company, which refuses to take any affirmative action against the railroad, or to co-operate with the losing insurance companies for restoration, the presence of the Lumber Company as a party defendant is essential to the complainants' cause of action. Unquestionably the Lumber Company might have joined with the complaining companies, asserting, as it has in its answer filed herein, that it disclaimed any purpose to proceed against the railroad company for the residue of the loss, or asserting a demand for the residue of its loss; and, with

all parties in interest before the court, the rights and equities of all could be adjusted in such suit. In such action the Lumber Company would be more than a nominal party. Such suit could not be brought in the first instance in the federal court, as all the complainants would not be nonresidents. But, the Lumber Company refusing either to compel the railroad company to adjust the loss or to join with the suffering insurance companies for indemnity against the wrongdoer, it and the nonpaying insurance companies were properly made parties defendant, for the proper protection of the railroad company itself, by adjusting the rights of all concerned and concluding the controversy in one suit. It seems to me that this case comes within the reason of the rulings and cases cited in *Wilson v. Oswego Tp.*, 151 U. S. 57, 14 Sup. Ct. 259, 38 L. Ed. 70; *Torrence v. Shedd*, 144 U. S. 527-530, 12 Sup. Ct. 726, 36 L. Ed. 528; *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823; *Missouri v. New Madrid Co. (C. C.)* 73 Fed. 304; *Springer v. Sheets*, 115 N. C. 370, 20 S. E. 469; *Association v. Farmer*, 23 C. C. A. 577, 77 Fed. 929; *Telegraph Co. v. Brown (C. C.)* 32 Fed. 337. The bill of complaint would have been clearly obnoxious to the objection of want of necessary parties, had the Lumber Company been omitted, and the defendant railroad company might well say to the complainants: "Before I settle with you, the Lumber Company must be present to be concluded by the convention."

The claim, made by the railroad company, that the bill cannot be maintained on its merits, cannot affect the question of removal; "that being a matter for the determination of the state court." *Evans v. Felton (C. C.)* 96 Fed. 176.

Was the case removable because of the suggestion of a constitutional question made in the petition for removal and the answer filed herein? It was doubtless because of this suggestion that the court heretofore refused the motion to remand. It overlooked the rule, firmly established by repeated decisions of the supreme court, that a case cannot be removed from a state to the federal court, as one arising under the constitution, laws, and treaties of the United States, "unless that appears by the plaintiff's statement of his own claim; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in any subsequent pleadings." *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Walker v. Collins*, 167 U. S. 57-60, 17 Sup. Ct. 738, 42 L. Ed. 76. It is the duty of the federal court, at any time in the progress of the case, when it discovers that the same has been improperly removed, to remand it to the state court. For this purpose the court retains "its power over the suit and the parties unto the end of the term at which final decree" is rendered; and the fact that the parties have pleaded and taken depositions since the assumed removal is of no consequence. As said in *Ayres v. Wiswall*, *supra*:

"That fact did not, of itself, confer jurisdiction, if there had been none before. It will be for the state court, when the case goes back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction."

The case is ordered remanded to the state court.

STRANG v. RICHMOND, P. & C. R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 331.

1. EQUITY PLEADING—DUE FORM—FILING BOTH DEMURRER AND ANSWER TO SAME PORTION OF BILL.

The filing by a defendant at the same time of a general demurrer to the bill and answer denying all the allegations of fact made in the bill is not pleading in due form, and in such case the demurrer will be treated as overruled by the answer.

2. EQUITY—JURISDICTION—BREACH OF CONTRACT.

A bill alleging the existence of a contract by which plaintiff was to construct a railroad for defendant, and its breach by defendant in refusing to allow plaintiff to proceed in its execution, states no ground for relief in equity, but the remedy is by an action at law for damages; and until the damages have been so ascertained, and the legal remedy exhausted, equity cannot entertain jurisdiction to aid in enforcing their payment, although the defendant is alleged to be insolvent.

3. LIENS—CREATION BY CONTRACT.

A contract by which plaintiff agreed to build a railroad for defendant, a railroad company, and was to receive in payment bonds of the defendant, which it was authorized to issue, or their proceeds, not less than a certain amount, does not give the plaintiff a lien on the bonds, which remained in the possession of defendant.

4. SPECIFIC PERFORMANCE—CONTRACT TO BUILD RAILROAD.

A contract to build a railroad cannot be specifically enforced in equity, nor will the court undertake to enforce performance by the railroad company indirectly by impounding its bonds, alleged to have been appropriated by the contract to pay for the work, at suit of the contractor, while the contract is still unperformed on his part.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This case comes up on appeal from a decree of the circuit court of the United States for the Eastern district of Virginia, in equity. 93 Fed. 71. The bill is filed by William B. Strang, Jr., against the Richmond, Petersburg & Carolina Railroad Company and others. The nature of the appeal renders it necessary to set out somewhat in detail the allegations of the pleadings. The bill sets out the corporate character of the defendant, a corporation under the laws of Virginia and of North Carolina, with authority to acquire all the property and works of the Virginia & Carolina Railroad Company, a company organized for the purpose of locating, constructing, equipping, maintaining, and operating a railroad from Richmond to a point on the line between North Carolina and Virginia, in Mecklenburg county, and authorized to extend, construct, equip, and operate its road from any point on the Virginia line to such point on the Raleigh & Gaston Railroad as should be found meet and practicable. It then alleges: That for the purpose of paying for rights of way, station grounds, and all other necessary lands and real estate, and for constructing, acquiring, completing, and equipping the lines of railway aforesaid, or which it should thereafter be authorized by law to construct, own, and acquire, the said Richmond, Petersburg & Carolina Railroad Company executed a mortgage to the Mercantile Trust Company of Baltimore, dated September 11, 1897, to secure certain bonds and coupons, the total issue of bonds not to exceed \$2,300,000; bonds to be payable in 1947; interest at 5 per cent. per annum. That said mortgage conveyed to the trust company, in trust as aforesaid, all its line of railway and property described as follows: "Commencing at a point at or near Hermitage road, on the Richmond, Fredericksburg & Potomac Railroad, near the city of Richmond, in the state of Virginia, which is to proceed via Richmond and Petersburg to a

point at or near Ridgeway, in the state of North Carolina, which said main line of railway is one hundred and three (103) or more miles in length; and all second or additional tracks which the railroad now owns, or may hereafter construct or acquire; and all lands, tenements, and hereditaments acquired or appropriated, or which may hereafter be acquired or be appropriated, for right of way, and all easements and appurtenances thereto belonging; and all railways and rights of way, depot grounds, tracks, bridges, viaducts, culverts, fences, and other structures, depots, station houses, engine houses, car houses, freight houses, wood houses, warehouses, machine shops, work shops, erections, and fixtures, whether now held or hereafter acquired, for the use of or in connection with the said main line or branches; also all locomotives, tenders, cars, and other rolling stock and equipment; all rails, ties, chairs, splices and angle bars, and machinery, tools, implements, fuel, and materials of every description, whether now owned or hereafter acquired, used, or acquired for the construction, operation, repair, or replacement of said main line and branches; also all leases, leasable interests, contracts, agreements, corporate franchises, and charters which it has now or may acquire, including the franchises to be a corporation; also all franchises connected with or relating to said main line and branches, or the construction, maintenance, or use thereof, now held or hereafter acquired by grant from the legislature or otherwise, including all corporate franchises exercised or possessed at any time by the railroad company, together with the income, advantages, and appurtenances in any way appertaining to the above-mentioned railway premises; and also all the income, tolls, rents, issues, and profits of said main line and branches." That thereafter, to wit, on October 18, 1898, the railroad company entered into an agreement with plaintiff whereby the said plaintiff agreed to construct, furnish, and build a complete roadbed between Ridgeway, N. C., a point on the Raleigh & Gaston Railroad, and Hermitage road, Virginia, on the line of the Richmond, Fredericksburg & Potomac Railroad, a distance of about 103 miles, together with the necessary depots, water stations, section houses, buildings, and terminals, in consideration of which the defendant agreed to pay the plaintiff in its aforesaid bonds secured by the said mortgage, to an amount provided for therein, or in cash representing the proceeds of said bonds, which should not be less than \$1,800,000. That the Richmond, Petersburg & Carolina Railroad Company also agreed that that part of its railroad between the points aforesaid, then completed, as well as that part nearly completed, should be turned over to plaintiff, with the right to issuance of bonds therefor under the aforesaid mortgage; and that plaintiff agreed, out of said bonds or the proceeds thereof, to reimburse the said defendant railroad for all sums expended by it on construction, evidenced by its receipted vouchers therefor. That defendant railroad company further agreed that plaintiff should have full control of the engineering of said railroad and the construction thereof, and the right to purchase all lands necessary therefor, as well as material and supplies; and further agreed to furnish plaintiff, to assist him in completion of the undertaking, all the necessary plans, specifications, drawings, engineers' reports, surveys, and data then in possession of defendant company. That defendant further agreed that the cost of construction of the road, as well as the equipment thereof, and the terminal facilities required, should not exceed the sum to be produced by sale of the bonds, \$1,800,000, less \$100,000, to be paid to the Colonial Construction Company; but that the cash derived from the sale of the bonds, not less than the sum stated, would be sufficient to construct the road so far as the same was then uncompleted, and leave a fair and reasonable profit to plaintiff in addition thereto. The bill then charges: That De Witt Smith, a defendant, as president of the company, had knowledge of this contract, and then had and now has vested in him titles to the various terminal properties in Virginia and North Carolina, and contracts therefor, as well as for rights of way, all of which he holds in his own name, but in fact in trust for the railroad company, in which plaintiff has an interest and right under his contract with the railroad company. That various of the bonds secured by the deed to the Mercantile Trust Company are now in possession of the railroad company, and that said company has the right to demand certification of other bonds on completion of the work and on acquiring title to rights of way and terminals;

all of which bonds, or the proceeds thereof, are to become, upon the completion of the aforesaid work by plaintiff or the acquirement of title, the property of plaintiff. That upon making the agreement with defendant railroad company the plaintiff entered into possession of said line of railroad, and is now in possession thereof, and is now and has been engaged in the preliminary work of construction thereof. That the plaintiff has demanded the delivery of the plans and specifications in possession of defendant, but it has refused to deliver the same. That this refusal has damaged the plaintiff, and has prevented him from placing his contracts for necessary bridges, ironwork, mason work, and other necessary contracts for completion of said railroad. That since the agreement was made, the railroad company and Smith, without the consent of plaintiff, are endeavoring and are threatening to cancel the mortgage and the bonds secured thereby upon which plaintiff relies as his security for payment of the construction of the railroad, and which bonds have been pledged and set apart as a fund for the payment of the sums to become due to plaintiff for construction of the railroad. That plaintiff is now, and has always been, ready and willing to complete and perform said agreement, and has entered upon the performance thereof, and is now in possession of said property, engaged in work thereon. After praying subpoena, this is the prayer of the bill: "The plaintiff, therefore, prays for a decree enjoining the defendant the Richmond, Petersburg & Carolina Railroad Company and the Mercantile Trust Company from canceling said mortgage or the bonds, or any of them, secured by the same; adjudging that the defendant De Witt Smith holds the title of all terminals and rights of way along the line of said railroad, as well as all contracts therefor, as trustee for said railroad, and that an injunction issue restraining him from parting therewith, and compelling him to transfer the title thereto to the defendant the Richmond, Petersburg & Carolina Railroad Company, and that said defendant railroad be enjoined from interfering in any manner, pending the hearing and determination of this cause, with the possession of the plaintiff of said railroad; requiring the defendant railroad company to fulfill said contract on its part; and declaring the said bonds secured by the mortgage aforesaid as a fund for the payment of the construction of said railroad, and requiring the defendant to issue and deliver the said bonds, and the defendant trust company to certify the same as required by the terms and provisions of said mortgage. That an injunction issue, pending the hearing and determination of this cause, restraining and enjoining the defendant the Richmond, Petersburg & Carolina Railroad Company and the Mercantile Trust Company from canceling, satisfying, or in any manner interfering with the said bonds and deed of trust aforesaid; and that the defendant Smith be enjoined from conveying or assigning any of said rights of way or terminals now in his name or under his control, or for which he has contracts, and that the plaintiff may be declared to have a lien thereon; and that the plaintiff herein may have such other and further relief in the premises as to the court may seem just and equitable, including a receiver to hold, manage, and operate the property of this defendant railroad pending the final determination of this cause." Analyzing this bill of complaint, and stripping it of the verbiage of the pleader, it charges the making of a contract between the plaintiff and the defendant railroad company. The subject of the contract was the construction of a railroad between two points not fixed, in which construction were included the roadbed, sidings, stations, terminal stations, bridges, culverts, and equipment, with no specifications or details enabling one to ascertain what the contract was; and when the work was completed it was to be paid for in bonds, or cash representing the proceeds thereof, not less than \$1,800,000. Then follows an averment of breach of this contract, and a prayer which is, in effect, for the specific performance of the contract. The bill does not state whether the contract was verbal or in writing, or whether it has been reduced to form. The bill was filed January 26, 1899. The railroad company, on March 4th of the same year, entered a general demurrer thereto, and on the same day filed an answer, denying in detail each allegation of the bill. On the same day—March 4th—the circuit court hearing the bill and accompanying affidavits, and upon the demurrer and answer of the railroad company, an order was entered setting the cause for a hearing on March 14th thereafter, and in the meantime issuing the ordinary

restraining order. On March 18, 1899, the complainant filed an amended bill, reiterating all the averments of the original bill, reciting the order of March 4th, and the pleading of the defendant company, and averring the insolvency of the defendant railroad company, praying the relief asked for in the original bill. De Witt Smith demurred to the original and amended bill on March 18th. On March 22d, the railroad company filed a general demurrer to the amended bill. It, on the same day, filed an answer insisting that, on the plaintiff's own showing, the court had no jurisdiction of this cause, relying upon its answer to the original bill, and denying in toto the allegation of its insolvency. On March 22d, upon hearing, the circuit court dismissed the bill, so refusing the injunction. To the decree the plaintiff excepted and the cause is here upon the following assignments of error: "First. The court erred in dismissing the bill filed by the complainant in this cause, and dissolving the temporary injunction which had been granted thereon. The bill does not ask for the specific performance of a contract, but, on the contrary, shows the complainant to have been, at the time of filing the same, in possession of the road of said defendant company, and in a position to perform his contract. The aid of the court, by injunction, is asked only to prevent the interference of the defendants in his said possession, and to preserve in statu quo the funds out of which he was to be paid. Second. The court erred in deciding that the contract for the construction of said railroad set out in the bill of complaint was either vague, obscure, or uncertain. Third. The court erred in deciding that the allegation of insolvency, fully set out in the bill of complaint and supported by affidavits, by reason of which the remedy at law would have been totally inadequate, was not sufficient ground for the intervention of a court of equity. Fourth. The court erred for other reasons and matters appearing upon the face of the said decree and the opinion made a part thereof." Of these the fourth is so general that it cannot be considered.

D. Lawrence Groner and John Larkin, for appellant.

W. W. Henry (W. R. McKenney and Henry & Williams, on the brief), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

SIMONTON, Circuit Judge (after stating the facts as above). Before entering upon the merits of this appeal, it may not be unprofitable to comment upon what seems a want of due form in the pleading in this case. To the original bill the defendant railroad company filed a general demurrer, and on the same day, at the same time, filed an answer. The demurrer admitted all the facts well pleaded in the bill. The answer denied in toto and in detail every allegation of fact in the bill. This cannot be said to be in due form. Mr. Justice Story in his Equity Pleading (section 454), says:

"The want of due form constitutes a just objection to the proceedings in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

To the amended bill there is also a general demurrer, and at the same time an answer. Besides the general denial in the answer, there is a saving of the objection also taken by demurrer. This reservation in the answer is proper. Fost. Fed. Prac. § 110. But it

removes the necessity for, and may supersede, the demurrer. A defendant may demur, plead, and answer to the same bill (Eq. Rule 32), but in such case he must demur to a part of a bill, plead to another, and answer another. Each of these modes of defense must relate to a separate and distinct part of the bill. Story, Eq. Pl. § 437. If there is a demurrer to a part of a bill or to the whole, and an answer to the same part of the bill or to the whole, the demurrer is overruled. Beach, Mod. Eq. Prac. § 241. It is true that equity rule No. 37 provides that no demurrer or plea shall be held bad and overruled upon argument because the answer may extend to some part of the same matter as may be covered by such demurrer or plea. But this will not protect a demurrer which goes to the whole bill, and is accompanied by an answer covering all the allegations of the bill. *Crescent City Live Stock Landing & Slaughter-House Co. v. Butchers' Union Live Stock Landing & Slaughter-House Co.* (C. C.) 12 Fed. 225. Judge Blatchford, in *Adams v. Howard* (C. C.) 9 Fed. 347, says that, when there is both a demurrer and an answer to the same bill, covering the same matter, the defendant can be put to his election which of the two modes of defense he will rely upon. If he select the demurrer, and it be decided against him, he would probably lose the right to answer over, permitted in rule 34. Whatever doubt may exist in some cases, there can be no doubt in this case that when the demurrer admits all the facts, and the answer denies categorically all the facts pleaded, the best rule is that laid down in *Daniell*, Ch. Prac. (Perkins' Ed.) p. 792, that the answer overrules the demurrer. Nor can this answer be treated as a motion to dismiss the bill for want of equity. Such a motion, common as it is in states which have adopted Code pleading, and perhaps in other states, has no place in proper equity practice. *Betts v. Lewis*, 19 How. 72, 15 L. Ed. 576; *La Vega v. Lapsley*, 1 Woods, 429, Fed. Cas. No. 8,123. We will treat this case as if made on bill and answer. The answer insists on the objection that on plaintiff's own showing this court has no jurisdiction of this case. The objection is well taken in an answer. Indeed, when this is brought to the attention of the court, it must itself suo motu examine and decide upon it. Act 1875 (18 Stat. 470); *Williams v. Nottawa Tp.*, 104 U. S. 209, 26 L. Ed. 719; *Turner v. Trust Co.*, 106 U. S. 555, 1 Sup. Ct. 519, 27 L. Ed. 273; *Farmington v. Pillsbury*, 114 U. S. 144, 5 Sup. Ct. 807, 29 L. Ed. 114. The bill sets out an unexecuted contract alleged to have been made with the defendant railroad company, and its breach by the defendant in refusing to allow the plaintiff to proceed in its execution. The contract was secured by no lien; nor is there any trust involved. It is, therefore, a cause of action for unascertained damages to be sued at common law. The whole case depends on the existence, validity, effect, and breach of the contract. Until these are established, there can be no recovery. The seventh amendment of the constitution of the United States preserves the right of trial by jury in suits at common law when the value in controversy exceeds \$20. And in *Scott v. Neely*, 140 U. S. 112, 11 Sup. Ct. 715, 35 L. Ed. 361, this has been held to prohibit federal courts from entertaining any such controversy in equity. The proper remedy is the ascertainment of the existence,

validity, and breach of the contract, and the amount of plaintiff's damages, in a suit at law; and when this is done, and the claim established, resort might be had to the court of equity. "In all cases," says the court, "when a court of equity interferes to aid a remedy at law, there must be an acknowledged debt accompanied by a right to the appropriation of the property of the debtor for its payment; or, to speak with greater accuracy, there must be, in addition to such established or acknowledged debt, an interest in the property, as a lien thereon created by a contract or by some distinct legal proceeding."

It is contended with great force that these bonds were specifically set apart under the contract for the payment of the work to be done by the plaintiff, and that hence the plaintiff has an equitable lien thereon. For this is quoted *Walker v. Brown*, 165 U. S., at page 664, 17 Sup. Ct. 453, 41 L. Ed. 865. In that case one Brown had delivered to a member of the firm of Lloyd & Co. \$15,000, in bonds, to be used as security by them in purchases. They did incur a debt with Walker & Co. Brown, by letter to Walker & Co., stated to them that any indebtedness by Lloyd & Co. to them should be paid before the return to him of the bonds, or the value thereof. Here was a distinct appropriation of specified bonds for a specific purpose, accompanied by the delivery of the bonds thereupon. The supreme court held that there was a lien. But in the case at bar there is no such delivery or appropriation. On the contrary, the allegation is that upon completion of the work it is to be paid for in bonds, or in cash representing the proceeds of the bonds, not exceeding \$1,800,000; the issue of bonds was \$2,300,000; the bonds in the meantime remaining in the possession of and under the control of the railroad company, and it having the option to pay in cash. Nor will the alleged insolvency of the defendant company aid the bill. In *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, the bill alleged a simple contract debt, the insolvency of the company, and that all the company's property was in the hands of a trustee under a deed charged to be fraudulent. The court says:

"The plaintiffs were simple contract creditors of the company. Their claim had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into equity to obtain the seizure of the property of the debtor, and its application to the satisfaction of their claims, and this notwithstanding a statute of the state may authorize such a proceeding in a court of the state. The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated. See, to the same effect, *Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; *Taylor v. Bowker*, 111 U. S. 115, 4 Sup. Ct. 397, 28 L. Ed. 368. In *Tube-Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070, the bill alleged a debt and that the corporation had no assets or funds to pay the plaintiff, and asked the court for process against a delinquent stockholder. The court says: 'The bill does not allege any judgment in New York, or any effort to obtain one; nor does it aver that it is impossible to obtain one. It merely alleges that the corporation has no funds or assets wherewith to pay the claim of plaintiff. When it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction in which the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegation showing that it is impossible to obtain such a judgment in any court within such jurisdiction.'"

Apart from this, the bill alleges a contract between the complainant and the defendant company to construct, furnish, and build a complete roadbed between some point in Virginia and another in North Carolina, together with necessary depots, etc.; the work to be paid for in certain bonds or in cash representing the proceeds of said bonds. It sets out certain terms in said contract, and alleges the breach of the contract. The bill prays, among other things, that the railroad company be required to fulfill its contract. Now, the contract on the part of the plaintiff was to construct, furnish, and build a complete roadbed. That on the part of the defendant was to pay for such completed roadbed in bonds, or cash, the proceeds of bonds. The plaintiff was not entitled to anything unless the roadbed was completed. He charges that he could not perform his contract unless the defendant fulfilled its contract in affording him the facility of doing so. The bill in purpose and substance is for the specific performance of a contract to build the road. If the court could undertake to order the defendant on its part to fulfill all the parts of its contract, it must order the plaintiff on his part to fulfill his contract; that is, to build the road. A contract to be specifically performed must be mutual. Fry, Spec. Perf. § 266. So the bill called upon the court to compel one party to build the railroad, and the other party to pay for it. This the court cannot do. A contract to build a railroad will not be enforced in equity. *Railway Co. v. Marshall*, 136 U. S. 407, 10 Sup. Ct. 846, 34 L. Ed. 385; *Ross v. Railway Co.*, 4 Woolw. 26, Fed. Cas. No. 12,080. This case is strikingly like the case at bar. The decision is by Mr. Justice Miller. It is a collation and discussion of many cases on the subject. In many particulars it meets the argument of appellant in this case, and distinctly decides that a contract to build a railroad cannot be enforced in equity. An executory contract will not be specifically enforced unless the remedy is mutual, and the performance of a comparatively inconsiderable part of a contract does not take it out of the class of executory contracts. Unless the court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it.

The counsel for the appellant, admitting that the court cannot decree specific performance of a contract to build a railroad, seeks, however, an injunction against the railroad company from any use of its bonds. That is to say, he asks the court to tie the hands of the railroad company and to impound all of its bonds, because he insists that they are applicable to a provision of a contract on his part, not yet performed, which he may not perform, and which this court cannot compel him to perform. He thus seeks to use the process of the court to compel by indirection the specific performance of the contract, which he could not ask the court to do directly. The language of the court of appeals of Maryland in *Canton Co. v. Northern Cent. Ry Co.*, 21 Md. 399, is not inapplicable to this case:

"As the bill stands, we are clearly of the opinion that it does not show such a contract as a court of equity can enforce by decree, and, failing in that, it follows that an injunction which was intended to aid the general relief sought by the bill was improperly granted."

The bill cautiously refrains from stating whether the contract was verbal or written, and the parts of the same set forth are vague to a degree. The court below was impressed with this. The uncertainty of the termini of the road between Ridgeway, a point on the Raleigh & Gaston Railroad and Hermitage road, Virginia, on the line of the Richmond, Fredericksburg & Potomac Railroad, a distance of about 103 miles; the uncertainty of the route through Richmond, Petersburg, and Manchester; the indefinite statement as to the depots and station houses; the character of the bridges; the time within which the work is to be completed; a total absence of any particulars as to the character of the work, the inspection of its progress, time and mode of payment,—all these are left in a condition of vagueness and uncertainty. Were the court to undertake its supervision, all its resources and time would be exhausted thereby. In our opinion, the bill on its face fails to state a case for the intervention of a court of equity. The conclusion reached by the court below is approved, but it should have dismissed the bill without prejudice. The cause is remanded to the circuit court with instructions to modify its decree in this respect, and to enter a decree dismissing the bill without prejudice.

COSMOPOLITAN MIN. CO. v. FOOTE et al.

(Circuit Court, D. Nevada. April 23, 1900.)

No. 684.

MINING CLAIMS—MISTAKE IN LOCATION—EXTRALATERAL RIGHTS.

Where by mistake a mining claim is located across, instead of along, the vein passing through the location point, the rights of the locator are governed by the facts as they exist with regard to such vein. His side lines, as located, become end lines, and he is not entitled to any extralateral rights thereunder, although another vein, extending transversely to the one intended to be located, may have its apex inside of such surface lines.

In Equity. Suit to determine rights of owners of adjoining mining claims.

W. E. F. Deal, for complainant.

Torreyson & Summerfield, for defendants.

HAWLEY, District Judge. Complainant is the owner of the Cosmopolitan patented mining claim, 1,000 feet in length and 600 feet in width, situate in Gold Hill mining district, Storey county, Nev. The patent was issued in October, 1873. Defendant Lottie Foote is the owner of a mining claim and location situate in the same mining district, immediately west of the Cosmopolitan, and called the "Badger." There is no controversy in relation to the surface lines of the Cosmopolitan claim. The complainant claims that there is a lode bearing mineral in the Cosmopolitan claim near its westerly side line, having a northerly and southerly course, with a dip to the east, and that the apex of this lode is within the Cosmopolitan surface location, except for a distance of a few feet, where a very small part of it extends over the surface line into the

Badger from 5 to 15 feet, more or less. The lode, as claimed by complainant, is in two branches at the southerly end, each branch being from 30 to 50 feet wide, and which, going north, unite in one vein, from 60 to 100, or more, feet wide. The defendants claim that there is a lode near the east side line of the Badger, having its course north and south along the entire length, with a hanging and foot wall, wholly within the Badger surface lines. The contest between the parties is in relation to the apex of the respective lodes, and upon that question a mass of evidence has been submitted by the respective parties. There is a decided conflict in the evidence upon this point.

In the year 1875 some work was done by the complainant in running an upper and lower tunnel into the Cosmopolitan ground. The mouth of the upper tunnel commenced near a point where a blacksmith shop was afterwards erected, about 100 feet southwesterly from the southwest corner of the Cosmopolitan claim. This tunnel runs in a northeasterly direction a distance of about 400 feet through the Cosmopolitan claim. At a point about 100 feet from its face the tunnel makes a turn, and runs more in a northwesterly direction. This tunnel was constructed by the complainant. Leases and licenses were at different times from 1894 to 1898 given to different parties to work therein and take ore therefrom. The rails in the tunnel, and cars to convey the ore, were supplied and paid for by the complainant. During the years 1895 and 1896 the Footes, father and sons, made several applications to Mr. Landers, the president of the Cosmopolitan Company, for the privilege of taking ore out of the Cosmopolitan claim through this tunnel. None was ever given them. Mr. Staricha in 1895, under a lease from complainant, extended the tunnel and took out ore from the stope called the "Staricha Stope," distant about 100 feet from the southerly line of the Cosmopolitan mine. In 1896 an incline from this stope was opened out to the surface, and came out near to, but west of, the westerly line of the Cosmopolitan claim. Around this stope and incline, and the character of the earth, rock, and other material found therein, cluster the most important facts upon which each of the parties relies to prove where the apex is found. In 1898 the defendants entered into the tunnel, took possession thereof, and excluded complainant therefrom, and at or near the face thereof stoped out a large quantity of ore, and were so engaged at the time of the commencement of this suit, and continued to work thereon for some time thereafter. At the trial the contention of the defendants was that the ore thus taken out belongs to a lode which has its apex within the surface lines of the Badger claim, and that they have the right to follow said lode in its downward course into the Cosmopolitan ground, although there may have been a mistake made in locating the ledge.

The Badger is a relocation, made in 1884. The notice of relocation reads as follows:

"Location Notice. Badger Mine.

"Notice is hereby given that I, the undersigned, have this day relocated 1,000 feet of the south end of the Badger mine & 500 feet of the north end of the

Margarita mine, in Storey county, Nevada, for mining purposes. This location is made subject to the mining laws of the United States and the state of Nevada. My residence is Silver City, Lyon county, Nevada, and am a citizen thereof. The said mine is situated in Negro ravine, adjoining the Flora Temple on the north, and west of the Cosmopolitan mines. July 14th, 1884. This claim shall be known as the 'Badger Mine.' George Foote."

At the time this location notice was posted there was a lode exposed within the surface lines of the location, running in an easterly and westerly direction. The rights of the defendants are based solely upon this relocation. If it was made upon a lode running in an easterly and westerly direction, then the side lines marked on the surface as such would become, in the eye of the law, the end lines of the location, and the end lines marked on the surface would become the side lines of the claim. The testimony concerning the relocation is very meager. Mr. Foote testified: That he made the relocation on a lode running in a northerly and southerly direction. That he placed the location notice at or near the center of the surface claim, and at a point marked "O" on the map. That ore was disclosed at that point. That there was a hole dug about 350 feet northerly from that point, which disclosed ore, and another one at a point about 750 feet southerly from the location point. At the point of location there is a cut 6 or 7 feet long, 2 feet wide, and 1 foot deep in vein matter. The hole towards the north line of the Badger is an opening 5 feet wide and 15 feet in length, in which ore is exposed. The hole towards the southern line of the Badger is 2 feet square and 1 foot deep, and is in solid country rock. The testimony in rebuttal was to the effect that the character of the ground between the hole at the north and the location point was in solid country rock. The witness Wrinkle said: Part of the country "is covered by surface dirt, but quite a large stretch is exposed, and it is solid country rock." The same is true of the ground between the location point and the hole at the southerly end of the claim. The witness said, "Wherever the ground is laid bare,—no surface dirt covering it,—it is nothing but country rock." The same witness, speaking with reference to the explorations in the Badger tunnel, testified as follows:

"Q. State whether or not any other vein appears in that tunnel, except the one that you have shown on the map,—any vein running northerly and southerly. A. No; there is not. * * * Q. State whether or not any vein running northerly or southerly is shown in that tunnel. A. No. Q. What indications are there, if any, on the surface between the opening shown to you near the north line, 200 feet from it, and the location point, or the location point and the opening 150 feet or so from the south line of the Badger,—what indication between those points of any vein whatever? A. There are none."

There are surrounding circumstances in connection with the testimony upon this point as to the course of the lode that ought not to be overlooked. No attempt was made upon the part of the defendants, except by the testimony of Mr. Foote, to establish the fact of the existence of any lode running northerly and southerly from the location point, which was and is of as much importance as the establishment of the existence of a lode running in that direction near the easterly line of the Badger claim. There is no pretense that the relocation was made upon the lode in dispute at the easterly

line of the Badger location, or that there is any possible connection between that lode and the one located by Mr. Foote. The defendants' contention seems to be that because, as they claim, they have subsequently discovered the apex of a lode running northerly and southerly at the easterly line of their surface location, they have a right to follow that lode in its dip underneath the Cosmopolitan claim, without any regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location, and find out what the defendant Foote located, because, if he located upon a lode that he thought had a northerly and southerly course, and made his relocation accordingly, and the subsequent developments proved that the locator was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his rights by the facts as they are shown to exist, instead of what he thought existed at the time the location was made. The testimony given by the locator is wholly insufficient to show that any lode, ledge, or vein had been discovered by him, or the prior locators of the ground, having a northerly or southerly course at the point of location. When the entire testimony is taken into consideration, it is made manifest that no such ledge exists, or at least that none has ever been discovered. The point of the relocation where the notice was posted was near to a well-defined lode, called by some of the witnesses the 'Badger,' and by others the 'Margarita,' which has a course clearly defined in an easterly and westerly direction, and upon which the Footes have been at work for years. No claim that his location was made upon a lode running north and south seems ever to have been made by the locator prior to the time of the trial, nor until after complainants' counsel had publicly stated that the relocation of the Badger was made upon a lode running east and west, and that the locator's side lines would be his end lines, and cut off his extralateral rights in that direction. Foote testified that he had never informed his counsel to that effect, nor had he given any such information to the surveyor employed by the defendants. But, whatever his claim may have been,—whatever his intentions were,—the fact remains that the relocation was absolutely made upon a lode which runs more east and west than north and south; and the law steps in and declares that his legal rights under this location must be determined by calling what he marked as the side lines the end lines of his location. This being true, it follows that he is not entitled to any extralateral rights beyond his end line along the western side line of the Cosmopolitan. The law upon this point is well settled. The principles which govern and control this question were first announced by the supreme court in *Mining Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253, affirmed in *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 485, 7 Sup. Ct. 1356, 30 L. Ed. 1140, and followed in *Del Monte Co. v. Last Chance Co.*, 171 U. S. 55, 86, 89, 18 Sup. Ct. 895, 43 L. Ed. 72, and *Walrath v. Mining Co.*, 171 U. S. 293, 307, 18 Sup. Ct. 909, 43 L. Ed. 170. See, also, *Iron*

Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 208, 6 Sup. Ct. 1177, 30 L. Ed. 98; *King v. Mining Co.*, 152 U. S. 222, 228, 14 Sup. Ct. 510, 38 L. Ed. 419; *Wyoming Min. Co. v. Champion Min. Co. (C. C.)* 63 Fed. 540, 548; *Walrath v. Mining Co. (C. C.)* 63 Fed. 552, 557; 2 Lindl. Mines, § 586 et seq. Numerous other authorities will be found cited in the cases here referred to.

In *Argentine Min. Co. v. Terrible Min. Co.*, supra, the court, in discussing this question, said:

"When, therefore, a mining claim crosses the course of the lode or vein, instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface. Such is the purport of the decision in *Mining Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253. The court there said, referring to the statute of 1866 (14 Stat. 251) and that of 1872 (17 Stat. 91): 'We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode and extend perpendicularly downward, and to be continued in their own direction either way horizontally, and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of the vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode.' And again that the end lines of the claim, properly so called, are 'those which are crosswise of the general course of the vein on the surface.' Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and, as a consequence, could not touch the premises in dispute, which are conceded to be outside of those lines, and outside of vertical planes drawn downward through them."

In *Wyoming Min. Co. v. Champion Min. Co. (C. C.)* 63 Fed. 540, 548, I said:

"The statute should be so construed as to give to the locator what he actually locates,—no more and no less. * * * He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he is at the same time assured that he will not be limited or deprived of his extralateral rights as to the depth of such lode, upon its dip, the apex of which is within the surface lines of his location. The statute of 1872 gives to locators of mining claims 'the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' These are their extralateral rights, which should neither be extended nor restricted by the courts. * * * One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute, to follow the lode upon its dip, as well as upon its strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked off the ground as such, then the

end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute."

Still more directly in point are the views expressed by myself in *Walrath v. Mining Co.* (C. C.) 63 Fed. 552, 557:

"The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. And it is apparent from an examination of the statute that the court has no power to make a new location for every vein that may be found within the surface lines of the location, and thereby enlarge the rights of the original locators. When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location. It necessarily follows that the end lines of the Providence [Badger] survey must be considered by the court as the end lines of any and all other lodes or veins which lie 'inside of such surface lines'; otherwise, endless confusion would arise in the construction of the statute. End lines would have to be constructed in different directions if the separate lodes or veins found within the surface lines did not run parallel with each other, and the result would be that these lines, extended, might give to the owner of the claims a greater length along the lode as it extended downward than they had upon the surface."

These views are conclusive as to the present controversy between the parties. They apply as well to the "dumping ground" claimed by the complainant as to the lode within the surface boundaries of the Cosmopolitan claim. The owner or owners of the Badger claim, under the location made by Mr. Foote, can only claim 300 feet on each side of the middle of the lode located by him; and, as thus limited, it does not reach any part or portion of the dumping ground of the Cosmopolitan Company. They are, of course, entitled to all lodes, ledges, veins, and deposits of mineral-bearing rock, earth, or ore, the apex of which is found within the limits of the Badger location as herein defined, but they are confined in such rights to the end line drawn downward vertically along the westerly side line of the Cosmopolitan claim. Beyond that they have no right to go.

In the light of these conclusions, it is unnecessary for the court to travel over the surface ground, pass through the tunnels, go up the stopes or down into the winzes, through the drifts and into the cuts and holes, visit the dump, or inspect the croppings, and then test and weigh the credibility, strength, and reasonableness of the testimony of the various witnesses by legal scales, for the purpose of determining the mooted question as to the existence or non-existence of a lode having its apex within the surface lines of the Badger claim west of and near to the Cosmopolitan westerly side line. Let a decree be entered in favor of complainant.

TESLA ELECTRIC CO. v. SCOTT et al.

(Circuit Court, E. D. Pennsylvania. May 10, 1900.)

1. COSTS—POWER TO IMPOSE.

The ultimate power to impose costs must be found in a statute.

2. SAME—RULE OF COURT.

Under the general power granted by congress to the federal courts in respect of costs, those courts may provide by rule for the taxation as costs of the expense of printing the evidence in equity cases.

3. COMMISSIONERS' TAXABLE FEES.

Commissioners are entitled to 20 cents a folio, and no other compensation, for taking and certifying depositions to file, and that expense is taxable as part of the costs.

4. COMMISSIONERS' NONTAXABLE FEES.

Commissioners are entitled to 10 cents a folio for each copy of a deposition furnished to a party on request, but that expense is not taxable as part of the costs.

5. DIVISION OF COSTS.

Where the bill was dismissed as to one of the three patents in suit, and was sustained as to the other two patents, the complainant recovered two-thirds of its costs from the defendants, while the defendants recovered one-third of their costs from the complainant.

See 97 Fed. 588.

Kerr, Page & Cooper, for complainant.

Albert H. Walker, for defendants.

McPHERSON, District Judge. The first question raised by this appeal concerns the validity of rules 6 and 16 of this court, so far as they make the expense of printing the evidence in equity cases a part of the costs. The power of the court so to provide was challenged on the ground that section 823 et seq. of the Revised Statutes contain no item concerning the printing of evidence; the argument being that costs are a creature of statute, and cannot be charged in the federal courts, unless by express warrant of an act of congress. Ultimately, no doubt, the power to impose costs must be found in a statute; but the legislature may grant the power in general terms to the courts, and these tribunals may then establish a fee bill by a rule or order that will have the binding force of a legislative act. This grant has already been made by congress, as was decided by Mr. Justice Clifford (Lowell, J., concurring) in *Jordan v. Woolen Co.*, 3 Cliff. 239, Fed. Cas. No. 7,516, in which the validity of a similar rule in the First circuit was upheld. The decision was rendered in 1869, before the Revised Statutes were enacted; but the fee bill of 1853 (10 Stat. 161), which was then under consideration by the court, does not differ in any important respect from the sections of the Revised Statutes that are now urged upon my attention. I follow *Jordan v. Agawam Co.* as an authority, and need not, therefore, discuss the cases that have been cited by counsel. They are collected in *Kelly v. Railroad Co.* (C. C.) 83 Fed. 183; and, if any one desires to examine the course of legislation on the subject of costs, he will find the various statutes cited in *Hathaway v. Roach*, 2 Woodb. & M. 63, Fed. Cas. No. 6,213; *In re Costs*, 1 Blatchf. 652, Fed. Cas. No. 18,284; and *The Baltimore*, 8 Wall. 388, 19 L. Ed. 463.

The second objection must be sustained. The testimony was taken before a United States commissioner, who has been allowed by the clerk \$3 a day for attendance, and 30 cents a folio, including in the latter sum the expense of a stenographer. This appears to be the practice in the Second circuit (*Edison Electric Light Co. v. Mather Electric Co.* [D. C.] 63 Fed. 559), and I am told has been the practice in this district also. Its correctness is now attacked, however, and the rightfulness of the charge must be decided according to the law, and not according to the practice. In my opinion, the law is clear. Section 847 allows a United States commissioner 20 cents a folio for taking and certifying depositions to file, and section 823 declares "that no other compensation shall be taxed and allowed." The charge of \$3 a day for attendance, under section 847, is also erroneous. Taking testimony is not "attending to a reference in a litigated matter * * * in pursuance of an order of the court." The function of an examiner in equity is to take and certify the depositions. No other duty is required of him, and for this service he is to be paid 20 cents a folio and no more. The commissioner may also charge 10 cents a folio for each copy of the depositions furnished to a party on request, but this sum has not been made part of the costs by the rules in question, and, in my opinion, the statute requires it to be paid by the party whose convenience is thus served. Section 847 fixes no limit to the number of copies that may be obtained, and, if the expense of one copy may be charged as costs, so may the expense of every other. Where there are numerous parties, this item might easily become oppressive; and this may be the reason why the expense of such a copy is not made part of the costs, either by statute or by the rules now under consideration. The charges of the stenographer are provided for by rule 16. The number of folios is, I think, not more than 1,000. If either party is unwilling to accept this estimate, the words must be counted.

The third objection is also sound. When this cause came on to be argued, the plaintiff asked leave to discontinue as to one of the three patents in suit. Leave was granted, the order directing "the costs of the defendant to be taxed pro rata with respect to said patent." Nothing was expressed concerning the costs of the plaintiff, for the obvious reason that the cause had not yet been decided, and it was not known which party would be successful; but the clear implication of the order is that the plaintiff's costs, also, should be taxed by the same rule in the event of success, and should be diminished pro rata. The order was intended to give the defendants the same advantage as if they had been successful in a separate suit over this one patent. The testimony had already been taken, and practically all the costs had been incurred, when the order was made. As already said, its meaning was—implied, if not expressed—that the plaintiff, if successful in the controversy still remaining, should tax against the defendants no more than two-thirds of its costs, and should also pay to defendants one-third of their costs; both bills to be taxed at the end of the litigation. The taxation appealed from must therefore be corrected in this respect also.

In view of the importance of settling these matters of practice, I think it proper to add that I have not reached the conclusions above stated without conference with Judge DALLAS.

The clerk is directed to retax the costs in accordance with this opinion.

SINGLETON v. FELTON.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 714.

1. APPEAL—REVIEW—FINDINGS OF MASTER.

Where a case is referred to a master to hear the evidence, and to report his findings and conclusions both of law and fact, so far as the master has to deal with conflicting testimony, or pass upon questions of credibility, his findings are to be treated as so far presumptively correct as not to be subject to review on appeal, unless manifest error is shown in his conclusions of fact or in the application of the law.

2. RAILROADS—KILLING OF TRESPASSER IN COLLISION—ACTIONABLE NEGLIGENCE.

A railroad company owes no duty of care to a trespasser who, contrary to its rules, which are known to him, is riding on a construction train without the knowledge of the company's employes; and the gross negligence of such employes, which results in a collision in which the trespasser is killed, does not constitute actionable negligence as to him which gives a right of recovery for his death.

3. WRONGFUL DEATH—CONSTITUTIONAL AND STATUTORY PROVISIONS—CONSTRUCTION.

In section 241 of the Kentucky constitution, providing that, "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death," and in the statute enacted to carry out such provision, the word "negligence" is used in its well-known legal significance, as meaning actionable negligence which would authorize a recovery for the injury if death had not ensued.

4. NEGLIGENCE—STATUTORY LIABILITY—KENTUCKY STATUTE.

Since the enactment of Ky. St. § 6, which repealed Gen. St. c. 57, § 3, there is no degree of "willful" negligence in that state, and the rule that contributory negligence is not available as a defense to any degree of negligence is no longer in force.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is an action to recover damages for the negligent killing of one Charles Singleton, the intestate and son of the plaintiff in error. The defendant is a receiver appointed by the court in which the suit was brought by an intervening petition. The death of the decedent was proximately due to a rear-end collision between two trains operated by the servants of the receiver sued. Both trains left Somerset, Ky., bound north, the first, a freight, about one hour before the last, a construction train, consisting of an engine and caboose, the caboose being in front. The freight train broke down a few miles out of Somerset. The construction train, following after, ran into the rear of the stalled freight occupying the track. The deceased, who was either inside or upon the rear platform of the construction caboose, was crushed and killed. The failure of those operating the stalled train to place torpedoes at a proper distance in rear of the train was the plain and conceded cause of the collision, though there was also evidence that the train dispatcher at Somerset failed to notify the construction train that the freight train had preceded it, bound in the same direction. The decedent was a youth between 13 and 14 years of age, residing at Somerset. He was frequently about the yard of the railroad com-

pany, and often made himself useful by voluntary assistance to trainmen. The company's rule prohibited all persons from riding on the construction train, and this was well known to the deceased, who had been warned against trying to ride on said train by its conductor as well as by members of his own family. Upon the morning of his death he was seen about the railroad yard, and rendered some assistance in switching, and when the collision occurred his dead body was found badly crushed between the end of the tender and caboose. There was some conflict in the evidence as to whether his presence on the train when it left Somerset was known to any of the receiver's employés. The intervening petition, on motion of the intervener, was referred to a special master "to hear the evidence * * * and report his findings and conclusions of both law and fact to the court." The master reported that the collision was the result of the gross negligence of the railroad, but that the decedent was wrongfully concealed on or about said construction train, and his presence thereon unknown to the servants operating same, and that the receiver was therefore not liable to the plaintiff in error for damages. Exceptions by the plaintiff in error were overruled, and the petition dismissed.

David S. Hounshell, for appellant.

George Hoadly, for appellee.

Before LURTON and DAY, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

That the decedent was an intruder upon the construction train, and that his presence thereon was unknown to those engaged in its operation, was the conclusion of the special master. On the motion of the plaintiff the petition was referred to a special master, not to take and report the evidence, but "to hear the evidence offered by the parties, respectively, with direction to report his findings and conclusions, both of law and facts, to the court." The order was in the nature of a submission to a tribunal selected by the parties themselves. So far as the master had to deal with conflicting facts or pass upon questions of credibility, his findings are to be treated as so far presumptively correct as not to be subject to review, unless there is shown manifest error in his conclusions of fact or in the application of the law. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Davis v. Schwartz*, 155 U. S. 631, 636, 15 Sup. Ct. 239, 39 L. Ed. 293.

In *Davis v. Schwartz* the court said:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of the law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. St. § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

The master reports that under the rules of the company no one was permitted to ride on the construction train except employés of the company, and that the decedent knew this, and had been warned against it by the conductor and by members of his own family. He

also reports that on the occasion of this collision said decedent "boarded said construction train, and so concealed himself in or about the caboose that his presence thereon or therein was not known to any one of those in charge of or operating said train." The master also reports that the collision by which decedent met his death was due to the gross carelessness of the employes of the freight train in not taking the proper and usual precautions prescribed by the rule of the company for the purpose of warning trains approaching from the rear. There was abundant evidence in support of both these findings, and under the rule stated there is no authority for reviewing the conclusions of the master upon the facts.

That the collision was due to the negligence of the receiver's servants, and that the intestate came to his death as a result of the collision, are conceded facts. But has the appellant by this evidence made out a case of actionable negligence? Actionable negligence presupposes some duty owed to the person asserting a right of action by the defendant, and a breach of that duty. What was the relation between the deceased and the receiver? What duty was due by the receiver to him? He was not a passenger. The train was a construction train, and persons other than employes were rigidly excluded therefrom. He knew the rule of the railroad in this particular. He did not have the permission of the conductor or other employe on the train as an excuse for his presence, and thus we are not called upon to deal with the question as to whether the consent of an employe, who had no power to consent, would create a relation and impose a duty towards him. His presence on the train was unknown to those operating it. He was therefore unlawfully upon a train not intended for passengers, and, but for his own wrongful conduct in intruding himself there, would not have lost his life. He was not willfully injured. There was no intent to bring about the collision which cost him his life. His presence on the train being unknown, the rule which requires the exercise of ordinary care to avoid unnecessary injury to a trespasser after his presence and danger are observed has no application.

The defendant, upon the facts, owed no duty to the deceased, and no action will lie for the negligence of the servants of the plaintiff by which the collision occurred. Actionable negligence consists in the failure to exercise that degree of care towards the plaintiff which was due to the plaintiff by the defendant under the circumstances of the case. That the servants of the defendant were under an obligation to exercise care in the movement of trains in order to prevent collisions may be conceded. This duty they neglected. But that was not a duty owed to the deceased under the facts of this case, and the breach of duty by which the collision occurred was not of a duty due to deceased. *Eaton v. Railroad Co.*, 57 N. Y. 382; *Planz v. Railroad Co.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835; *Files v. Same*, 149 Mass. 204, 21 N. E. 311; *Railroad Co. v. Bingham*, 29 Ohio St. 369; *Heaven v. Pender*, 11 Q. B. Div. 503, 506; *Lygo v. Newbold*, 9 Exch. 302; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Sawyer v. Railway Co.*, 38 Minn. 103, 35 N. W. 671; *Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Shackleford's Adm'r v. Railroad*

Co., 84 Ky. 43; *Railroad v. Meacham*, 91 Tenn. 428, 19 S. W. 232; *Shear. & R. Neg.* (5th Ed.) § 8.

Counsel for appellant has insisted with much force that the question as to the liability of the defendant must turn upon the provisions of the constitution of Kentucky and the statute law of that state, which, it is contended, give a right of action whenever the death is the result of negligence, without regard to other considerations.

Section 241 of the Kentucky constitution is as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporation and person causing the same."

Section 6 of the Kentucky statute, enacted since the adoption of the new constitution, is as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the person or persons, company or companies, corporation or corporations, their agents or servants causing the same, and when the act is willful, or the negligence is gross, punitive damages may be recovered."

We know of no authority which would require or justify us in attaching to the word "negligence," as used in the constitution and statute of Kentucky, any other than its well-known legal significance. The "negligence" which will authorize a recovery when death results is the actionable negligence which would authorize a recovery if death had not ensued. There is no actionable negligence unless there was a breach of some duty owed to the person injured. But it is said that the gross character of the negligence which brought about the collision constitutes "willful" negligence, under section 3, c. 57, Gen. St. Ky., and that that statute has been construed by the supreme court of Kentucky as imposing absolute liability, without regard to the contributory negligence of the plaintiff. *Jones' Adm'r v. Railroad Co.*, 82 Ky. 611; *Railroad Co. v. Privitt's Adm'r*, 92 Ky. 223, 17 S. W. 484; *Railroad Co. v. Survant*, 96 Ky. 201, 27 S. W. 999. But section 3, c. 57, being the act of 1854 above referred to, and upon which the cases cited above were based, was repealed by section 6 of the Kentucky statute, and the word "willful," as descriptive of a degree of negligence, is now eliminated. With this change in the statute, the rule that contributory negligence was not available as a defense to any degree of negligence is no longer in force. *Clark's Adm'r v. Railroad Co. (Ky.)* 39 S. W. 840. Nor is a defendant prevented from relying upon contributory negligence by the terms of section 241 of the constitution. *Passamaneck v. Railway Co. (Ky.)* 32 S. W. 620. There is no error, and the judgment must be affirmed.

TOLEDO BREWING & MALTING CO., Limited, v. BOSCH.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 778.

1. MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT.

In an action by a servant against the master to recover for personal injuries, on the ground of the failure of defendant to furnish reasonably safe appliances, where the facts are substantially undisputed, and the conclusion that there was a negligent omission of duty by defendant is one at which all reasonable men must have arrived therefrom, the question of liability becomes one of law, and it is not error for the court to instruct the jury that the right to recover is established, and submit to them only the question of damages.

2. SAME—UNSAFE APPLIANCES—NEGLIGENCE OF INDEPENDENT CONTRACTOR.

A master is not relieved from the positive personal duty which he is under to the servant by letting work to a contractor, and he cannot avoid liability for an injury to the servant due to the dangerous condition of appliances which he is required to use, on the ground that such dangerous condition was caused by the negligent acts of an independent contractor, whom the master had employed to make certain repairs about the premises.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

This action was brought in the state court of common pleas of Lucas county, Ohio, and removed, on application of plaintiff in error, into the circuit court of the United States for the Western division of the Northern district of Ohio. The object of the suit was to recover damages for a personal injury sustained by defendant in error while in the service of plaintiff in error; his regular work being that of engineer of an ice machine operated by plaintiff in error at its brewery house, in the city of Toledo, Ohio. It was part of his duty to aid occasionally in hoisting barrels of salt from the ground to the second floor of the brewery building, and he was engaged in the discharge of this duty at the time the injury was received. The apparatus or machine used in hoisting the barrels of salt consisted of a large beam projecting over and from the wall of the building at the top about two feet. The wall extended about two feet above the roof of the building, which was flat. One end of the beam rested on the wall, and the other on the roof, so that there was an incline from the outer end towards the roof. The end of the beam upon the roof was held in place by weights placed thereon, one of which was a large door nailed to the beam, on which was placed other articles of weight. An iron hook was attached to the outer end of the beam and on this was hung a pulley. This hook was about 45 feet above the ground. The rope extending over this pulley was secured to a stake driven into the ground, and was adjusted to two other pulleys, and to the other end of the rope at the ground was hitched a horse, so as to operate the hoisting apparatus by horse power. The barrel of salt, caught and held by a pair of hooks attached to one of the pulleys, was carried or elevated to a window on the second floor, at which defendant in error was stationed, to take in or receive the barrel of salt, and place it on the second floor, where the ice machine was operated. This window was directly under the beam, and the top of it about eight feet below the beam. A few days prior to the day of the accident the president and superintendent of the company employed Schillinger Bros., who were engaged in the general roofing business, to make such repairs to the roof of the brewery building as would put it in good condition. One of the Schillingers first examined the roof, and reported to the president that the roof needed "recoating all over." Schillinger Bros. were thereupon directed to do whatever work was necessary on the roof. The contract was verbal, and consisted of nothing beyond the general direction to make such repairs as were found necessary. There was no suggestion or provision in respect to any precaution to be taken by Schillinger Bros. in the prosecution of the work, and no notice or direction was given to the servants

of plaintiff in error engaged at work about the building in relation to the intended repairs on the roof. It became necessary for Schillinger Bros. to have the roof swept and examined, and for that purpose the roofing gang, at work under them, removed the weights from the beam, so that the beam could be shifted from one side to the other, as might be necessary. The weights were removed, and the beam carried to one side, and left in that condition without replacing the weights. In this situation defendant in error, under order of the foreman of plaintiff in error, took his position with another man at the window for the purpose of receiving barrels of salt about to be hoisted. The foreman of the brewery had no knowledge of the removal of the weights, or the condition in which the beam had been left, and there was no indication of that condition, looking at the beam from the ground. The rope was stretched as usual, the hooks attached to a barrel of salt, and the horse started, when the beam upset and fell, the end to which the pulley was attached coming down into the window where defendant in error was stationed, striking him on the head, shoulders, and ankle, breaking his ankle, and causing serious injury.

The right to recover in the court below was grounded on the alleged omission of duty by the master to take reasonable precautions for the safety of the servant, and this right was denied upon the ground that the acts complained of as negligent were those of an independent contractor, for which the defendant, as employer, was not responsible. The court instructed the jury, in substance, that the defendant was under a positive duty to take reasonable care and precautions for the safety of the servant in providing a safe place in which to work, and safe machinery and apparatus with which to do the work, and that it was not relieved of this duty in consequence of the contract with Schillinger Bros., and that its responsibility in that respect was the same, under the given facts in this case, as if the work had been done by the defendant company itself; and, by way of restating the substance of the instructions, the court said: "So I say to you, gentlemen, upon the admitted and conceded facts in this case, that it was the duty of the defendant to maintain this apparatus in a safe condition when it put its servants, including the plaintiff here, at work in using it for the purpose of raising salt barrels; and when, by the direction of one of its general officers (the general manager), the weights that held this beam securely in its place were removed, and the beam displaced, so as to render its operation and use unsafe to those who might be employed about it, it failed in that duty which the law requires,—that care and prudence which should be exercised in the use of its agencies and apparatus, so that harm may not come to those in its employ who use them and put them in operation. And, being guilty of negligence in that respect, it will be responsible—it will be liable in damages—to the plaintiff for the injuries which he has sustained, unless the plaintiff by his own negligence directly contributed to the injuries of which he complains." To the charge of the court in these respects exception was duly taken, and error is assigned. The jury returned a verdict in favor of plaintiff below, assessing his damages at \$5,000, upon which judgment was pronounced, and to revise that judgment the case is brought here on writ of error.

Wm. P. Tyler, for plaintiff in error.

Orville S. Brumback and Charles A. Thatcher, for defendant in error.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case as above, delivered the opinion of the court.

It was suggested, rather than pressed in argument, that the question of negligence should have been submitted to the jury, conceding that the court below was right in the view taken of the law applicable to the case. This question of negligence, of course, involved the point whether the displacement of the beam in the work of repairs on the roof was so probable or necessary that it should have been anticipated, and the danger guarded against by the master by

suitable precautions. The facts were substantially undisputed, and the conclusion that there was a negligent omission of duty was one at which all reasonable men must have arrived, provided the master was responsible to the servant for the defect in the hoisting apparatus caused by displacement of the beam. Under these circumstances, the question of liability was one of law, and the court might properly instruct the jury that the right to recover was established, and submit the case to the jury to determine the measure of damages. This was what the court did. *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; *Scholtz v. Insurance Co.* (C. C. A.) 100 Fed. 573.

The controlling question, then, is whether, in view of the contract between plaintiff in error and Schillinger Bros., the doctrine in relation to employer and independent contractor is applicable to the facts of the case.

The principle—respondent superior—upon which the master is held responsible for the unlawful and negligent acts of a servant done in the course of the servant's employment does not, of course, extend to make an employer responsible for the acts of a person not in his service, with whom he has contracted to do the work in the course of which the default occurred. The general rule is well settled, and not controverted, that an employer is not liable for an injury resulting from the negligence of an independent contractor, or his servants, such as negligence in the mode of doing a work in itself lawful. *Pol. Torts* (5th Eng. Ed.) 75; *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; 1 *Shear. & R. Neg.* (5th Ed.) § 168. There are a number of established important exceptions to the general rule, but we are not now concerned with these generally. One exception to the general rule of exemption from liability in such cases is where the law imposes on the employer the duty to keep the subject of the work in a safe condition. A municipal corporation, for example, being under a duty imposed by law to keep the streets in a safe condition for passage, is liable for injuries in consequence of an obstruction or dangerous excavation caused in the performance of a work, and left exposed, although the work is done by an independent contractor. *Mayor, etc., v. McCary*, 84 Ala. 469, 4 South. 630; *City of Chicago v. Robbins*, 2 Black, 418, 17 L. Ed. 298; *Hughes v. Percival* (1883) 8 App. Cas. 443; *Bower v. Peate*, 1 Q. B. Div. 321; *Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421. See, also, *Wood, Mast. & Serv.* § 316; 1 *Shear. & R. Neg.* § 176.

These and other like cases proceed upon the principle that a positive personal duty cannot be delegated to an agent or contractor, and that the obligation in such cases is to do the thing required, and not merely to employ another to do it, and, to bring a case within the rule, it is sufficient if the duty is one to the public or a third person, and imposed by law or by statute. *Bridge Co. v. Steinbrook* (Ohio Sup.) 55 N. E. 618; *Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485; *Wood, Mast. & Serv.* § 316; 1 *Shear. & R. Neg.* §§ 14, 176.

This subject was much considered and the previous cases reviewed by the English court of appeal in *Hardaker v. District Council* [1896]

1 Q. B. 335, in which Lindley, L. J., after stating that the city council were not bound in point of law to do the particular work by servants of their own, but were left free to employ contractors to do the work for them, said:

"But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called 'casual' or 'collateral' negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. 'The ratio decidendi of these cases,' said Smith, L. J., in the same case, 'is that, as the duty was imposed upon the defendant by law, he could not escape liability by delegating the performance of the duty to a contractor; for the obligation was imposed upon the defendant to take the necessary precaution to insure that the duty should be performed.'"

In *Bridge Co. v. Steinbrook* the supreme court of Ohio declared that:

"The weight of reason and authority is to the effect that, where a party is under a duty to the public or third person to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another. * * * The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. Cockburn, C. J., in *Bower v. Peate*, 1 Q. B. Div., at page 328. It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others incident to the performance of the work let to contract that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work."

The opinion in this case is instructive, and refers to the leading cases in this country and in England upon the subject. In *Water Co. v. Ware*, supra, the liability was based upon an obligation imposed by contract. And this doctrine, in the light of the reasons on which it rests, is equally and cogently applicable to that duty resting on the master to exercise reasonable care and caution to secure the safety of the servant. While the relation between master and servant is contractual, the obligation of the master in respect of the safety of the servant is one implied or imported into the contract by law, and is not an express term or provision of the contract. Accordingly, in *Railroad Co. v. Herbert*, 116 U. S. 647, 6 Sup. Ct. 593, 29 L. Ed. 758, Mr. Justice Field, speaking for the supreme court of the United States, said:

"It is equally well settled, however that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him."

And in the subsequent case of *Railroad Co. v. Baugh*, 149 U. S. 368, 386, 13 Sup. Ct. 921, 37 L. Ed. 780, Mr. Justice Brewer, speaking for the court, declared and defined this duty in language as follows:

"Again, a master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects."

In *Baird v. Reilly*, 35 O. C. A. 78, 92 Fed. 884, the circuit court of appeals for the Second circuit, discussing this duty of the master, said:

"He cannot escape responsibility by delegating his duty in this behalf to another, because it is his implied contract with the employé that he will see to it that the working place is reasonably safe, in view of the character of the work to be performed, and this obligation is not satisfied by devolving it upon a subordinate."

In *The Magdaline* (D. C.) 91 Fed. 798, the facts were that the vessel was undergoing general repairs, and the libelant was a servant employed by the ship to do work in the hold. McCaldin Bros. were engaged in laying a new main deck under contract, and the Ross Iron Works in doing certain ironwork. The servant was at work in the hold in the forward part of the ship when a piece of wood fell upon his head, producing the injury which was the subject of the libel. The libelant's contention was that the wood was caused to fall by the act of certain of the vessel's crew, while the respondent claimed that the wood fell from the main deck, where the floor was being relaid in constructing the new deck. The facts which the court treated as established were: (1) That the libelant was injured by the wood falling between one or two openings in the between-decks, it not being material which; (2) that the wood fell by reason of the negligence of some of the crew, or of the carpenters at work on the main deck; and (3) that the libelant was not furnished with a safe place to work. Judge Thomas, first pointing out that while the vessel was undergoing repairs pieces of wood had previously fallen into the hold, and that the work undertaken was likely to lead to this, said:

"In such cases, it was the duty of the master, when placing servants in the hold of the vessel, to use due care to guard them against injury arising from the conditions existing above. A master may not place his servant at a work made dangerous by the nature of the work of other servants, or persons performing work under contract, without due effort to furnish adequate protection,

and, when injury arises, escape upon the plea that, but for the negligence of a co-servant or third person employed on the premises, the injury would not have happened. A servant may expect that his master will not surround him with dangerous agencies, or expose him to their operation, whether they are in charge of the master's servants or of any independent contractor. The rule is well illustrated, if the block was dropped by one of the crew, by *Ford v. Lyons*, 41 Hun, 512, which, in all its facts, is similar to the case at bar. See, also, *Stephens v. Knitting Co.*, 69 Hun, 375, 23 N. Y. Supp. 656, and *Daley v. Schaaf*, 28 Hun, 314, where, however, an element existed not now present. If the block was dropped by the servants of an independent contractor, the case is illustrated by *Burnes v. Railroad Co.*, 129 Mo. 41, 56, 31 S. W. 347, and *Rook v. Concentrating Works*, 76 Hun, 54, 27 N. Y. Supp. 623."

The doctrine thus announced was fully recognized and declared in the late cases of *Trainor v. Railroad Co.*, 137 Pa. St. 148, 160, 20 Atl. 632, and *Burnes v. Railroad Co.*, 129 Mo. 41, 56, 31 S. W. 350. In the last case cited, the supreme court of Missouri, speaking in relation to the duty of the master, said:

"The duty of keeping its road, track, and yards in a reasonably safe condition is a personal duty which the master owes the servant, and it cannot delegate this duty to any servant, high or low, nor can it avoid liability by letting out a part of its duties as a common carrier to independent contractors. While, for many purposes, this relation of independent contractor will be recognized, it cannot be sustained to shield the master from those positive personal obligations cast upon him by his relation to his servant. *Schaub v. Railroad Co.*, 106 Mo. 74, 16 S. W. 924; *Lewis v. Railroad Co.*, 59 Mo. 495; *Siela v. Railroad Co.*, 82 Mo. 435."

In view of these cases, it must be regarded as established by the weight of authority, supported by reason, that the master is not relieved from the positive personal duty which he is under to the servant by letting work to a contractor, and that he does not avoid liability in case the work is negligently done, and the servant thereby injured in consequence of exposure to a dangerous place or defect against which, in the discharge of the master's duty, he should have been protected. It follows, therefore, that the learned circuit judge rightly ruled the question on which the case turns, and in regard thereto correctly instructed the jury. Judgment affirmed.

FRIEDMAN v. EMPIRE LIFE INS. CO.

(Circuit Court, D. Kentucky. February 21, 1899.)

FOREIGN CORPORATIONS—JURISDICTION IN SUIT AGAINST—SERVICE OF PROCESS.

A resolution adopted by the directors of an insurance company of another state, on its being authorized to do business in Kentucky, in accordance with Act Ky. April 5, 1893 (Ky. St. § 831), providing that, before authority is granted to any foreign insurance company to do business in the state, it must file with the commissioner a resolution of its board of directors, consenting that service of process on any agent of the company in the state or on the state commissioner of insurance, in any action brought or pending in this state, shall be valid service upon said company, though such resolution is not limited by its terms as to time, and has never been repealed, cannot be held to confer authority to make service on the insurance commissioner, by force of the statute, after the company has ceased to do business in the state, and has withdrawn all its agents therefrom.

On Motion by Defendant to Quash the Return of Service.
Walker & Slack, for plaintiff.
Sweeney, Ellis & Sweeney, for defendant.

BARR, District Judge. This case was submitted to me on the motion to quash the service of summons issued from the Daviess circuit court, and served upon Mr. W. H. Stone, insurance commissioner, and the facts that are material to considering this question, as shown by the record, are these: John Jacob Friedman was a member originally of the National Insurance Company of New York, a New York corporation, having become a member of that company in 1892. By an arrangement between the National Mutual Insurance Company and the Home Benefit Society of New York, also a New York corporation, the Home Benefit Society took from the National Mutual Insurance Company its existing insurance policies or membership, on certain terms agreed upon between the companies. This arrangement was made in the month of March, 1894, and under that arrangement John Jacob Friedman became a member of the Home Benefit Society, and entitled to a life policy of insurance for \$5,000, payable upon his death to the plaintiff Annie M. Friedman, who was his wife. An agreement between said Friedman and the Home Benefit Society was entered into, and was dated April 17, 1894. Mr. Friedman died at Owensboro, in this state, in 1896, having paid his regular premium installments to the Home Benefit Society from the time he became a member of that society until his death. Plaintiff, having made proper proof of loss, brought suit as the beneficiary under the policy in the Daviess circuit court against the Empire Life Insurance Company. The Empire Life Insurance Company was at the time of the commencement of this suit, and still is, the corporate name of the Home Benefit Society; the corporate name of that society having been changed to the Empire Life Insurance Company under a proceeding in the state of New York, and in accordance with a statute of that state, in November, 1894. A summons was issued on the petition filed in the Daviess circuit court, and sent to the sheriff of Franklin county, and was by him served with this return, viz.: "Executed on the Empire Life Insurance Company by delivering to W. H. Stone, insurance commissioner for the state of Kentucky, a true copy of the within summons. April 13, 1898. B. F. Suter, S. F. C., by D. L. Kennedy, D. S." The suit was removed from the Daviess circuit court to this court upon the petition of the defendant, the life insurance company, and that company has entered a special appearance, and moved to quash the return on the summons, executed as above on the insurance commissioner.

An act entitled "An act to provide for the creation and regulation of private corporations" (section 94, Sess. Acts 1891-93, p. 647; see, also, Ky. St. § 631) provides:

"Before authority is granted to any foreign insurance company to do business in this state, it must file with the commissioner a resolution of its board of directors consenting that service of process upon any agent of such company in this state or upon the commissioner of insurance of the state in any action brought or pending in this state shall be valid service upon said company, and if process is served upon the commissioner it shall be his duty to at once send (it) by mail addressed to the company at its principal office."

It is upon this statute that process is claimed to be legally served.

It appears from the record that the Home Benefit Society made application to, and was authorized by, the Kentucky insurance commissioner to do business in this state. The writing authorizing this is dated March 1, 1893, signed by B. F. Duncan, insurance commissioner. After reciting that the Home Benefit Society has complied with the provisions of the Kentucky statute, it declares thus: "Now, therefore, I, B. F. Duncan, insurance commissioner of the state of Kentucky, in pursuance of the provisions of the act aforesaid, do hereby certify that said company is legally authorized and entitled to do business in this state." The act aforesaid is stated to be the act approved 19th of April, 1884.

It appears from the correspondence filed between that company and the insurance commissioner that application was made for the renewal of the authority in February, 1894, and that by a letter dated February 9, 1894, the insurance commissioner refused, upon the showing then presented, to renew the authority which had theretofore been granted. The refusal was not absolute, however; B. F. Duncan suggesting in his letter that "the authority of the company could not be renewed, in any event, without a deposit of \$5,000, the amount of the maximum certificate issued, with insurance department of home state, or in this or some other state, for the benefit of policy holders; that is a requirement of our present law." This letter evidently was written after the passage of the act of the 5th of April, 1893. There was some subsequent correspondence, and on the 26th of June, 1894, and the 3d of July, 1894, the Home Benefit Society again applied. To this the insurance commissioner, by letter of July 5, 1894, peremptorily declined to renew the authority for the company to do business. It appears, however, that the company did a considerable business during the entire year of 1894 in the state of Kentucky, but the premiums were collected through the home office, or through the Louisville Banking Company, after the 1st of March, 1894. It also appears that upon the request of the Home Benefit Society licenses were issued to the agent of the company, up to and including the 17th of November, 1893. It also appears that, pursuant to the act of the 5th of April, 1893, the Home Benefit Society had passed by its board of directors on the 8th of June, 1893, and sent to the insurance commissioner, the following resolution:

"Resolved, that the Home Benefit Society Insurance Company, of the city of New York, in the state of New York, having been admitted or having applied for admission to transact business in the state of Kentucky, in conformity to the laws thereof, does hereby consent that the service of process upon any and all and every agent that is now or hereafter may be acting for said company in Kentucky, or upon the insurance commissioner of said state, shall be valid service upon said company in any action or special proceeding against said company in the state of Kentucky, subject to and in accordance with all the statutes and laws of the state of Kentucky now in force, or such other acts as may hereafter pass amendatory thereof or supplemental thereto. The said agents or said insurance commissioner are hereby authorized and empowered to acknowledge service of process for and on behalf of said company in the state of Kentucky, and service of process, mesne or final, upon such agents or said insurance commissioner shall be held and taken to be as valid as if served upon said company, according to the laws of this or any other state,

hereby waiving all claim by writ of error by reason of such acknowledgment of service; and service of process upon such agents or said insurance commissioner in any county of this state shall be good and valid, and authorize the control of the court whence such process issued."

The defendant company insists that it has had no agent in Kentucky since March 1, 1894, and that all collections of premiums made since that time have been sent directly to the home office in New York, or sent through the Louisville Banking Company, in the city of Louisville. The question, then, to be determined is whether or not the commissioner of insurance in the state of Kentucky, under the provisions of this law and the resolution of the 5th of June, 1893, authorized the service of the summons in this suit which was instituted in April, 1898. We think this inquiry must be answered in the negative. It is true that the resolution of the insurance company board is not limited as to time, and it is also true that there is no action by the board revoking the authority thus granted, but the resolution itself was passed in pursuance of the requirement of the law of April 5, 1893, and it seems to me that a fair construction of that law is only to authorize the service upon the insurance commissioner when the insurance company had an agent in the state; and that when the company ceased to do business in the state, and withdrew all of its agents, then the authority granted under the resolution, by force of the statute, ceased, and the authority of the insurance commissioner to acknowledge service, or to be served with process, ceased. In considering this question, I have not assumed that the contract of the 17th of April, 1894, was made when the Home Benefit Company had no authority to do business in the state. On the contrary, I think from the correspondence and from the surroundings that, until there was a peremptory refusal to renew the authority to do business, the authority continued, and that the contract of the 17th of April, 1894, was under the authority which had theretofore been granted by the insurance commissioner. I am strengthened somewhat in this conclusion by the difference between this provision of the law and the previous provision of the Kentucky statute. The third section of that law provides in regard to foreign insurance companies:

"No such company mentioned in the preceding section shall transact any business in this state by an agent unless it shall first file with the insurance commissioner a written instrument or power of attorney, duly signed and sealed, authorizing any and every agent that is or may be acting for such company in this state to acknowledge service of process for and in behalf of such company in this state, and consenting that service of process on any such agent shall be taken and held to be as valid as if served upon the company according to the laws of this or any other state; and in case any such company shall cease to transact business in this state any person who acts as such agent shall be considered and held as continuing to be agent for said company, for the purpose of process as aforesaid, in any action against the company upon any policy or liability issued or contracted during the time such company transacted business in this state." Act April 19, 1894.

This provision of the law, however, was expressly repealed in section 273 of the act of April 5, 1893. It would be desirable, as a matter of legislation, to have a law sufficiently broad as to continue the agency of the insurance commissioner on suits on all contracts made in the state while the company was authorized by the insurance

commissioner to do business in the state. But this, I think, is not the proper construction of the act. While it is true that the act authorizes the service of process upon any agent of the foreign insurance company, whatever may be the character of the agency, and also authorizes service upon the insurance commissioner, still the agents of the company and the insurance commissioner are so connected, we think, as to make the authority of the insurance commissioner cease when there is no agent whatever of the insurance company, and no business done in the state, so as to give under the law either residence or a legal presence of the insurance company. We have been able to find no decisions upon this point, nor have we been cited to any, but we think it would be entirely too broad a construction of the Kentucky statute to make the insurance commissioner perpetually the agent of the foreign insurance company in all suits that might be brought against it. It will be observed that the statute itself does not limit the authority to serve process upon the insurance commissioner or the agents to suits on contracts made in the state of Kentucky, and, if there is no limit as to the time, then there must be no limit as to the character of the action. It follows that the motion to quash must be sustained, and the suit will be dismissed without prejudice, unless the plaintiff desires simply the order to quash to be entered.

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA v. TOMPKINS.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 339.

1. PLEADING—AMENDMENTS—DISCRETION OF COURT.

The allowance of an amendment to a declaration, changing an allegation as to the citizenship of the plaintiff to conform to the writ, is within the discretion of the court.

2. FEDERAL COURTS—VENUE—WAIVER OF OBJECTIONS.

The objection that an action is brought in a district in which neither the plaintiff nor defendant resides is not waived by a defendant by attending at the taking of depositions by the plaintiff before the issues are made up, nor by failing to file a plea in abatement.

3. SAME—RESIDENCE OF PLAINTIFF.

Plaintiff, who had previously been a citizen and resident of West Virginia, removed with his family into Virginia, where he bought a house, in which he resided with his family, paid taxes, and voted for some three or four years, after which he determined to return to West Virginia, and rented a house there, but before his actual removal he commenced an action in the circuit court of the United States in West Virginia against a corporation of California. *Held*, on a plea by defendant to the jurisdiction, that, even conceding that plaintiff had not lost his domicile in West Virginia by his removal, he had lost his residence, which was only regained by his actual return to the state to reside, and that at the time of the commencement of the action he was not a resident of the state, so as to give the court jurisdiction under the judiciary act of 1888.

In Error to the Circuit Court of the United States for the District of West Virginia.

B. S. Hutchinson and John F. Brown (Brown, Jackson & Knight and Harvey, Wyatt & Hutchinson, on brief), for plaintiff in error.

F. B. Enslow (Simms, Enslow & Alderson, on brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the circuit court of the United States for the district of West Virginia. The action in the court below was brought by George H. Tompkins, defendant in error here, against the Pacific Mutual Life Insurance Company of California, plaintiff in error; the cause of action, injury caused to the plaintiff by reason of malpractice upon the part of the physician of the defendant company. The first question raised in the case was as to the jurisdiction of the court.

George H. Tompkins, the plaintiff, was born in the state of West Virginia, and married in Huntington, in that state. He lived there five years. He obtained employment as a brakeman on the Chesapeake & Ohio Railroad, and for the sake of convenience he removed with his family to Clifton Forge, Va., in the latter part of 1893, or early in the year 1894. He lived with his family in Clifton Forge until October, 1898. He owned the house in which he lived in Clifton Forge, paid his taxes there, and exercised the right of suffrage in that town. About July, 1898, he was promoted, or expected promotion, as baggage master on the same road, and as by this promotion he had a long lay-over at Huntington, W. Va., he rented a house in that place. He did not remove at once, and did not complete his preparations for removal until 26th October, 1898. His delay was caused in part by the illness of his wife. On the 26th October, 1898, he removed finally to Huntington. On 2d September, 1897, Tompkins sustained an accident; whereby his foot and ankle were seriously wrenched and strained. He was compelled to call in a physician, who prescribed for him, and inclosed the injured parts in a plaster of Paris cast. At that time he held an accident policy in the defendant company. Under the terms of that policy, it was provided that the insured should permit any medical adviser of said company to examine the body of the insured in respect to any alleged injuries, in such a manner and at such times as the medical adviser might require. Under this clause in the policy, James F. Hughes, the medical adviser of the company, called upon Tompkins on October 8, 1897, for the purpose of making this examination. To this end, he took off the plaster cast and examined the injury, did not replace it, and advised Tompkins to take other means of cure. Tompkins followed his directions, became rapidly worse, and, finally, taking resort to other medical advisers, after much time and suffering, was reasonably cured. He charges malpractice upon the part of this medical agent of the company, and seeks to hold it responsible therefor. He brought his action on 30th of September, 1898, in the circuit court of the United States for the district of West Virginia. The writ states that the defendant is a citizen and resident of the state of California, and that the plaintiff is a citizen and resident of the state of West Virginia. The declaration setting forth

the jurisdictional clause says that the plaintiff is a citizen and resident of the state of Virginia. On 12th January, 1899, the circuit court of the United States granted leave to the plaintiff to amend his declaration so as to accord to the writ, and to insert the word "West" before the word "Virginia," thus alleging him to be a citizen and resident of the state of West Virginia. The allowance or refusal of this amendment was one of discretion in the circuit court, and is not reviewable here. *Chirac v. Reinicker*, 11 Wheat. 302, 6 L. Ed. 474; *Walden v. Craig*, 9 Wheat. 576, 6 L. Ed. 164; *Wright v. Hollingsworth*, 1 Pet. 165, 7 L. Ed. 96; *Opelike City v. Daniel*, 109 U. S. 108, 3 Sup. Ct. 70, 27 L. Ed. 873.

Thereupon the defendant filed its plea to the jurisdiction of the court; traversing the allegation as to the citizenship and residence of the plaintiff, and averring that at the date of bringing the suit he was a citizen and resident of the state of Virginia; so, the defendant being a citizen and resident of the state of California, the suit was not brought in a district in which either the plaintiff or defendant was resident. To this plea the plaintiff filed two replications,—one joining issue on the allegation of citizenship and residence; the other averring that the defendant had waived all objection to the jurisdiction by reason of the fact that on separate occasions, before filing said plea, it had appeared at the taking of depositions on behalf of the plaintiff, and had then and there cross-examined witnesses, without exception or protest, and without saving the question of jurisdiction. The issues on these pleas were submitted to the court without the intervention of a jury. The court sustained these objections to the plea, and it was overruled. Defendant excepted, and this is one of the assignments of error.

At the time these depositions were taken, the declaration, on its face, stated that the action brought in the district of West Virginia was brought by a citizen and resident of the state of Virginia against a citizen and resident of the state of California. This of itself showed that the court had no jurisdiction. "Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Act Cong. Aug. 13, 1888 (25 Stat. 433). No plea was necessary, as without amendment the court, *suo motu*, would have dismissed the suit. Nor could this have been waived. A person is protected from any original process or proceeding in any other district than that whereof he is an inhabitant. *Id.* This is his personal privilege, and he may waive that. *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98. But the provision quoted applies to the suit, and it limits the jurisdiction to suits brought only in the residence either of plaintiff or of defendant. Even if it could be waived, the mere presence of the defendant at an examination of witnesses, taken before issue made up, and in anticipation, would not be a waiver of any objection to the jurisdiction. It is only a very proper precaution. It is said that the proper mode of objection to the declaration was by plea in abatement, and that by omission to enter such plea the objection was waived. An objection to the jurisdiction of a circuit court of the

United States for want of the requisite citizenship of the parties is not waived by filing a demurrer for the special and single purpose of objecting to the jurisdiction, or by answering to the merits upon that demurrer being overruled. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 377. "Under the judiciary act of 1789, an issue as to the fact of citizenship could only be made by a plea in abatement when the pleadings properly averred the citizenship of the parties. But the act of 1875 imposes on the circuit court the duty of dismissing a suit if it appears at any time after it is brought, and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. *Williams v. Nottawa Tp.*, 104 U. S. 209, 26 L. Ed. 719; *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269. And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court." *Morris v. Gilmer*, 129 U. S., at page 326, 9 Sup. Ct. 292, 32 L. Ed. 694. The crucial question is, was the plaintiff, at the date the action was brought, a citizen and a resident of the state of West Virginia? The jurisdiction depends on the state of the parties at the commencement of the suit. No subsequent change of citizenship can affect it. *Conolly v. Taylor*, 2 Pet. 556, 7 L. Ed. 518; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; *Morgan v. Morgan*, 2 Wheat. 297, 4 L. Ed. 242.

At the beginning of this suit the plaintiff had his home and family at Clifton Forge, in the state of Virginia. He had lived at Clifton Forge from 1893, or the beginning of 1894, up to that time, owned his house there, voted there. He had been born in the state of West Virginia, and had lived at Huntington, in that state. He removed to Clifton Forge, Va., and had changed his domicile. Was this change made *animo manendi*? By this term is not meant the hope and expectation which so many entertain who leave their homes for business purposes or to better their fortunes,—of some day returning to the place of their birth, and there to reap the reward of their efforts. But did he go to Virginia intending to make it his home so long as his business required it? He had no home elsewhere. He established his home at Clifton Forge by buying a house and putting his family in it. He paid his taxes there. As has been seen, he cast his vote there. In his application for his policy he stated his residence to be Clifton Forge, May 21, 1897. In his claim notice, September 5, 1897, he states his name, and his residence as Clifton Forge, Va. The policy states him to be of Clifton Forge, Va. "Among the circumstances usually relied on to establish the *animo manendi*," says the court in *Mitchell v. U. S.*, 21 Wall. 353, 22 L. Ed. 584, are declarations of the party, the exercise of political rights, the payment of personal taxes, a house of residence, and a place of business." "On a change of domicile," says the court in *Shelton v. Tiffin*, 6 How. 185, 12 L. Ed. 397, "from one state to another, citizenship may depend upon the intention of the individual. But this intention may be more satisfactorily shown by acts than declarations. An exercise of the right of suffrage is conclusive on the subject." In

The *Venus*, 8 Cranch, at page 279, 3 L. Ed. 562, if one removes with the intent to make a permanent settlement or for an indefinite time, he changes his domicile. See *Knox v. Greenleaf*, 4 Dall. 360, Fed. Cas. No. 7,908; *Byrne v. Holt*, 2 Wash. C. C. 282, Fed. Cas. No. 2,272; also, *Ennis v. Smith*, 14 How. 400, 14 L. Ed. 472. There is a very strong presumption that in the case at bar the plaintiff had changed his domicile, and had become a citizen of the state of Virginia. He, no doubt, hoped and intended to return to his former home in West Virginia. But the consummation of that hope and intent depended upon circumstances beyond his control,—the happening of some fortunate event giving him opportunity of return. But, besides this, and even admitting, for the sake of argument, that the remote expectation and hope of return to West Virginia were sufficient to prevent a change of domicile, and so he remained a citizen of West Virginia, this would not be sufficient to give the court jurisdiction. He must have been at the institution of the suit a resident as well as a citizen of the state of West Virginia. Now, on the 30th of September, the day this suit began, he and his family still had their home in Clifton Forge, Va., which he had purchased, and in which he had established them. From this home he and they did not remove until nearly a month afterwards. Even if he had not changed his domicile, he certainly had his residence in the state of Virginia. Residence and domicile are not the same. "A party may be a resident of a place, although not domiciled there." *Chambers v. Prince* (C. C.) 75 Fed. 177. Opinion of supreme court of Massachusetts to the legislature, 5 Metc. 587, Supp. It is true that he had made every preparation for removal, and had a fixed intention to remove. But, to make a change of residence, two things must concur,—the intention to remove and the act of removing. "A citizen of the United States is entitled to transfer his citizenship from one state to another, by change of domicile, whenever he desires to do so. And when there has been an actual removal with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicile, although he may have formerly declared that he nevertheless considered himself a citizen of the state he has left." 6 Am. & Eng. Enc. Law (2d Ed.) p. 32; *Butler v. Farnsworth*, Fed. Cas. No. 2,240. So, also, in *Ennis v. Smith*, 14 How., at page 423, 14 L. Ed. 472, actual residence is necessary for a change of domicile; and, by analogy, actual removal is necessary for a change of residence. The rule of *Ennis v. Smith* is still more distinctly stated in *Mitchell v. U. S.*, 21 Wall. 353, 22 L. Ed. 584. The change must be both *facto et animo*. In *Penfield v. Railroad Co.*, 134 U. S. 351, 10 Sup. Ct. 566, 33 L. Ed. 940, is a decision as to the term "residence," as contradistinguished from "domicile." In that case it was held that a traveling salesman residing in St. Louis, Mo., who had sent his wife and children to Brooklyn, N. Y., where they took up their residence and commenced to keep house, and have since then resided, did not become a resident of the state of New York until he joined his family there, and changed his actual residence to that state, although his

domicile might be there. In that case many New York cases are quoted, and commented upon with approval, all showing that the term "residence" means actual residence, and not residence in contemplation. In our opinion, the plea to the jurisdiction was well taken, and should have been allowed. The case will be remanded to the circuit court, with instructions that the same be dismissed for want of jurisdiction.

On Rehearing.

(May 19, 1900.)

The petition for rehearing filed in this case has received careful consideration. With so much of the decision of this court as holds that the plaintiff was not a resident of the state of West Virginia when the action was instituted, we see no reason to change our opinion. The petition for rehearing calls the attention of the court to the fact that proceedings in attachment were issued in this case in the circuit court of the United States for the district of West Virginia, and that moneys have been attached, and are now held, sufficient to pay the judgment obtained below. Attention is also called to the fact that under the law of West Virginia the defendant corporation was required to appoint a resident agent upon whom process against it could be served. Upon these grounds it is contended that the defendant corporation could be sued in the district of West Virginia, and virtually had a residence therein. The validity of the attachment proceedings depends altogether upon the question, had the court jurisdiction of the cause? If it had not originally, the fact that moneys were attached under it cannot create jurisdiction. The language of the act of congress on this subject is as follows:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Act Cong. Aug. 13, 1888 (25 Stat. 434).

The plaintiff is not a resident of the state of West Virginia. Can the defendant corporation, created under the laws of the state of California, be a resident of the state of West Virginia? In *Railroad Co. v. Koontz*, 104 U. S. 12, 26 L. Ed. 643, it is held that a corporation created under the laws of a state is resident there, and nowhere else. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But its residence in one state creates no insuperable objection to its contracting in another. In *Shaw v. Mining Co.*, 145 U. S. 449, 12 Sup. Ct. 935, 36 L. Ed. 768, it is held that under the act of congress quoted above a corporation can sue or be sued only in the state or district in which it is incorporated, or in the state of which the other party is a citizen. In *Re Hohorst*, 150 U. S. 662, 14 Sup. Ct. 10, 37 L. Ed. 1211, this rule is emphasized, but it is held not to apply to a case of a foreign or alien corporation. And this exception is declared in *Railway Co. v. Gonzales*, 151 U. S. 503, 14 Sup. Ct. 401, 38 L. Ed. 248, to have been made in order to prevent a failure of justice, and it was distinctly declared that the term "foreign" meant an

alien corporation. In *re Keasbey & Mattison Co.*, 160 U. S. 230, 16 Sup. Ct. 273, 40 L. Ed. 402, discusses and decides the same question, and says:

"That case [Hohorst] is distinguishable from the one now before the court in two essential particulars: First, it was a suit against a foreign corporation, which, like an alien, is not a citizen or an inhabitant of any district within the United States; second, it was a suit for infringement of a patent."

And upon this ground, also, was decided *Steamship Co. v. Kane*, 170 U. S. 112, 18 Sup. Ct. 526, 42 L. Ed. 964, relied upon in the petition for rehearing.

The petitioner seems to rely on the act of 1875 as giving jurisdiction, and lays stress upon the attachment levied upon the moneys of the defendant corporation. The act of 1875 gives jurisdiction against an absent defendant in a suit to enforce any legal or equitable lien upon or a claim to, or to remove any incumbrance, cloud, or lien upon, the title to real or personal property within the district. But, when this suit was brought, the plaintiff had no such lien upon or claim to the moneys attached. Its claim or lien arose because of the suit, and the suit did not arise because of the lien. No doubt, if the plaintiff had been a citizen and resident of the state of West Virginia at the time his suit was brought, he could have maintained his action, and could have pursued under attachment proceedings all that the laws of West Virginia could allow him. Rev. St. U. S. § 915. But he was not a resident of the district of West Virginia at that time, nor could the corporation of California be, in the sense of the statute, a resident of that district. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 377. And the circuit court had no jurisdiction. In the state court, probably, he could have had full remedy. The petition is dismissed.

BAKER v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, S. D. New York. May 10, 1900.)

NEW TRIAL—EFFECT OF SPECIAL FINDING.

The fact that a special finding by a jury is against the weight of evidence does not afford ground for setting aside its general verdict, where it is not inconsistent therewith, and where there is ample evidence to sustain the general verdict, outside of the question to which the special finding relates.

On Motion by Defendant to Set Aside Verdict and for a New Trial.

Henry W. Taft, for the motion.

John J. Crawford, opposed.

LACOMBE, Circuit Judge. There was abundant evidence in the case to sustain the general verdict under the rule laid down by the court of appeals. It would not be at all difficult to enumerate several particulars in which the jury might well have reached the conclusion that defendant had not "observed the utmost caution characteristic of very careful, prudent men." In addition to the general verdict, however, the jury answered a special question, framed by the defendant and put at its request. The question is:

"After the boom of the derrick or its attachments had begun moving towards the track, could the train have been slowed down or stopped after coming in sight in time to avoid the accident?"

This question did not itself cover the whole case, nor was it coupled with other questions, covering the remaining issues submitted to the jury. The answer to the question was against the weight of evidence, but such answer in no way conflicts with the general verdict. Of course, if the jury had found a general verdict for the defendant, and answered the question as they did, the whole verdict would have to be set aside. In the authorities cited by defendant there was either some inconsistency between the special finding and the general verdict, or else it was manifest that the general verdict was induced by the erroneous answer to the special question. Such is not the case here. If defendant had supplemented his question by others covering the more important part of the case, the one most dealt on in the charge, he would, by securing answers to all, have accomplished what by the single question he has failed to do, viz. discovered precisely how the jury reached their general verdict. But he has not done so, and we have a general verdict abundantly sustained by proof, even if everything bearing on the precise question submitted were eliminated from the case. The proper practice in such cases is well set forth in *Staser v. Hogan*, 120 Ind. 207, 227, 21 N. E. 911, and 22 N. E. 990. The motion is denied.

McCUTCHEON v. HALL CAPSULE CO.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 745.

1. APPEAL—REVIEW—SUFFICIENCY OF EXCEPTIONS.

A single exception, taken to a charge as a whole, which does not direct the attention of the court to the particular portions to which objection is made, raises no question for review; nor can its indefiniteness be remedied by a more particular specification in the assignments of error.

2. SAME—MOTION FOR NEW TRIAL.

A ruling upon a motion for new trial cannot be assigned for error in the federal courts.

3. SAME—QUESTIONS NOT PRESENTED BY RECORD.

A contract sued on cannot be adjudged void, as contravening public policy, by an appellate court, where the alleged invalidity does not appear, as matter of law, upon the face of the pleadings or the contract, and the question was not raised in the court below by a motion to direct a verdict, but was submitted to the jury as a question of fact on the evidence, without objection, by a charge not excepted to in that respect.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This action was brought to recover damages for the refusal on the part of the National Capsule Company to perform a contract executed on the 8th of August, 1892, between that company and the Hall Capsule Company. The suit was instituted in the state court, and removed, on defendant's application, into the circuit court of the United States for the Southern district of Ohio. The contract was, in substance, one for the sale by the Hall Capsule Company to the National Capsule Company of certain patent rights, machinery, and its

business of manufacturing empty capsules. Among the stipulations in the contract was one providing for the institution and prosecution of a suit for the purpose of having adjudicated the validity of certain patents, and the question whether another company, called the Warren Company, was infringing those patents. A more particular statement of the terms of the contract is not material for the purpose of the case as now presented to this court. The due performance of that contract on the part of the National Capsule Company was guaranteed in writing by the defendant in error, McCutcheon, and Charles M. Stephens, and the present suit is against defendant in error alone on the written guaranty. The trial in the court below resulted in a verdict in plaintiff's favor for \$10,000, on which, after overruling the motion for a new trial, judgment was passed, and the case is brought here for review. There was no exception on the trial in the court below to any ruling of the court in the admission or rejection of evidence. There was no motion at the close of the evidence to direct a verdict in favor of the defendant, and the verdict was a general one in favor of the plaintiff. There is in the record a bill of exceptions covering nearly 300 pages of the printed record, and purporting to contain all of the evidence offered on the trial of the case in the court below. Much of this evidence consisted of letters, identified in the bill of exceptions only by reference to them as Exhibits 1 to 57, inclusive, with reference to which the recital in the bill of exceptions is, "The letters are specified below, without being copied in the record, but are made part of the same." The charge of the court was full and specific in relation to the issues in the case, extending over 13 closely printed pages of the record. The charge closed in a conversation between the judge and counsel of both parties as to the meaning and effect of certain parts of the charge already given to the jury. This concluding part of the charge, with the only exception taken to the charge, was in the following language: "The Court: No doubt, that is a sound rule of law, but how do you apply it in the present case? Mr. Matthews: I don't apply it at all, except on this theory, that the contract still remains in force, except that part of it which compels the buying and fixing of prices was changed. The jury may have supposed that that was the same single contract. The Court: The rule in regard to suretyship in that respect is undoubtedly this: A guarantor and surety are the same things in the eye of the law; and the release, where the principal contract, to which the party becomes a mere surety, is varied in any substantial respect without the consent of the surety, that bars the surety from his obligation, because he is in a position to say, 'The contract as it now stands is one which I did not guaranty.' Mr. Granger: In that connection, we will ask the court to charge the jury, as a matter of law, that the contract, by its terms, fixes the maximum prices; it is no change in that contract to charge a less price. The Court: Undoubtedly not. That is correct. We will not prolong this discussion. The court is clear that the taking at a less price than the maximum agreed upon in the contract was not a violation of the contract, or, rather, not a change of it which would release the guarantor. (To which charge of the court counsel for defendant then and there excepted.)" The fourth assignment of error is to this part of the charge, setting it out as required by the rules of this court. There is an assignment of error on the denial of the motion for a new trial. There are some other general assignments, not based on any question, ruling, or exception in the court below, otherwise than on the motion for a new trial. The contract itself was not made part of the pleadings, but introduced as a part of the evidence, and during the progress of the trial the question whether the contract was illegal arose, as may be inferred, from the court's instructions to the jury upon that subject. The case is now presented for consideration on motion to dismiss, with which is united a motion to affirm.

C. Bentley Matthews, for appellant.

Walter L. Granger and Miller Outcalt, for appellee.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

OLARK, District Judge, after stating the case, delivered the opinion of the court.

The record disclosing no exception in the court below to rulings in the admission or rejection of evidence, and there being no motion or request for a peremptory instruction in favor of the defendant, the contention of the defendant in error is that the one general exception to the whole charge does not authorize a bill of exceptions which brings before this court the whole evidence used on the trial of the case in the court below, and that the bill of exceptions is also insufficient in view of rule 10 of this court. 31 C. C. A. cxiv., 90 Fed. cxiv. In view of this state of the case, it is insisted by the defendant in error that the case is not brought within the revisory power of this court, and that no question of law is presented for our consideration. The *S. C. Tryon*, 105 U. S. 267, 26 L. Ed. 1026; *Pennock v. Dialogue*, 2 Pet. 1, 7 L. Ed. 327; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960, 29 L. Ed. 215; and other cases,—are cited as supporting the contention of the defendant in error; but, assuming that the motion to dismiss should not be sustained, we are of opinion that there was color for the motion, which authorizes the court to entertain the motion to affirm, and that this motion should be granted. The single exception taken to the charge did not direct the attention of the court to the particular portions of it to which the objection was made, and therefore raised no question for review. It has been declared again and again that our right of review is limited to questions of law appearing on the face of the record, and no such questions are presented here. In *Holder v. U. S.*, 150 U. S. 92, 14 Sup. Ct. 10, 37 L. Ed. 1010, Mr. Chief Justice Fuller, in giving the opinion of the court, said:

"There is no pretense that the charge of the court, occupying twenty-four pages of the printed record, was erroneous in every part, and no exception to any particular part is shown. The rule is that a general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review. *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960, 29 L. Ed. 215; *Iron Co. v. Blake*, 144 U. S. 476, 488, 12 Sup. Ct. 731, 36 L. Ed. 510; *Lewis v. U. S.*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011. It has also been settled by a long line of decisions of this court that the denial of a motion for a new trial cannot be assigned for error. As observed by Mr. Justice Lamar in *Van Stone v. Manufacturing Co.*, 142 U. S. 128, 134, 12 Sup. Ct. 181, 35 L. Ed. 961, no authorities need be cited in support of the proposition."

See, also, *Holloway v. Dunham*, 170 U. S. 615, 620, 18 Sup. Ct. 784, 42 L. Ed. 1165; *Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746.

And the assignments of error cannot be availed of to import questions into the record, in the absence of an exception which directs the attention of the court to the particular portions of the charge objected to. *Lindsay v. Burgess*, 156 U. S. 208, 15 Sup. Ct. 355, 39 L. Ed. 399; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960, 29 L. Ed. 215; *Claassen v. U. S.*, 142 U. S. 140, 148, 12 Sup. Ct. 169, 35 L. Ed. 966; *Philip Schneider Brewing Co. v. American Ice-Mach. Co.*, 23 C. C. A. 89, 77 Fed. 138; *Ansbro v. U. S.*, 159 U. S. 695, 16 Sup. Ct. 187, 40 L. Ed. 310.

Assuming that the exception, although general in its terms, could be regarded as limited to that portion of the charge embodied in the fourth assignment of error, as insisted by counsel for plaintiff in error, it would only be necessary to say that the charge in this respect was obviously sound. Indeed, this is now conceded, or, if not, is too obviously true to admit of denial.

The chief contention in this court on behalf of the plaintiff in error is that the contract sued on is void, as in restraint of trade, at common law, and in contravention of the act of congress prohibiting contracts in restraint of interstate commerce. This question is not raised by the assignments of error in this court, nor was it raised by the pleadings in the court below. It is insisted, however, that a contract contravening public policy is one which should not be enforced, and that the objection should be noticed by the court and considered, in the absence of an assignment of error. The alleged illegality does not, however, appear as a matter of law upon the face of the pleadings; and if, in view of the record, disclosing no motion for a peremptory instruction for the defendant, and only a general exception to the charge, we were authorized to examine the evidence and refer to the contract, the asserted invalidity does not appear upon the face of the contract, or from the admitted facts of the case. The conditions, therefore, which would justify this court in such action as is suggested, do not exist here. *Carter-Crume Co. v. Peurrung*, 30 C. C. A. 174, 86 Fed. 439. Furthermore, the issue whether the contract was invalid on account of any unlawful purpose, or knowledge of such purpose, in its execution, was submitted to the jury as a question of fact, without objection, under a charge not excepted to in that respect, and without a motion to direct a verdict. Under such circumstances, this question of fact is not open to re-examination by this court. *Hansen v. Boyd*, 161 U. S. 402, 16 Sup. Ct. 571, 40 L. Ed. 746. Judgment affirmed.

In re DEWS.

(District Court, D. Rhode Island. January 12, 1900.)

BANKRUPTCY—OPPOSITION TO DISCHARGE—FALSE OATH.

Where a bankrupt, on a hearing on his application for discharge, produces to the court a written account, called a "Statement of Expenditures," which purports to show in detail the disposition made of a sum of money which he is charged with having secreted, and testifies to its truth, but such statement is in fact false and inaccurate, if the inaccuracies are the result of an intentional and fraudulent manipulation of figures, for the purpose of making a showing favorable to the bankrupt, and not the consequence of an honest mistake, he is guilty of making a "false oath and account in a proceeding in bankruptcy," within the meaning of Bankr. Act 1898, § 29b, subd. 2, and his discharge must be refused.

In Bankruptcy. On application of bankrupt for discharge, and opposition thereto by creditors.

H. E. Bolles, for objecting creditor.

Lorin M. Cook and S. W. K. Allen, for bankrupt.

BROWN, District Judge. The Washington National Bank, a creditor, opposes the discharge of the bankrupt on the following grounds: (1) Because the bankrupt has made a false oath and a false account in and in relation to a proceeding in the matter of his bankruptcy; said proceeding being a hearing before this court upon the petition of said bankrupt for his discharge and the objections of said creditor thereto. (2) Because said bankrupt at said hearing made to, and presented to said court in writing as a part of his evidence in said proceeding a false account, entitled "Statement of Expenditures," which account purported to show the way in which said bankrupt had spent \$125,242.98, withdrawn by him from the Phoenix Woolen Company, a corporation. (3) Because said bankrupt in said proceeding made a false oath and testified falsely to said court in substance that said account substantially showed the manner in which said sum withdrawn by him from said Phoenix Woolen Company had been expended by him.

Previous to the hearing before me the bankrupt had been under examination before the referee for some 30 days, and it is stated in the bankrupt's brief, and so appears from the evidence taken before the referee, that at those hearings the objecting creditor had, in effect, charged the bankrupt with having appropriated and secreted from his creditors money drawn by him from the Phoenix Woolen Company. The manner in which the bankrupt had disposed of the sum of \$125,242.98 had been long a subject of examination, and the bankrupt was so thoroughly aware of the necessity of accounting fully for the disposition of this sum that he had prepared and brought into court with him a written account showing on one side by items the amounts received from the Phoenix Woolen Company, and on the other what was marked in open court as a "Statement of Expenditures," the last item of which was as follows: "Premiums on life insurance in hands of S. Williams, also interest on above notes until paid, and family expenses for seven years, \$45,903.08." The accounts were balanced by this last item. Not only does the face of the account show that it was prepared and intended to show the manner in which the sum of \$125,242.98 received by the bankrupt was expended, but it was in express terms presented to the court for that purpose.

After the bankrupt had testified to the receipt of \$125,242.98, his counsel said to him, "Now, Mr. Dews, I wish you would explain what you did with that money." In reply to a question from the court, "Is there also an account of the disposition?" counsel for the bankrupt replied, "Yes, sir." The bankrupt then proceeded to explain the account of expenditures, concluding with the statement, "This used up the \$125,000." It is clear beyond a reasonable doubt that the bankrupt intended that the court should accept this as a statement of what had been done with the sum of \$125,000, and should believe that no part of this sum had been concealed or appropriated by the bankrupt. Yet it is an indisputable fact that in this very account there is a concealment of the method of disposing of some \$30,000 of the bankrupt's receipts. The inaccuracy of the statement of expenditures is conceded, and an amended statement has been submitted by the bankrupt. The original statement contains items amounting to about \$30,000, which were not paid out of the \$125,000. The account,

therefore, is untrue in at least two particulars: First, in the insertion of sums aggregating \$30,000 as payments made from the \$125,000 when in fact they were not so paid; second, in the statement that the sum of \$45,000 covered certain premiums, interest, and family expenses for seven years. The bankrupt's right to a discharge must therefore turn upon the question, were these inaccuracies due to mistake, or were they the result of an intentional and fraudulent manipulation of figures, for the purpose of making a showing as favorable as possible to the bankrupt, regardless of the actual facts. The bankrupt contends that the conceded inaccuracies were due to mistake. At the hearing, though this matter was strongly pressed by counsel for the objecting creditor, the counsel for the bankrupt made no reply thereto. Though this question was then before the court for decision, it seemed that the serious nature of the charge rendered it proper to give to the bankrupt the fullest opportunity for explanation, and permission was given to the bankrupt to file, within 30 days, a brief specially directed to the charges contained in the additional specifications. *In re Dews* (D. C.) 96 Fed. 181. This decision was rendered on June 24, 1899. Further time was granted, and the brief was finally filed after a period of about three months.

In the brief it is not contended that the account was correct. It is contended simply that this was an honest mistake, without any reasonable explanation of how the mistake arose. The statement of expenditures was deliberately prepared, and was on the final sheet of the account in a column parallel to that of receipts, not, as the brief states, on a separate sheet. The accounts were balanced, showing that the bankrupt fully understood that the important inquiry was the relation between the receipts and expenses. The bankrupt is a man of wide experience, and it is impossible to believe that he could have misunderstood the charge reiterated through some 30 hearings before the referee and again before the judge. He fully understood that he was to explain what he did with a specific sum of money, and adopted a method of accounting which enabled him to avoid any explanation of what he did with \$30,000 of that sum. Whether this was done for the purpose of concealing the present possession of assets, or for the purpose of concealing extravagant expenditures, is immaterial.

This mode of accounting is further suspicious from the fact that it is a departure from the usual method of accounting. On the books of the Phoenix Woolen Company appeared not only the receipts of the bankrupt, but also an account of personal expenditures. A man of the bankrupt's experience, desiring in good faith to explain, would have resorted first to this account. It is idle for the bankrupt to claim that his account was the result of his best efforts to show his expenditures, when he had on the books an itemized account that would have shown the final item of the account presented to have been far in excess of \$45,000. In order to work in as expenditures from \$125,000 the moneys drawn in his wife's name, the bankrupt was compelled to ignore his personal account of expenditures on the books. Instead of referring to his books, he produced a large bundle of receipts. Had he taken the obvious course of inserting all expenditures shown on the books in addition to those he took from receipts, etc.,

it would have appeared that he had expended at least \$30,000 more than he had received. The failure to resort to his personal account on the books is strong evidence of fraudulent intent.

Not only did the bankrupt insert items known to him not to have been paid out of the \$125,000, but in order to do this he also knowingly omitted many items, as, for example, large sums given to his children upon their marriage, which could not have escaped his memory. The bankrupt's testimony is, in my opinion, false in the suppression of those items as well as of many other items appearing on the books.

The bankrupt contends that he had put in evidence the books of the Phoenix Woolen Company, both ledger and journal, and that they spoke for themselves, and that "when it is desired to ascertain what has become of the \$125,000, or any other sum drawn by the bankrupt from the Phoenix Woolen Company, it is only necessary to examine the books." But this is not true. As a matter of fact, the books do not disclose fully how the bankrupt disposed of his money. Though the disposition of a large amount is shown, many items are simply for money drawn, without showing how it was applied. The bankrupt himself claimed that the books would not show what he did with the money, and that, therefore, he had resorted to "releases and one thing and another." The accounts contained in the books of the Phoenix Woolen Company were not offered by the bankrupt to support his account of expenditures.

He further contends that the accounts of Mrs. Dews were in the books, and spoke for themselves, and showed that a part of the expenditures were from money drawn by her. But this was not in any way referred to by the bankrupt in explaining and presenting his account. On the contrary, throughout the protracted examination before the referee, the bankrupt had vigorously and successfully resisted persistent attempts to examine the account of Mrs. Dews, and in the hearing before me the counsel for the bankrupt, so far from offering Mrs. Dews' account in evidence, strenuously insisted that it should not be examined. Had this effort to exclude Mrs. Dews' account been successful, there would have been no means of disputing the bankrupt's statement that he had paid those sums from his own withdrawals. I am satisfied that this account was prepared and presented with reliance upon a legal objection to prevent the introduction of Mrs. Dews' account and the exposure of the falsity of the statement of expenditures. It is absurd for the bankrupt to claim, as evidence of good faith, that he put in evidence the account of Mrs. Dews, to which he did not refer to support his account, and which conclusively disproves his account. Not until, against the bankrupt's objection, the court ruled that the objecting creditor had the right to examine the account of Mrs. Dews was any allusion made to the fact that certain items were paid out of Mrs. Dews' withdrawals. The effect of the ruling was at once obvious to the bankrupt, and his forced allusion to Mrs. Dews' account, instead of affording evidence of good faith, is rather evidence that he quickly saw that the introduction of Mrs. Dews' account was a destruction of his own account, and exposed the fraudulent theory upon which it was prepared.

The offense was fully complete before any allusion to her account,

and is not in the least mitigated by certain expressions of the bankrupt which tend to show that he thoroughly understood the false principle upon which his account was prepared, rather than that he intended to explain to the court facts which would entirely destroy his carefully prepared account. The bankrupt is thoroughly familiar with accounts, and it is impossible to believe that his original plan was to present an account, and then to supplement that account by evidence that would show it untrue in fact as well as irresponsible to the inquiry, "What was done with the sum of \$125,000?" After a most cautious and careful examination of this case, I am convinced beyond a reasonable doubt that the bankrupt is guilty as charged in the specifications, and the discharge is therefore denied for the reasons therein stated.

In re BARDEN.

(District Court, E. D. North Carolina. May 15, 1900.)

1. **BANKRUPTCY—FILING FEE—PARTNERSHIP PETITION.**

Where a partnership applies for the benefit of the bankruptcy law, and files a petition for the adjudication of the firm as such, and also separate petitions for the adjudication of the several partners, each petition, with the accompanying schedules, constitutes a separate and distinct "case," within the meaning of the provisions of the act relating to fees of officers; and a deposit of the statutory filing fee of \$25 must be made, not only for the partnership, but also for each member of the firm who seeks an adjudication.

2. **SAME—TIME OF DEPOSITING FEE.**

A deposit of the statutory filing fee by a proposed voluntary bankrupt, not within the exception in favor of paupers, is a condition precedent to the filing of the petition; but if the petition is placed on file, and an adjudication made without payment of such fee, the objection may be raised on the bankrupt's application for discharge, and action on such application will be stayed until the filing fee is paid.

In Bankruptcy. On bankrupts' petition for final discharge.

The referee certifies the following facts:

"On the 4th day of March, 1900, I received order of reference, and partnership adjudication, petition, and schedules, in the matter of J. P. Wilson & Co., bankrupts. The final clause of the petition is as follows: 'Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts, within the purview of said acts.' The order of reference and adjudication are hereto attached, and marked Exhibits 'A' and 'B,' respectively. Attached to the individual schedules, which accompanied the schedule of partnership property, were individual petitions, but the undersigned referee is informed that these individual petitions were not filed as separate cases with the district court clerk in Raleigh: that no deposit fee was made, except \$25 in the partnership matter; that the judge was not asked to make individual adjudications, and that no individual adjudications were made by the judge, and that the individual petitions and schedules were not referred to the referee, except as a part of the partnership petition; that at the first meeting of creditors, in the matter of J. P. Wilson & Co., the referee called the attention of the bankrupt's attorney to the fact that there was no individual adjudication of bankruptcy, though individual petitions had been filed, and suggested that members of bankrupt firm would not be entitled to receive individual discharges; the said attorneys, Messrs. Stevens, Beasley & Weeks, decided to file individual petition with the district court clerk in Wilmington, so that the referee could be author-

ized to make the individual adjudications; a few days afterwards, to wit, on March 22d, the referee received individual petitions and schedules in the matters of J. E. Pollock, J. R. Barden, and J. P. Wilson, with order of reference from deputy clerk of the United States district court at Wilmington, and, supposing deposit of \$25 had been made in each case, he at once made adjudications in these matters, and mailed notices of first meeting to creditors, and had same published in the Morning Star; that on the following day he was notified by the clerk in Wilmington that no deposit had been made; the referee at once notified Messrs. Stevens, Beasley & Weeks, and requested that same be made. They replied: 'The filing fees are in the hands of Mr. Weeks, my partner, in Wilmington. Mr. Shaw at first refused to file individual petitions of Barden and others, but, upon examination of the order sent from Raleigh signed by Judge Purnell, it stated that the individual adjudications had been made by Judge Purnell, and fees paid. Therefore we have been holding the funds. On April 2d, when we see you, we will do what is right.' Neither in the wording of the act nor in the form of partnership petition prescribed by the supreme court does it seem to have been contemplated that discharge from individual debts could be had upon partnership petition. Of course, it is frequently necessary that individual assets and liabilities be considered in the settlement of partnerships by trustees in bankruptcy. If every member of a partnership could receive a discharge from his individual debts after a firm adjudication, all the bankrupts in a town, by forming a partnership, could get their individual discharges for \$25. However this may be, no individual adjudications were asked in the partnership petition, nor granted by the judge, and the individual petitions filed in a different town constituted separate cases. Had the referee known that no deposit fee had been made in these cases, he would not have signed adjudication, and called first creditors' meeting in the individual matters; but, when he was informed no fees had been deposited, he had already signed adjudications, mailed notices, and publication made, so he concluded to go on with the proceedings, and when petitions for discharge were filed raise the questions—First, of whether the bankrupts are entitled to individual discharge where there is no individual adjudication; and, second, whether bankrupts can file partnership petition in Raleigh before the judge, and, after partnership adjudication is made, file individual petition in Wilmington, and have the referee make adjudications on these, and proceed to discharge at a cost of \$25 for the filing fees of all. The undersigned referee does not think that the bankruptcy act and general orders justify the contention of the bankrupts in this case, and he therefore recommends that they be required to make the \$25 deposit in each of the individual proceedings before receiving individual discharges."

Stevens, Beasley & Weeks, for bankrupts.

PURNELL, District Judge (after stating the facts as above). The question presented by the foregoing finding of facts, of which the individual bankrupt partners ask a review, seems to be one of first impression. No opinion in point is cited, except two district court opinions, in which I cannot concur; and, if there has been any other decision, it has been overlooked by counsel, referee, and court. The decision must depend on a construction of the statute itself, gathering the legislative intent from the provisions therein,—“from the four corners” of the act. Section 52 of the bankruptcy act, after prescribing the duties of the clerk, says: “Clerks shall respectively receive as full compensation for their services in each estate a filing fee of ten dollars, except where a filing fee is not required of a voluntary bankrupt.” This section further provides for the fees of the marshal. The case at bar is not one of those excepted. Section 40 of the act provides: “Referees shall receive as full compensation for their serv-

ices payable after they are rendered a fee of ten dollars deposited with the clerk at the time the petition is filed in each case," etc.; the remaining clause referring to commissions, which are not pertinent to or material in the present inquiry. Section 48 provides for a fee of five dollars and commissions for the trustee "in each case."

What do the expressions "in each estate" and "in each case" mean, as used in the statute, when a partnership files a petition in bankruptcy? Among the definitions peculiar to the act is that of "person," which (section 1, subsec. 19) shall include partnerships, showing the legislative intent was to recognize firms as legal entities, separate and distinct from the individual members of the firm or partnership. Section 4, applying this definition, provides for a voluntary petition in bankruptcy of a partnership, and the next section (5), without the aid of the definition, provides expressly for such adjudication. Subsection (d) of this section provides that the trustee shall keep separate accounts of the partnership property and of the individual partners; (e) that the expenses shall be paid from the partnership property and the individual property in such proportion as the court may determine; * * * that the proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of the individual debts; the surplus, should there be any, after paying the individual debts, is to be applied to the payment of partnership debts, and vice versa; and (g) the court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estate so as to prevent preferences, and secure the equitable distribution of the property of the several estates. The following provision is for the administration of the partnership estate when all partners are not bankrupt. Other sections might be quoted to illustrate the provisions peculiar to partnerships, but the foregoing are sufficient to show a recognition of the partnership as a distinct entity, and the legislative intent to recognize different estates when a partnership and the individual partners are adjudged bankrupt,—the sense in which the words "each estate" are used in the section providing for the payment of the clerk's fees. Most of the decisions which have been made on this line apply to the commissions allowed by the act, and none has been cited or found applicable to the filing fees. In *Re Meyer*, 39 C. C. A. 368, 98 Fed. 976, the circuit court of appeals of the Second circuit took the same view, above expressed, as to the distinct entity of a partnership and individual partners, and held, in an involuntary proceeding against a firm and its members, no adjudication can be made against a partner who has not committed, or participated in committing, any of the acts specified in the statute as acts of bankruptcy. In general order No. 8 the supreme court seems to recognize this distinction as it does in the prescribed forms. 18 Sup. Ct. v. Form No. 2 (Id. xviii.) closes with a prayer that the firm be adjudged bankrupt, and No. 1 (Id. xi.) is the individual petition. In short, the proceedings are separate; the estates different. The only logical conclusion from the act itself, keeping in view the legislative intent deducible therefrom, "estate" having no

restricted technical meaning, but meaning the ownings, real and personal property, choses in action, whatever may belong to the person, as defined in the statute, is that congress meant exactly what the statute provides. Clerks shall receive for their services to each estate a filing fee of \$10; that is, \$10 for filing the petition and schedules of the partnership, and \$10 for filing the petition and schedules of each individual member thereof,—\$10 from each estate to be administered. And if congress thus used the words "each estate," it is not probable the phrase "in each case" was used in a more restrictive sense. In section 1 special meanings are given to the words and phrases used in the act, "unless the same be inconsistent with the context." Congress thus, in addition to the rule of construction, by express terms made the context the test for the meaning of the words and phrases used in the act.

The labors of the referee and trustee are greater in every case than those of the clerk. The referee, by section 39, is required to prepare dividends, examine schedules, and, if defective, cause them to be amended, furnish information to parties in interest, prepare records, prepare and file schedules of property and list of creditors, etc. In short, he is the court in many respects, as defined in section 1. As the estates must be kept separate, the petitions and schedules being different, many questions may arise as to the estates of the firm or individual members, thus making several cases. Because the papers are or may be filed in the same files case, jacket, or envelope does not, of necessity, make them one and the same case. The case at bar is a part of the original proceeding of J. P. Wilson & Co., as was the case of J. E. Pollock, recently decided, but they involve questions which could not arise in the original proceeding; hence are separate cases. The trustee, too, whose duties are defined, must keep separate accounts of each estate. In short, the act recognizes separate estates, and it is a logical conclusion from the act itself it was intended that each petition, set of schedules, and estate should in the bankruptcy court constitute separate cases. "Case" has no technical restrictive legal meaning. Congress evidently used the word to apply as above considered, and not, while allowing to the clerk a filing fee in each estate, require the officers created by the act to administer, collect, distribute, and settle possibly half a dozen estates as one case. The duties of these officers are more responsible, burdensome, and laborious than those of the clerk, and it is not reasonable to suppose congress intended the narrow construction to be given to the act which would require of them so much more for so much less compensation in this peculiar class of proceedings. My conclusion is that the proper construction of the statute in proceedings where petitions are filed by a partnership to have a firm adjudged bankrupt, and a petition by the individual members of the firm, is that each petition and the accompanying schedules constitute a separate and distinct case; hence the referee and trustee are entitled to a fee of ten and five dollars, respectively, in each case,—one on the partnership petition, and one on the petition of each individual member. The general idea of the bankrupt law is economy in its administration, but, above this, the law is just,—just to bankrupts, just to creditors,

and was intended to be just to the officers of the court. Any other construction would not be in keeping with the spirit of the law, but flagrantly unjust to the officers.

The case at bar is one strong in point. The adjudication as to the firm was made at Raleigh by the district judge on the petition and schedules there filed. Afterwards petitions and schedules were filed at Wilmington, and the referee made the adjudications. Here are separate cases certainly, and the proceeding is in strict conformity with the statute. There is no argument in the fact that the court at Wilmington is a part of the court at Raleigh, and the officer at Wilmington a deputy clerk. Under Act April 13, 1792, c. 17, there was but one district, known as "North Carolina District," and this district was by act of February 13, 1801, divided into three districts, to be known as "Albermarle," the courts of which were to be held at Edenton; "Pamlico," the courts of which were to be held at New Bern; and "Cape Fear" (Clarendon), the courts of which were held at Wilmington. There was one judge. It was provided by statute the district court should "appoint clerks for said courts, respectively, which clerks were required to reside and keep their records of said courts at the places of holding said courts whereto they shall respectively belong." The courts of the district have been held at these places until, since 1872, the court formerly held at Edenton has been held at Elizabeth City. The Western district of North Carolina was established by the act of June 4, 1872 (17 Stat. 217). The act of August 9, 1894 (28 Stat. 274), provided for a session of the district court at Raleigh, and re-enacted the law as it was before in regard to other courts of the district. There has been no other special legislation on the subject of the clerks, but, in deference to a decision of the comptroller of the treasury (1898), that there should be no complication in regard to the accounts of these officers, in which it was held that there could be but one clerk in the district, a clerk was appointed to reside at Raleigh, and the other clerks made deputy clerks. The decision referred to does not seem to be in conformity with law as contained in the acts of congress, but deferring to it saves trouble to the clerks in having their accounts settled. The several courts in this district are separate and distinct, according to the acts of congress. The clerk at Wilmington should, as required by section 51, subsec. 2, of the bankrupt act, have collected a fee of \$25 in each petition filed. The payment of these fees is a condition precedent to filing a petition, when the case does not fall under the exception, as this one does not, and until paid the petitioner has no standing in the bankruptcy court. The petition for final discharge will not be heard when it appears the fees have not been paid. Action herein will be deferred until the filing fees are paid. This ruling applies to the petitioners J. R. Barden, J. P. Wilson, and J. E. Pollock, bankrupts, trading under the firm name of J. P. Wilson & Co. The ruling of the referee is affirmed.

In re LITTLE RIVER LUMBER CO.

(District Court, W. D. Arkansas, Texarkana Division, February, 1900.)

1. BANKRUPTCY—COSTS AND EXPENSES—FEE OF CREDITOR'S ATTORNEY.

Where one of the creditors of a bankrupt, by his attorney, objects to the allowance of a claim filed by another creditor, the trustee declining to interfere, and upon a contest and trial secures its rejection, thereby saving a considerable sum for distribution among the creditors generally, the attorney for such contesting creditor may be allowed a fee for his professional services rendered, to be paid out of the estate.

2. SAME—ATTORNEY FOR TRUSTEE—COMPENSATION.

Creditors of a bankrupt, at their first meeting, when they elect a trustee, should also elect an attorney to perform such services for the trustee as he may require, if they believe the services of an attorney will be necessary for the preservation of the estate. Failing such action on the part of creditors, the referee may authorize the trustee to employ an attorney, if satisfied that such a course is imperatively necessary in the best interest of the estate; and an attorney so employed will be allowed a fee, of such amount as will actually compensate him for services rendered, chargeable as part of the expense of administering the estate.

In Bankruptcy. On review of decision of referee in bankruptcy allowing a fee, payable out of the estate, to the attorneys for a creditor of the bankrupt.

The opinion of the referee (A. H. SEVIER) was as follows:

The facts in this case briefly are as follows: The Little River Lumber Company was adjudged bankrupt on January 14, 1899, and the first meeting of its creditors was held on January 25, 1899, when a trustee was elected. On August 7, 1899, O'Dwyer & Ahern, creditors of this estate, filed an unsecured claim against the estate for \$1,996.45 for allowance by the referee. A. Demarce, another unsecured creditor of the Little River Lumber Company, whose claim had been allowed by the referee, filed on the 19th day of October, 1899, a protest against the allowance of the claim of O'Dwyer & Ahern, on the ground of that firm being a preferred creditor of the estate. The issue, after notice to all the creditors by the referee, was contested before the referee on October 30, 1899, by attorneys of Demarce and O'Dwyer & Ahern, and the claim of O'Dwyer & Ahern for \$1,996.45 was disallowed by the referee, whereupon O'Dwyer & Ahern filed a petition for a review of the proceedings by the judge of the United States district court of the Western district of Arkansas. The case was heard by Hon. John H. Rogers, United States district judge, and the decision of the referee was sustained. 92 Fed. 585. The estate of the Little River Lumber Company had, previously to this decision, paid 50 per cent. dividends upon its indebtedness, so the disallowance of this claim of O'Dwyer & Ahern saved \$1,000 for distribution among the creditors of this estate. Now comes the firm of Kirby & Carter, attorneys, joined by their client Demarce, the contesting creditor in this case, and makes application for an attorney's fee for \$200 for legal services rendered in contesting and defeating this claim of O'Dwyer & Ahern. The attorneys of O'Dwyer & Ahern and several other creditors file objections to the payment of any fee to Kirby & Carter, attorneys, contending that the bankrupt act makes no provisions for payment of an attorney's fee where one creditor contests another creditor's claim. Section 64 of the bankrupt act (paragraph "b") provides for payment of one reasonable fee to an attorney for services actually rendered to the petitioning creditors in involuntary cases, but makes no provision for payment of an attorney's fee in suits between creditors over the allowance of contested claims. The attorneys for creditors who oppose the allowance of the claim of Kirby & Carter cite as conclusive authority, and depend almost exclusively on, the opinion of Judge

Phillips rendered in the case of *In re J. W. Harrison Mercantile Co. (D. C.)* 95 Fed. 123, as sustaining their contention in objecting to the allowance of this fee. * * * In courts of equity a party who brings property into a general fund for creditors is allowed his costs out of the fund in preference to all other claims. This is a well-known proposition. See *Trustees v. Greenough*, 105 U. S. 538, 26 L. Ed. 1157. Is not that a proper rule to apply in the case at bar? See General Order in Bankruptcy of United States Supreme Court. 18 Sup. Ct. x. "The trustee may properly be allowed counsel when the situation requires assistance, and fees of such counsel are properly allowed as part of the expenses of the bankruptcy proceedings." Woolson, J., in *Re Stotts (D. C.)* 93 Fed. 438. It is the province of the trustee to represent all the creditors and bring all suits in the administration of the estate. Yet where the trustee declines to act, as is plainly shown by the evidence in this case (although secured against costs and expense of the suit in event of failure), and where the trustee leaves it to a creditor of the estate to resist the allowance of a claim, it is the opinion of the referee that that creditor had the right to make the contest; and, having made it successfully, is entitled to have the fee of his attorney paid out of the general fund. And the referee so finds. The attorneys, Kirby & Carter, will be paid \$125, that amount being estimated as ten per cent. of the dividends, past, present, and future, declared upon this disallowed claim of O'Dwyer & Ahern, canceled and turned into the general fund of this estate, as the result of this contest.

Kirby & Carter, for A. Demarce, contesting creditor.
Jones & Hudgins and Williams & Arnold, for other creditors.

ROGERS, District Judge. In this matter the action of the referee is affirmed. The trustee in this case at the time this claim should have been resisted had removed from the state. Under the advice of his counsel, to the effect that he had no right to employ an attorney for the purpose of resisting fraudulent claims, he declined to employ counsel. Being away from the state, and his counsel declining to act without remuneration, the counsel in this case, using the name of one of their clients, A. Demarce, resisted the claim of O'Dwyer & Ahern, and successfully defeated it, thus increasing the assets of the estate for the benefit of all the creditors to the extent of about \$1,000. The court is somewhat familiar with the services rendered in this case, and thinks the allowance made by the referee is not exorbitant. This allowance is made and goes as a part of the expenses of the administration of the estate, and is allowed under the general equity powers of the bankrupt court. It seems to me that, on well-recognized equitable principles, an attorney who, under the circumstances of this case, intervened and successfully resisted an unjust claim, ought to be paid by the estate which was benefited by his services. The injustice of requiring the intervening creditor to pay the attorney is manifest. His distributive share of the funds preserved to the estate would not pay one-third of the attorney's fee if he were required to pay for the services. It is inequitable and unjust to permit the other creditors to avail themselves of his services, accompanied by the necessary risk, involving costs, etc., and then share in the estate without contributing to the payment of the attorney who did the work. The court, however, does not intend that this case shall become a precedent for future cases. The better opinion is that at the first meeting of the creditors, when the trustee is elected, if the creditors believe the services of an attorney for the

trustee are necessary for the preservation of the estate, they should, at the same time they elect a trustee, elect an attorney to perform such services as he may require. In *re Smith*, 1 Am. Bankr. R. 37. In the event they do not do so, and the trustee becomes satisfied that the services of an attorney are necessary, the referee should direct him to employ an attorney, his services to be compensated upon application to the court, the amount to be charged as part of the expense of the administration of the estate. The referee, however, should always satisfy himself, by conference with the trustee, that an attorney's services are necessary, and ought not to authorize the employment of one where the creditors have not elected one, except where there is an imperative necessity therefor in order to subserve the best interest of the estate. In view of the whole spirit of the bankrupt law, counsel who are required to represent the trustee must expect only such remuneration as will actually compensate them for services rendered. The court will endeavor, in all these cases, to so conduct the administration of the estate as to best subserve the interest of both creditor and debtor. The allowance of \$125 by the referee to Kirby & Carter is affirmed, and the referee will cause the same to be paid as a part of the expense of the administration.

In re PEACOCK.

(District Court, E. D. North Carolina. May 16, 1900.)

1. BANKRUPTCY—APPLICATION FOR DISCHARGE—GROUNDS OF OPPOSITION.

It is no ground of opposition to the discharge of a bankrupt that the debts due to the objecting creditors were contracted in fraud, or that they were induced to sell goods to the bankrupt, and give him credit, by his false representations as to his financial condition at the time, and as to his business relations with a third person.

2. SAME—SUFFICIENCY OF SPECIFICATIONS.

Specifications in opposition to a bankrupt's application for discharge which allege that he could not account for the proceeds of goods sold, and that, "a short while prior to filing his petition," he sold goods and paid debts contracted several months prior thereto, are too indefinite in substance, and too uncertain in respect to time, to defeat the application.

In Bankruptcy. On bankrupt's application for discharge, and opposition thereto by creditors.

G. E. Hood, for objecting creditors.

PURNELL, District Judge. Some of the creditors of J. W. Peacock, bankrupt, object to a final discharge on grounds set out as follows: First, because of false representations by the bankrupt when the debts were contracted, representing that another (his son) was a member of the firm; second, that notice of the dissolution of the firm was not given to creditors; third, such representations were made without the consent of said son; and, fourth, the bankrupt concealed his true financial condition when the goods were purchased and the debts contracted. These four grounds of objection in effect charge false representations which might amount to a criminal offense, but not

one of the offenses indictable under the bankruptcy act, and hence do not constitute, singly or collectively, a valid objection to a final discharge. The court will refuse a discharge when the bankrupt has committed an offense under the bankruptcy act punishable by imprisonment. Section 14b. The offenses thus punishable are when the bankrupt has knowingly and fraudulently concealed from his trustee any of the property belonging to the estate in bankruptcy; made a false oath or account in, or in relation to, the proceeding in bankruptcy; presented under oath any false claim for proof against his estate, or used any such claim in composition personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act; extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings. Section 29b. The objections do not allege either of these offenses. Nor do they allege (which is another valid objection to a final discharge) that the bankrupt has, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained, as provided in section 14b. In short, the objections seem to have been made on general principles, without any regard to, or examination of, the bankruptcy law. This is not sufficient. To defeat the purposes of the act, the objections to discharge should be in strict compliance with its provisions. These objections relate exclusively to the time when the debts were contracted. Possibly section 17, providing from what debts a discharge shall not be effectual,—such as “judgments in actions for fraud or obtaining property by false pretenses or false representations,” etc.,—has confused counsel, who, without examination of the act, had a general idea this class of debts would form the basis for an objection to, and refusal of, a final discharge. This section does not apply to a petition for a final discharge, however.

The fourth objection is that the bankrupt could not account for the proceeds of sale of goods sold; and, fifth, that “a short while prior to filing his petition” he sold goods, and paid debts contracted several months prior thereto. The periods fixed by the bankruptcy law are definite and specific. Allegations fixing no time within which goods were sold, except by the phrases “a short while prior to,” and “several months before,” are too indefinite and uncertain. They may mean hours, days, months, or years. They are no more definite than “some time before,” or the expressions with which all good nursery tales open,—of “once upon a time,” “in the good old days,” and other classic phrases with which mothers, nurses, and others mystify and amuse the young mind. In *Æsop's Fables*, Grimm's and other fairy tales, “Nights with Uncle Remus,” or, it may be, in equity proceedings when time is not of the essence of the contract, such expressions may be fit and proper; but in bankruptcy proceedings the periods within which certain acts must be done, or alleged to be done, are fixed by statute, and, unless done or alleged within the statutory periods, they are of no avail. Acts of bankruptcy, assignments or transfers, preferences,

etc., to be void, must be within four months. Section 67e. Application for final discharge must be after one and within twelve months after the filing of the petition, and objections to a discharge within a year.

Objections 4 and 5, while they may refer, or be intended to refer, to acts which might defeat the bankrupt's discharge, are too indefinite in substance to serve that purpose. The objections are therefore overruled, and the bankrupt will be granted a final discharge.

In re ROSSER.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1900.)

No. 13.

1. BANKRUPTCY—JURISDICTION—REQUIRING BANKRUPT TO SURRENDER PROPERTY.

Under the general rules of law, and under the specific provisions of the bankruptcy act, a court of bankruptcy has power and jurisdiction to make an order requiring the bankrupt to pay or deliver to his trustee in bankruptcy money or other property found to be in his possession or control, constituting a part of his estate in bankruptcy, and which he has not surrendered or accounted for, and to enforce his obedience to such order by commitment as for contempt.

2. SAME—TRUST FUNDS.

Two essential facts condition the lawful exercise of the power to require a bankrupt or other person to pay or deliver to the trustee money or property in his possession. They are that the money or property directed to be delivered to the trustee is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time the order of delivery is made.

3. SAME—IMPRISONMENT FOR DEBT.

An order of the court of bankruptcy for the payment of money or delivery of property to a trustee in bankruptcy, which constitutes a part of the estate in bankruptcy, and which is in the control and possession of the party directed to pay or deliver it, at the time the order is made, is not an order for the payment of a debt; and a commitment of the party to jail until such order is complied with is not imprisonment for debt, within the meaning of a state law (Const. Mo. art. 2, § 16; Rev. St. Mo. § 8954), abolishing imprisonment for debt.

4. SAME.

Notice to the defendant of the charge, claim, or proposed judgment or order against him, and an opportunity to be heard respecting the justice of the order or the judgment proposed, are essential elements of due process of law in judicial proceedings.

5. SAME—DUE PROCESS OF LAW.

After the examination of a bankrupt and other witnesses concerning his estate, under subdivision 9, § 7, and section 21, of the bankrupt act, an order was made by the referee requiring the bankrupt to pay to his trustee a sum of money alleged to be in his possession and to constitute assets of his estate. The bankrupt had no notice that the examination, or the testimony taken thereat, would be used to obtain such an order, nor was he notified that such order was contemplated or had been applied for, nor given an opportunity to show cause against it. Thereafter, the order not being obeyed, the trustee moved the district court to punish the bankrupt for contempt. Notice of this motion and of the application for adjudication thereon was given to the bankrupt, and he answered, alleging his want of notice of the application to the referee, and want of opportunity to defend against it, and praying that the proceedings

be dismissed, or that he be given an opportunity to take the testimony of witnesses showing that he was unable to comply with the order. The court refused this prayer, but offered the bankrupt an opportunity to be cross-examined upon the matters embraced in his previous examination, and upon any matters tending to show what had become of the money in question or his inability to comply with the order of the referee. Upon his answering that he had disposed of the money before the institution of the proceedings in bankruptcy, and declining to be cross-examined, on the ground that his answers would tend to criminate him, the court adjudged him in contempt and committed him to jail. *Held*, that the order of the referee was unlawful and void, for want of notice to the bankrupt and an opportunity to defend against it, not being based upon due process of law; that the defect was not cured by the subsequent proceedings in the court of bankruptcy; and that the judgment of contempt and order of commitment must be vacated and annulled.

6. SAME—APPEAL AND REVIEW—LAW AND FACT.

On a petition to the circuit court of appeals for review of proceedings in bankruptcy had in the district court, under Bankr. Act 1898, § 24, subd. b, the jurisdiction of the appellate court is restricted to the consideration of matters of law, and does not embrace the review of questions of fact; and an objection of the petitioner for review, that the evidence in the case did not warrant the order complained of, will not be considered by the appellate court.

Petition for Review of an Order of the District Court of the United States for the Northern Division of the Eastern District of Missouri, in Bankruptcy. See 96 Fed. 305, 308.

This proceeding invokes a revision under subdivision "b" of section 24 of the bankrupt act (30 Stat. 544, 553, c. 541) of the rulings upon questions of law of the United States district court in the matter of George P. Rosser, bankrupt. On April 7, 1899, the creditors of Rosser petitioned to have him adjudged a bankrupt, and their prayer was granted on May 11, 1899. At the request of the trustee appointed in this proceeding the referee in bankruptcy required the bankrupt, Rosser, to submit to an examination under subdivision 9, § 7, and section 21, of the bankrupt act. At this examination his testimony and that of various other witnesses was taken, but no notice was given to him that this examination or the testimony of the witnesses at this hearing would be used to obtain, or that any application would be made for, an order upon him to deliver or pay over \$2,500, or any other sum, to the trustee as a part of the property of the bankrupt estate. On July 20, 1899, in the absence of any preceding notice to Rosser that such an order was contemplated, the referee ordered him to pay over to the trustee \$2,500, which the referee found in said order that Rosser had received about March 17, 1899, and had failed and refused to account for or to schedule as a part of his estate. This order was served on Rosser on July 25, 1899, and on August 4, 1899, he answered that he was unable to obey said order, because he had no money with which to comply with it. On August 14, 1899, the trustee filed a petition in the district court in which he set forth the proceedings that have been recited, alleged that the bankrupt had refused to obey the order of the referee, and prayed that he might be adjudged in contempt of court, and be punished for such contempt. Notice of this petition and of the application for an adjudication upon it was duly given to the bankrupt, and he answered that he was never notified of the intention of the trustee to ask the referee to make the order upon him to pay over the \$2,500, that he was never given an opportunity to show cause why said order should not be made, that it was made without giving him an opportunity to be heard in the premises, that he had not the present ability to comply with the order, and he prayed that the proceedings against him be dismissed, and that he be given an opportunity to take the testimony of witnesses for the purpose of showing that he was unable to comply with the order of the referee. The court denied his application to dismiss the proceedings, and to have an opportunity to take the testimony of witnesses, but announced that it would give the bankrupt an opportunity to be cross-examined before the court upon any of the matters

and things upon which he had been examined before the referee, and upon any other matters tending to show what had become of the \$2,500 he had been ordered to surrender, or tending to show his inability to comply with the order of the referee. Thereupon the case was set down for hearing on August 26, 1899. On that day the bankrupt appeared, and filed an answer to the citation for contempt, in which he averred that he was unable to comply with the order of the referee or to pay over the \$2,500, because he had not the money or any part of it in his possession or under his control, and was unable to procure the same. He further averred in his answer that he borrowed the said sum of money on March 17, 1899, and that he had disposed of the same prior to the institution of the proceedings to have him adjudged a bankrupt, and had not then, or at the time of filing his answer, any control or ownership of said sum of money, or any part thereof, and that he was unable to inform the court of the disposition he had made of the money, because the disclosure of the facts in relation thereto would tend to incriminate him. After this answer was filed the bankrupt declined to be cross-examined, and thereupon the court adjudged that he was in contempt of court for refusing to obey the order of the referee to pay over the said sum of \$2,500, and committed him to the custody of the marshal, to be held in captivity in the city jail until he should pay to the trustee the said sum of \$2,500, or be otherwise discharged by due process of law. The bankrupt petitions this court to set aside the order and judgment committing him to jail upon the ground that the order of the referee was void because he had received no notice of the charge against him upon which it was founded, or of the intention of the trustee to ask for such an order, and had had no opportunity to show cause why it should not be made until after it was made, and because the district court erred in refusing to dismiss the proceedings against him for contempt for failure to comply with the referee's order, and in refusing to permit him to produce testimony to show that he was unable to comply with it.

P. H. Cullen and T. P. Bashaw (J. D. Hostetter, on the brief), for petitioner.

Dorsey A. Jamison (Robert E. Collins and Edwin R. Chappell, on the brief), for respondents.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bankrupt, Rosser, was committed to jail for contempt of court, in that he failed to obey the order of the referee to turn over to the trustee \$2,500 alleged to have been a part of his estate when he was adjudged a bankrupt, and to have been in his possession when the order for him to deliver it to the trustee was made. He challenges the order of commitment on three grounds: (1) That conceding that the money was a part of his estate at the time of the adjudication in bankruptcy, and that he had control of it when the order for its delivery to the trustee was made, the order of commitment constituted imprisonment for debt, and violated section 16, art. 2, of the constitution of Missouri, and section 8954 of the Revised Statutes of that state; (2) that as a matter of fact the \$2,500 was not a part of his estate, and was not in his possession when the order for its payment was made; and (3) that the proceedings which culminated in the order of commitment did not constitute due process of law. These objections will be considered in their order.

The power of a court to punish for contempt of its proceedings, for disobedience of its lawful orders, is inherent in the being of every court of general jurisdiction. Without it the orders of a court would

be without force or effect, would command neither respect nor obedience, and there would be neither warrant nor reason for its longer existence. From the earliest annals of our law this power has been exercised. It rests upon the fundamental principles of judicial establishments, and is inseparable from the existence, as well as from the usefulness, of a court of general jurisdiction. 4 Bl. Comm. 286; *State v. Matthews*, 37 N. H. 451; *Watson v. Williams*, 36 Miss. 331; *Hurd*, Hab. Corp. 7; *Ex parte Crenshaw*, 80 Mo. 447, 453; *In re Knaup*, 144 Mo. 653, 667, 46 S. W. 151. The act to establish a uniform system of bankruptcy throughout the United States (30 Stat. 544, c. 541) vests in the district courts of the United States the power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided [section 2, subd. 7]; * * * punish persons for contempts committed before referees [section 2, subd. 16]." The effect of an adjudication in bankruptcy is to place all the property of the bankrupt not exempt by law in the custody of the district court, and to charge the bankrupt, and all other persons who have the possession or control of any of it, as trustees for the court and for the trustee in bankruptcy, who is subsequently appointed. The act of congress requires the bankrupt to "comply with all lawful orders of the court" (section 7, subd. 2); forbids him to "disobey any lawful order, process, or writ" issued by the referee (section 41, subd. 1); subjects him to the punishment of imprisonment for a period not exceeding two years for knowingly and fraudulently concealing, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy (section 29b); or for making a false oath or account in or in relation to any proceeding in bankruptcy (section 29b, subd. 2). There can be no doubt that under the general rules of law and under these specific provisions of the bankrupt act the court and the referee were vested with the right and subjected to the duty of making the necessary orders to require the bankrupt and all other persons who had the possession and control of the property of the bankrupt estate to surrender and deliver it to the trustee. Such orders constitute one of the essential means by which the court and the referee are empowered to collect the estate of the bankrupt. It is a broad and comprehensive power, and great caution should be exercised to observe its limits and to issue under it only lawful orders. But, without its lawful exercise, the administration of the estates of bankrupts would in many cases be so complicated and tedious that all the assets would be wasted in litigation, and the beneficent purpose of the bankrupt law would fail of accomplishment. Two essential facts limit this power and condition its lawful exercise. They are that the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made. If the property is not a part of the estate, obviously no lawful order for its delivery to the trustee can be made. If the money or property in controversy was a part of the estate of the bankrupt, but

before the order for its delivery is made he has squandered, disposed of, or lost it, so that it is not in his control or possession, and he cannot obtain and deliver it at the time the order of delivery is made, or within a reasonable time thereafter, it cannot be a lawful order, because the court may not order one to do an impossibility, and then punish him for refusal to perform it. The punishment of the bankrupt for such acts must be sought under the provisions of the bankrupt law relative to the fraudulent concealment of the property of the estate and the making of false oaths relative thereto. But, if it appears to the satisfaction of the referee or the court that property of the bankrupt estate is in the control or possession of the bankrupt, a lawful order for its delivery to the trustee may be made, and a refusal to obey this order may be punished as a contempt of court, both under the general law relative to contempts and under the specific provisions of the bankrupt act.

The contention that the commitment of a contumacious bankrupt to jail until he complies with such an order constitutes imprisonment for debt, and is prohibited by the constitution of Missouri, is untenable. Such an order is not an order for the payment of a debt. All the property of the bankrupt estate is placed in custodia legis by the adjudication in bankruptcy. Every part of the estate belongs to the court, and vests in the trustee when appointed, and the bankrupt and every other party who has the possession or control of any part of it holds that part as the agent and trustee of the court and its officer. The money or the property of the estate which a bankrupt thus holds is not a debt which he owes to the court or to the trustee, but it is the money or property of the court or of the trustee, which it is alike the duty of the court, of the referee, and of the bankrupt to place in the hands of the trustee in bankruptcy for distribution to the creditors pursuant to the provisions of the bankrupt law. An order for the payment of money or the delivery of property, which is a part of the estate in bankruptcy, and which is in the control and possession of the party directed to pay or deliver it, at the time of the making of the order, is not an order for the payment of a debt, and a commitment to jail until such order is complied with is not imprisonment for debt, under section 16, art. 2, of the constitution of Missouri, and section 8954 of the Revised Statutes of that state. In *re Purvine*, 37 C. C. A. 446, 448, 96 Fed. 192, 194; In *re Salkey*, Fed. Cas. No. 12,253; *Id.*, Fed. Cas. No. 12,254; In *re Knaup*, 144 Mo. 653, 667, 46 S. W. 151; *Ex parte Crenshaw*, 80 Mo. 447, 453; *Coughlin v. Ehlert*, 39 Mo. 285, 286; *Roberts v. Stoner*, 18 Mo. 481, 484; *Burt v. Packing Co. (Minn.)* 57 N. W. 940, 941; *State v. Becht*, 23 Minn. 411, 413; *State v. Mauberret*, 47 La. Ann. 334, 335, 16 South. 814.

The second objection to the order of commitment is that the evidence in this case does not establish either the fact that the \$2,500 which the bankrupt was ordered to pay to the trustee was a part of his estate, or that he had the possession or control of it at the time that the order for its payment was made. These, however, were questions of fact, which it was the duty of the referee or of the court below to ascertain and determine when the order for the payment of

the money was made. They are not here for our consideration, nor is this court empowered to review the finding of the referee or of the district court upon them. This is a petition for a revision of the proceedings of the district court under section 24, subd. b, of the bankrupt act, and under that subdivision the jurisdiction of the circuit courts of appeals is restricted to the consideration of matters of law, and does not embrace the review of questions of fact. In *re Purvine*, 37 C. C. A. 446, 448, 96 Fed. 192, 193.

A more serious question is presented by the contention of the bankrupt, that the proceedings in the court below did not give him such a notice of, and such an opportunity to be heard upon, the propriety of the order for the payment of this money as constitute due process of law. Chancellor Kent says: "The better and larger definition of 'due process of law' is that it means law in its regular administration through courts of justice." 2 Kent, Comm. 13. While it is perhaps impossible, and is certainly unwise, to attempt to give a concise and comprehensive definition of the terms "due process of law" and "law of the land," it is certain that notice to the party to be affected of the claim against him, and an opportunity to be heard upon it, are essential elements of every proceeding in a court of justice which can be said to constitute due process of law or to be in accord with the law of the land. "Perhaps no definition," says Judge Cooley, "is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By "law of the land" is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'" Cooley, Const. Lim. 431. The basic principle of English jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws, and cannot be sustained. *Gentry v. U. S.* (C. C. A.) 101 Fed. 51; *Burton v. Platter*, 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. 901, 905; *Windsor v. McVeigh*, 93 U. S. 274, 277, 278, 23 L. Ed. 914; *Capel v. Child*, 2 Crompt. & J. 558, 574; *Hovey v. Elliott*, 167 U. S. 409, 414,

416, 446, 17 Sup. Ct. 841, 42 L. Ed. 215; *Galpin v. Page*, 18 Wall. 350, 368, 21 L. Ed. 959; *Underwood v. McVeigh*, 23 Grat. 409, 413; *Henry v. Carson*, 96 Ind. 412; *Hovey v. Elliott*, 145 N. Y. 126, 39 N. E. 841; *Taussig's Ex'rs v. Glenn*, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; *Merrill v. Rokes*, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452.

The claim against the bankrupt, upon which the order for his payment of the \$2,500 is based, was that this money was a part of his estate, and that he had the possession and control of it on July 20, 1899, when the referee made the order upon him to pay it to the trustee. Under the principle to which reference has been made, he was entitled to a citation or notice of a hearing upon this claim and of the proposed order before it was made. In *Galpin v. Page*, 18 Wall. 350, 368, 21 L. Ed. 963, the court said:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In *Capel v. Child*, 2 Crompt. & J. 558, 574, Lord Lyndhurst said:

"A party has the right to be heard for the purpose of explaining his conduct; he has a right to call witnesses for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defense. On consideration, then, it appears to me that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment."

It is an axiom of pleading and practice that one may not bring a suit for one cause of action and recover a judgment for another, much less may one recover an order or judgment for money and property without any suit or notice of the claim upon which it is founded. *Gentry v. U. S. (C. C. A.)* 101 Fed. 51. In the case in hand no notice was given to the bankrupt that any hearing would be had upon any claim that he should be required to pay over the \$2,500 in controversy before the order to that effect was made. No order to show cause why he should not pay it was made or served upon him before the absolute order for its payment was presented to him. No opportunity was afforded him to be heard upon the questions it presents. He was cited to appear and be examined under section 21 of the bankrupt act, and his testimony and that of various other witnesses were taken before the referee upon that citation, but no notice was served upon him that the claim, which culminated in the order for the payment of the \$2,500, was made or was in issue at that examination, or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense or to be heard upon the issues of fact or of law which the issue of the order involved. Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which

it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the questions of law which it involves. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void.

The subsequent proceedings failed to extract the vice of this order. The first notice which the bankrupt received of the order was its service upon him five days after its date. He answered that he was unable to comply with the order, because he had no money to pay to the trustee. The testimony taken on the examination under section 21, the order of the court, and the answer of the bankrupt were then certified to the district court. A petition was filed by the trustee in that court, in which he set forth the order of the referee, and that the bankrupt had failed to comply with it, and prayed that he might be adjudged in contempt of court therefor. Notice was duly given to the bankrupt that a hearing upon this petition would be had on August 24th. On August 25th the bankrupt appeared in the district court before Judge Rogers, set forth that he had never been notified of the intention of the trustee to ask the referee to make the order for the payment of the \$2,500, that he had never been given an opportunity to show cause why it should not be made or to be heard in the premises, and moved the court that the proceedings against him for contempt be dismissed, or that he be given an opportunity to take the testimony of witnesses for the purpose of showing that he was unable to comply with the order. All the proceedings for contempt were founded upon the order of the referee. That order was void, and the district court should have granted the motion to dismiss the proceedings for contempt of court for its disobedience. It overruled the motion, and announced to the counsel for the bankrupt that it would give the latter an opportunity to be cross-examined before the court upon any of the matters and things upon which he had been examined before the referee, and upon any other matters tending to show what had become of the \$2,500 he had been ordered to surrender, or tending to show his inability to comply with the order of the referee in the premises. On the next day, August 26, 1899, the bankrupt answered that he was unable to comply with the order of the referee, because he was unable to procure the \$2,500 or any part thereof; that he borrowed that sum of money on March 17, 1899, and had disposed of it before the institution of the proceedings in bankruptcy, so that he had not then, nor at the time of his answer, any right, control, title, or ownership of said sum of money or any part thereof. He declined to be cross-examined, and the court thereupon adjudged him guilty of contempt for his failure to comply with the order of the referee, and committed him to the custody of the marshal until he should pay the \$2,500. The fundamental error in all these proceedings is that there was no notice to the bankrupt, either before the referee or before the court, of any hearing upon the claim of the trustee that he had \$2,500 of the bankrupt estate in his possession which the trustee asked the referee or the court to order him to pay over, and there was no opportunity for him to be heard upon the questions of fact and of law which that claim presented.

There were various methods by which this notice and hearing could have been given. An order to show cause why the \$2,500 should not be directed to be paid over by the bankrupt to the trustee, fixing a time and place for hearing, might have been issued by the referee or by the court, and properly served. At that hearing an opportunity might have been given to the trustee and to the bankrupt to present their evidence, to cross-examine the witnesses of each other, and to be heard upon the questions of fact and of law in issue, and the referee or the court might then have made a finding of the essential facts, and have issued the proper order. If the bankrupt then refused to obey it, the court, after a hearing upon notice or upon an order to show cause, might have adjudged the bankrupt in contempt for a refusal to obey the order, if the facts and the law warranted that judgment. Nothing equivalent to the course suggested can be found in this record. The bankrupt never had any notice of the presentation or hearing of the claim against him for the \$2,500 until after the order for its payment was made. The permission of the court for his cross-examination upon the hearing in the proceedings for contempt failed to extract the fatal vice of this defect. It gave him no opportunity to produce testimony of other witnesses, or to have an original hearing of the questions involved in the order of the referee. Those questions had already been determined without notice or hearing, and the question the court was considering was whether he should be punished for a failure to obey the order that had determined them. All the proceedings of the district court rested on the theory that the order of the referee was valid. For this reason no notice of a hearing and no opportunity to be heard upon the crucial questions which determined the propriety of that order were given in the district court, and, as no such notice or opportunity was given before the referee, all the proceedings from the close of the examination, under section 21 of the bankrupt act, to the judgment for contempt, are without force, and must be set aside. The judgment of contempt and commitment is hereby vacated and annulled, and this fact will be certified to the district court.

In re GOLDSMITH.

(District Court, E. D. Pennsylvania. May 11, 1900.)

No. 272.

BANKRUPTCY—OPPOSITION TO DISCHARGE—FALSE OATH.

At a meeting of creditors of a bankrupt, certain testimony which he had formerly given on a hearing under the state insolvency law was put in evidence, under an agreement between his counsel and counsel for certain creditors that such testimony should be transcribed and made a part of the record, and should have the same force and effect as if the said testimony was originally taken before the referee in that proceeding. The bankrupt took no oath before the referee that such former testimony was true, and was not a party to the agreement that it should be treated as evidence in the bankruptcy proceeding. Creditors opposed his application for discharge on the ground that part of such testimony was false. *Held,*

that the objection could not be sustained, the bankrupt not having been guilty of making "a false oath in or in relation to any proceeding in bankruptcy," within the meaning of Bankr. Act 1898, § 29b, subd. 2.

In Bankruptcy. On exceptions to report of referee in bankruptcy recommending the discharge of the bankrupt.

Furth & Singer, for creditors.

David Mandel, for bankrupt.

McPHERSON, District Judge. The discharge of the bankrupt was opposed upon the ground that he had committed one of the offenses specified in section 29, Bankr. Act, namely, that he had "made a false oath * * * in, or in relation to, any proceeding in bankruptcy." The objections were heard by the referee, from whose report it appears that the oath in question was taken in 1889 before a common pleas judge of Philadelphia county, in a hearing under the Pennsylvania act of 1842. During this hearing the bankrupt testified concerning the causes of his insolvency, and concerning other matters that need not now be referred to. The stenographer's notes of his testimony were introduced before the referee at the meeting of creditors held in January last, an agreement having been made between counsel for certain creditors and counsel for the bankrupt that these notes "shall be transcribed and made part of this record, and have the same force and effect as if the said testimony was originally taken before the referee in this proceeding."

These notes contain the statements that are declared to be false, and are relied on to prevent the discharge; but I think it is clear that, even if their falsity be assumed, no offense under section 29 has been committed. The bankrupt took no oath before the referee that his former testimony was true, and he did not himself agree (whatever effect the agreement might have had) that such testimony should be treated as if it had been repeated in the bankruptcy proceedings. It was his counsel who made the agreement, and manifestly it exceeds the authority of counsel thus to expose his client to the danger of prosecution for perjury. I do not say that under such an agreement the testimony might not be used for ordinary civil purposes, but to say that a criminal prosecution could be based upon it is a different proposition.

As there was no oath before the referee, there is no foundation of fact for the objection, and the report must be approved.

In re WILSON et al.

(District Court, E. D. North Carolina. April 28, 1900.)

1. BANKRUPTCY—PARTNERSHIP EXEMPTIONS—RETIRING PARTNER.

Where two members of a firm signed a writing reciting that a certain sum of money was due to the third partner, which was to be paid in installments as stipulated, and that the latter should "be and remain a partner in the business until the full amount is paid," and that security should be given to him, *held*, that the transaction was not a conditional sale by the third partner of his interest in the firm and its prop-

erty, but an agreement to retire from the firm on the payment of the money; and, the condition not having been performed at the time the firm became bankrupt, he was still a member of it, and entitled to his statutory exemption out of its personal property.

2. SAME—EXEMPTION OUT OF PARTNERSHIP ASSETS.

In North Carolina, in case of the bankruptcy of a partnership, where there are firm assets but no individual estate, each partner is entitled to receive, out of the partnership assets, the exemption allowed by the law of the state, provided the other partners consent thereto; and the filing of their voluntary petition in bankruptcy is prima facie evidence of such mutual consent.

3. SAME—ALLOTMENT UNDER PROCESS OF STATE COURT.

Where judgment is recovered in a state court against an insolvent firm, execution issued, and a personal property exemption allotted by the sheriff to each member of the firm, and, within four months thereafter, the firm becomes bankrupt, all proceedings under the judgment, including such allotment by the sheriff, are annulled by the adjudication in bankruptcy; and the trustee in bankruptcy, in setting off the exemptions of the bankrupts, may either adopt the allotment made by the sheriff, or make a new allotment, if the former is not satisfactory.

In Bankruptcy. On review of decision of referee in bankruptcy.

Stevens, Beasley & Weeks, for bankrupt.

E. K. Bryan and Junius Davis, for creditors.

PURNELL, District Judge. Prior to February 1, 1899, J. P. Wilson was merchandising at Warsaw, N. C., and on that day associated with him, under the firm name of J. P. Wilson & Co., J. E. Pollock. The partnership thus formed continued until October, 1899, when J. R. Barden became a member of the firm, and the business continued. On the 15th day of January, 1900, the following paper writing was signed, and is filed as Exhibit A:

"Due J. E. Pollock two hundred and fifty and no/100 dollars. Twenty-five dollars to be paid February 1st; seventy-five dollars to be paid March 1st; seventy-five dollars to be paid April 1st; seventy-five dollars to be paid May 1st. And said J. E. Pollock to be and remain a partner in the business of J. P. Wilson & Co. until the full amount is paid, and security to Pollock to be same as that given J. R. Barden by J. P. Wilson & Co., which contract J. R. Barden holds, which is virtually a bill of sale."

Nothing has been paid on this obligation. Under the contract, as appears in the testimony of Pollock, Barden was to receive one-fourth of the profits, and the balance was to be divided between Wilson and Pollock. This is the only testimony on the subject of Pollock's connection with the firm, except that he was a partner from February 1, 1899. On March 3, 1900, the firm was, on a voluntary petition, adjudged bankrupt. Prior to that time, and within four months, judgment had been obtained in the state courts against J. P. Wilson & Co., composed of the three members named, executions issued, and a personal property exemption allotted by the sheriff to each member of the firm. The contract with Barden is filed as Exhibit B, but, as it is only referred to as a security, in the view the court takes of the case this is of no importance for a determination of the question involved. In the referee's court the counsel for the creditors contended that paper writing "A" is a conditional sale, and, not being registered under the North Carolina statute (Code, § 1275),

is void; hence Pollock is not entitled to his personal property exemption. The referee adjudged Pollock not a member of the firm of J. P. Wilson & Co., and signed an order for him to deliver to the trustee the property allotted to him (Pollock) as his personal property exemption by the sheriff in a proceeding immediately preceding the petition in bankruptcy.

The solution of the matter is a proper construction of the paper writing recited. What is it? The creditors contend and the referee holds it is a conditional sale, and under the statute of North Carolina void. Section 1275 of the Code provides that conditional sales, where title is retained, must be reduced to writing, and registered, to give them validity. This is the meaning, as construed in many cases, not the words of the statute. Admitting the position of the creditors to be correct, purely for the sake of argument,—for I cannot concur in this view,—then the agreement is void, and does not change Pollock's relation to the firm or its property. He was a partner before the paper was signed, and a void paper could not change or affect that relation. If void, he was still a partner. According to this contention, Pollock was a member of the firm as fully after the paper writing was signed as he was before.

But what is the paper writing Exhibit A? Pollock does not sign it. It is signed by the other members of the firm. Without drawing any nice distinctions, it is simply written evidence of an agreement to retire from the firm on the payment of a certain amount of money. It is a conditional retirement. It is not only not signed by Pollock, but contains no words of conveyance. If it be said it is evidence of a parol agreement to sell his interest in personal property, there is no evidence of a delivery accompanying such agreement, or any change in the possession of the property. The paper provides expressly he shall remain a member of the firm until the money was paid, showing there was no change of possession,—no delivery, no complete sale. There is no other evidence of a dissolution of the firm, no advertisement, or any of the prerequisites of a dissolution. Pollock was still liable for the debts of the firm; still entitled to participate in the profits until the agreement was fully complied with. That the bankruptcy of the firm should increase or make his interest in the property more than he had agreed to receive as the condition of his withdrawal may not seem exactly equitable to the creditors or to others, but, if bankruptcy thus favors a bankrupt, it is because the state exemption laws so provide. It is not because of any defect in the bankrupt law, which in exemptions follows the state law, and is one of those anomalous and exceptional cases where a man increases his estate by bankruptcy. In North Carolina each member of a firm is entitled to his personal property exemption out of the assets of the firm, where the debtor has no other estate and the other partners consent. *Scott v. Kenan*, 94 N. C. 296; *Burns v. Harris*, 67 N. C. 140; *Allen v. Grissom*, 90 N. C. 90. A voluntary petition in bankruptcy is *prima facie* evidence of such consent. *In re Stevenson* (D. C.) 93 Fed. 790.

In the view which the court takes of the question involved, the decision of the referee is reversed, and the order made revoked. J.

E. Pollock had been and was, at the time of the filing of the petition in bankruptcy, a member of the firm of J. P. Wilson & Co. The petition is prima facie evidence of a consent by the other partners that he shall have his personal property exemption allotted to him from the firm assets. He is entitled to such exemptions. The proceeding in the state court being within four months of the petition in bankruptcy, all process under such proceeding is void; hence the allotment by the sheriff is void. The trustee may adopt such allotment, or make other allotment, if the same is not satisfactory. In the view the referee took of the case, the order made by him was proper, and the bankrupt is still subject to the orders of the referee's court under the bankruptcy act and proceeding.

In re BAUDOUINE.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 121.

1. BANKRUPTCY—JURISDICTION—SUITS BY AND AGAINST TRUSTEES.

Under Bankr. Act 1898, § 2, cl. 7, as limited by section 23b, a district court, as a court of bankruptcy, has original jurisdiction of actions by trustees in bankruptcy to recover property alleged to belong to the estate of the bankrupt, against third persons claiming title thereto adversely to the bankrupt or in hostility to the trustee, provided the cause of action is one which did not originally exist in the bankrupt himself, and also of all actions brought in such court against a trustee in bankruptcy by adverse claimants.

2. SAME—SUMMARY PROCEEDINGS.

A stranger to the bankruptcy proceedings, setting up an adverse title to property which is claimed by the trustee in bankruptcy as assets of the estate, cannot be compelled to submit his claims to adjudication in a summary proceeding in the court of bankruptcy, but is entitled to be heard in a plenary suit. If the matter in controversy is of legal cognizance, he has the right to a trial by jury. If it is of equitable cognizance, it may be litigated according to the recognized processes and procedure of courts of equity.

3. SAME—WHO ARE ADVERSE CLAIMANTS.

Where trustees under a will are directed thereby to apply the income of property to the use of the beneficiary during his life, with no direction for accumulation, and the law of the state provides that the surplus of an income so settled, beyond what is necessary for the support of the beneficiary, shall be liable in equity to the claims of his creditors; that the trust vests the whole estate, in law and in equity, in the trustees, subject only to the execution of the trust; and that no person beneficially interested in such a trust can assign or in any manner dispose of it, and the courts cannot sanction any disposition of it by the concurrence of the beneficiary and the trustee,—the testamentary trustees have a title or interest hostile to that of the trustee in bankruptcy of the beneficiary (the latter claiming the surplus income of the estate as assets in bankruptcy), such as to entitle them to be heard in opposition to such claim in a plenary suit, as distinguished from summary proceedings in the court of bankruptcy.

On Petition to Review an Order of the District Court of the United States for the Southern District of New York, in Bankruptcy.

John A. Garver, for petitioners.

Edward Van Ingen, opposed.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The trustee in bankruptcy, claiming that certain income derived by the bankrupt as the beneficiary of a trust created by will was applicable to the payment of the bankrupt's creditors, commenced a proceeding in the United States district court for the Southern district of New York, in bankruptcy, by a petition and rule to show cause against the bankrupt and the testamentary trustees, to procure an adjudication to that effect. Upon the return day of the order to show cause, the trustees under the will appeared "solely for the purpose of objecting to the jurisdiction of the court," and insisted by demurrer (1) that the court had no jurisdiction to entertain the suit; and (2) that the rights of the parties could not be determined summarily upon petition. They also insisted by demurrer that the trustee in bankruptcy did not acquire any title to the income. The court overruled the demurrers, and made an order allowing the trustees to answer within 20 days, and directing a referee in bankruptcy at the expiration of that time to take testimony, and report to the court the amount of the trust income, and what portion thereof was applicable to the claims of creditors. 96 Fed. 536. The case is now before this court upon a petition of the testamentary trustees to review the order.

The jurisdiction of the district courts, as courts of bankruptcy, to adjudicate the rights and titles of persons not parties to the bankruptcy proceeding, who claim property adversely to the bankrupt or in hostility to the trustee, if given at all, is conferred by clauses 6 and 7 of section 2 of the bankrupt act. The act does not contain any distinct provision specifically giving such jurisdiction, and in this respect differs from the act of 1867, in which (section 2) concurrent jurisdiction over such controversies was conferred on the circuit and the district courts. Section 2 of the present is measurably a substitute for section 1 of the act of 1867; and the omission of any provision similar in terms to section 2 of the earlier act is significant, and means that congress did not intend to confer the jurisdiction, or considered the terms of the present section adequate for the purpose. Section 2 invests courts of bankruptcy, within their respective territorial limits, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings. By clause 6 they are authorized to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy"; and by clause 7, to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Whether it is the meaning of these clauses to confer jurisdiction respecting the titles of those not parties to the original proceeding is a question of much difficulty, which has been decided differently by different tribunals, upon elaborate consideration. One of the most

recent judgments is *In re Hammond* (D. C.) 98 Fed. 845, where Judge Lowell cites all the decided cases, analyzes the various conflicting provisions of the bankrupt act bearing upon it, reviews the history of the legislation, and adverts to the impossibility of reaching a thoroughly satisfactory conclusion. A definite answer can only be given by that tribunal whose opinion is theoretically infallible, and we understand the question is before the supreme court for decision upon a certificate for instructions. Under the circumstances, an independent discussion of the subject by this court would not be profitable; and we shall content ourselves with a brief statement of our conclusions, sufficient for present purposes, and as a rule of decision in other cases now before us.

Standing alone, the language of clause 7 would seem to be sufficiently comprehensive to authorize the determination by courts of bankruptcy of every controversy relating to the estates of bankrupts. It is as broad as was the language of section 6 of the bankrupt act of 1841, which seems to have been considered by the supreme court sufficient, irrespective of section 8 of that act, to confer such jurisdiction. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603. Nevertheless, it is capable of a narrower construction, and can be read as extending only to controversies about property which actually belongs to the bankrupt's estate, or which arise strictly in the bankruptcy proceeding, such as those in reference to the marshaling of assets, or the extent and priority of conflicting liens. The clause must also be read with section 23, relating to the jurisdiction of the United States and state courts. Section 23, by its first clause, confers jurisdiction upon the circuit courts of all controversies at law and in equity, "as distinguished from proceedings in bankruptcy," between trustees and adverse claimants concerning the property claimed by the trustee, and, by its second clause, requires every action by a trustee to be brought in a court where the bankrupt could have brought it, unless the defendant consents to be sued elsewhere. The jurisdiction conferred by the first clause is not exclusive. That declared by the second clause doubtless refers only to such causes of action as originally existed in favor of the bankrupt, and compels a resort to the state court, unless by reason of the diversity of citizenship between the parties the bankrupt could have been sued in a federal court. Thus, by section 23, in one class of controversies the trustee may sue or be sued in the circuit court, and in another class he must sue in the state court; and the two classes embrace every controversy about property rights claimed in hostility to the title of the trustee which can arise. In view of this section, the utmost effect that can be given to clause 7 of section 2 is to authorize jurisdiction of such controversies between a trustee and an adverse claimant of the bankrupt's property as the trustee is not compelled by section 23 to bring in the state court. We think it should have that effect, not only because its language warrants it, but also because that construction is demanded by expediency and convenience. Bankruptcy courts ought, in the interests of promptitude and uniformity of decision, to have original jurisdiction to entertain and adjudicate all controversies which affect the administration of the assets in their custody. We therefore de-

cide that by clause 7 of section 2 the district court, as a court of bankruptcy, has original jurisdiction to determine all controversies brought to it by a trustee, where the cause of action did not originally exist in the bankrupt, against a person asserting a hostile title to the bankrupt's property, and also of all controversies brought to it against the trustee by an adverse claimant. This conclusion disposes of the first objection relied upon by the testamentary trustee.

In conferring such "jurisdiction at law and in equity" as will enable courts of bankruptcy to determine the controversies they are authorized to entertain, the bankrupt act does not attempt to prescribe the procedure which is to obtain when strangers to the proceeding are compelled to litigate rights or titles with the trustee. Unlike section 6 of the act of 1841, which authorized jurisdiction to be "exercised summarily in the nature of summary proceedings in equity," section 2 merely authorizes courts of bankruptcy to "make such orders" and "issue such process" as may be necessary to enforce their powers. Clause 15. In the absence of provisions to the contrary, it is to be presumed that congress intended that the ordinary procedure of courts of law or equity, according to the nature of the controversy, should be observed. As was said by the supreme court of the bankrupt act of 1867, it could not have been the intention of congress to deprive those not parties to the bankruptcy proceeding "of the usual processes of the law in defense of their rights." Under that act it was settled by the adjudications that the assignee must proceed by plenary suit, and that the courts could not compel adverse claimants to litigate their controversy by a summary proceeding. It suffices to refer to *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748, and *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481. In the present act (section 19, cl. "c"), where the matters in controversy are of legal, as distinguished from equitable, cognizance, the right of the parties to a trial by jury is expressly preserved. We do not doubt that, when the matters in controversy are of equitable cognizance, they are to be litigated according to the recognized processes and procedure of courts of equity.

If the testamentary trustees had an interest adverse to the trustee in bankruptcy in the fund sought to be reached in the present case, they are entitled to be heard in a plenary suit. Doubtless, the court could have acquired jurisdiction to adjudicate the controversy without the formal process of a subpoena and a bill in equity, as the petition was in the nature of a bill in equity, and contained substantially all the matters essential to such a bill. *Stickney v. Wilt*, 23 Wall. 150, 23 L. Ed. 50; *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444. But where the objection is taken in limine by the respondents, as it was here, it cannot be ignored, and the party who insists upon being heard in a plenary suit is entitled to that mode of procedure.

The learned judge who made the order under review proceeded upon the legal theory that the testamentary trustees had no adverse rights to the fund in controversy. This theory we cannot accept as correct. The trust created by the will was one to receive the rents and profits of lands, and apply them to the use of the beneficiary during his life, without any direction for an accumulation. By the

statutes of New York it is provided that in case of such a trust the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the beneficiary, "shall be liable in equity" to the claims of his creditors "in the same manner as other personal property which cannot be reached by an execution at law"; the trust vests the whole estate, in law and in equity, in the trustee, "subject only to the execution of the trust"; and no person beneficially interested in such a trust "can assign or in any manner dispose of such interest." The courts of New York have uniformly declared nugatory every attempt by the act of the beneficiary to alienate or incur the income arising under such a trust, or to anticipate it in any manner, and have denied the power of the courts to sanction any disposition of it by the concurrence of the beneficiary and the trustee. *Graff v. Bonnett*, 31 N. Y. 12; *Wood v. Wood*, 5 Paige, 596; *Van Epps v. Van Epps*, 9 Paige, 237; *Cruger v. Jones*, 18 Barb. 467. In *Douglas v. Cruger*, 80 N. Y. 19, the court of appeals said:

"The purpose of the statute was to make these trust estates and trust interests indestructible and absolutely inalienable during the existence of the trust; and, if they could be rendered alienable by the order of the court, the whole scheme of the statute would be greatly impaired, and its purpose thwarted."

To the same effect is *Outhbert v. Chauvet*, 136 N. Y. 326, 32 N. E. 1088, 18 L. R. A. 745.

Such being the nature of the trust, it is obviously the right and duty of a trustee to protect the income for the use and enjoyment of the beneficiary, and to resist any attempt to divert it from the object of the testator's solicitude. He is entitled to insist that he shall not be prevented from paying it to the beneficiary and compelled to pay it to another. If the fund can be reached by the trustee in bankruptcy after it has come into the hands of the bankrupt, the testamentary trustees are not necessary parties to an action. But, if it is sought to be reached before they have discharged their fiduciary and statutory obligation towards the beneficiary, they are in duty bound to resist. In defending their trust duties they are hostile to the trustee in bankruptcy, and, if they are entitled to be heard at all, they are entitled to contest his title as fully as though they were the equitable owners of the fund. The case is distinguishable from one where the trustee in bankruptcy seeks to reach the assets in the hands of an assignee for the benefit of creditors, and we do not intend to decide that a plenary suit is always necessary in such a case. Where the assignment is without preferences, the trust being nugatory and the assignment void because in fraud of the bankrupt law, and the trustee in bankruptcy represents all parties having any real interest in the assets, it may be argued that the assignee and trustee do not stand upon hostile titles. In *Re Gutwillig*, 34 C. C. A. 377, 92 Fed. 337, we decided that the court of bankruptcy had power, pending a decision upon a petition against the assignor to adjudicate him a bankrupt, to restrain the assignee from disposing of the assets. We thought that power deducible from clause 3 of section 2, authorizing courts of bankruptcy to take charge of the property of bankrupts pending such a decision and

until the qualification of the trustee, and from the terms of clause 15, authorizing them to make the orders and issue the process necessary. The decision was not intended to have any wider scope.

As we are of the opinion that the order under review should be vacated, and the rights of the parties adjudicated in a plenary suit, it would be premature now to express any opinion upon the merits.

The order is accordingly set aside

LACOMBE, Circuit Judge. I concur in the conclusion that the rights of the parties must be adjusted in a plenary suit, which should be brought in the district court. I think, however, that upon the questions of law arising upon the merits, which have been fully discussed, and which will be in no wise changed by being presented in a suit in equity, the opinion of this court should be expressed for the guidance of the district court in disposing of such suit. Upon this branch of the case I concur in the careful and exhaustive opinion of the district judge.

In re LYNCH.

(District Court, S. D. Georgia. March 15, 1900.)

1. BANKRUPTCY—HOMESTEAD EXEMPTION—VALUE.

Where a bankrupt claimed the property on which he resided as exempt under the state law allowing a homestead of the value of \$1,600, but it was alleged that the property was worth more than that amount, and responsible parties offered to bid larger sums for it, *held*, that the property should be offered at public sale by the trustee, after due advertisement, and knocked down to the bankrupt at a bid of \$1,600, if no better offer was made, but, if the property brought more than that amount, the bankrupt should receive \$1,600 in money out of the proceeds, as his exemption.

2. SAME—SETTING APART EXEMPTION—STATE LAW.

While the value or amount of the exemption to be allowed to a bankrupt depends upon the law of the state of his domicile, the method of ascertaining the value of property claimed as exempt, or of setting apart the property, is not governed by such law, but by the bankruptcy law.

In Bankruptcy. On review of decision of referee in bankruptcy.

SPEER, District Judge. The question for decision arises from the controversy following: The bankrupt, W. H. Lynch, desired the trustee to set apart his residence lot in the city of Augusta as an exemption. The trustee declined to do so, upon the ground that it is worth much more than \$1,600,—the amount of the exemption allowed by the law of the state. The referee sustained the action of the trustee, after hearing much testimony offered for and against the applicant, and exceptions were made to his finding. The evidence is strongly conflicting as to the value of the premises. The witnesses on either hand are apparently equally credible. In the presence of the conflict, the court is not able to hold, as requested by the counsel for the bankrupt, that the referee's finding was er-

roneous. Besides, there are several bona fide offers by responsible bidders to pay at least \$2,500 for the property. A practical method, then, for the determination of this dispute, is to order the property in question sold, and the trustee to set apart to the bankrupt \$1,600 of the proceeds. This, it is said, will be in conflict with the theory of the homestead law of the state, which does not, it is insisted, comprehend a sale, as one of the methods of ascertaining the value of property sought to be exempted. It is true, however, that the bankruptcy exemption is not in all respects like the homestead exemption of the state. In value, and seemingly in that alone, it is the same. It need not be invested by the court. It is delivered to the bankrupt himself. It is not liable for his proper indebtedness, even though he should cease to be the head of a family. It seems merely a bonus to him to enable him to start anew in his business ventures. Its value and amount, then, are the only matters with which the court is concerned. To ascertain this value in the case before the court, it will be directed that the premises in question be sold, and the trustee is authorized to accept the bankrupt's bid of \$1,600, and set apart the lot to him as his homestead, provided there is no higher bid. In any event, he will receive the value of his exemption from the proceeds of the sale. The order must provide for a public sale, with not less than 10 days' full advertisement, so that all parties at interest may have ample notice.

WEBER MEDICAL TEA CO. v. KIRSCHSTEIN.

(Circuit Court, S. D. New York. May 7, 1900.)

UNFAIR COMPETITION—ORAL REPRESENTATIONS BY DEALER.

Although by a prior adjudication it has been determined that another manufacturer has the right to use labels and packages containing a name similar to that used by complainant, a dealer in the goods of such manufacturer may be enjoined from making further oral representations tending to confuse the goods of the two makers in the minds of purchasers.

On Motion for Preliminary Injunction.

Louis C. Raegenar, for the motion.

James A. Whitney, opposed.

LACOMBE, Circuit Judge. In view of the decision of the case against Wilhelmina Weber in the Eastern district, complainant is not entitled to any relief which will interfere with the labels or manner of packing the goods complained of. The further representation, however, of the defendant, when selling, that such tea is "Weber's tea," is an independent act not considered in the former suit. He may sell the packages which Wilhelmina is allowed to put up, and which represent the goods as "genuine imported Alpine herb tea, manufactured by F. G. Weber & Co.," and may repeat that representation orally; but, when he further represents the contents to be "Weber's tea," his statements, as the affidavits show, tend to produce a confusion of goods, against which the public should be protected. The prayer

for relief seems to be broad enough to warrant an injunction against selling any preparation, not manufactured by complainant, upon the representation that it is "Weber's tea." To that extent the motion is granted; in all other respects, it is denied.

DODGE et al. v. OHIO VALLEY PULLEY WORKS et al.

(Circuit Court, D. Kentucky. May 1, 1899.)

1. PATENTS—SUBSTITUTION OF MATERIAL.

It was not invention to substitute wood for iron, especially in view of the well-known utility of paper or leather as equivalents for iron. The use of wood as an equivalent for iron in many arts of more or less analogy deprives its substitution in the art of making pulleys of all claims of discovery.

2. SAME—COMBINATION.

Separate split thimbles, being old and well known in the art as an element of combination with a separable wood pulley, cannot be sustained, unless the claim is limited to the peculiar structural devices of the pulley described and claimed in the patent.

3. SAME—NOVELTY.

The feature of "rim contact" is an essential feature of the separable pulley in the Dodge and Phillion patent, No. 260,462. Defendants' pulley, which does not have the rim contact, but uses struts between the spoke-arms, and which keeps the rims from contact, does not infringe.

4. SAME—CONSTRUCTION OF CLAIM.

Where a claim calls for a specific element as a feature of the combination, it is not admissible to broaden the claim so as to include a different and older method of construction.

5. SAME—PLURALITY.

The claim for patent upon a separable pulley of certain specific construction, in combination with "a separable split thimble interposed between said shaft and pulley," cannot be broadened to cover a plurality of bushings, which is a mere carrying forward of the original idea.

(Syllabus by the Court.)

Lysander Hill and John W. Hill, for complainants.

E. E. Wood and Wm. R. Wood, for defendants.

LURTON, Circuit Judge. This bill, as originally filed, claimed that the defendants infringed both the first and third claims of patent No. 260,462, of July 4, 1882, to Wallace L. Dodge and George Phillion. After the proof in the case had been taken, the complainants dismissed the bill so far as infringement of the first claim was charged, and the case is now heard upon the questions involved by the charge that the defendants infringed the third claim. This third claim is for a combination. The elements are: First, "a separable pulley, whereof, when the meeting ends of the rim are in contact, the meeting faces of the spoke-bars are slightly separated"; second, "the clamp-bolts, G," described in the specifications; and, third, "a separable split thimble interposed between said shaft and pulley, substantially as set forth."

1. The validity of both the first and third claims was passed upon and sustained in an elaborate opinion by the late Judge George R. Sage in the circuit court for the Southern district of Ohio. His opinion is reported as *Dodge v. Post*, 76 Fed. 807. Judge Sage, in that

case, after an elaborate consideration of a very large number of anticipatory devices, found himself enabled to sustain the validity of the first claim, which is the broad one of the patent, upon the ground that:

"Complainant's patented pulley is the only one shown in the record in which compression to the shaft to any required degree—a compression bringing the entire inner surface of the hub to bear upon the shaft, and so constructed that it may be increased whenever necessary by reason of change of shaft, or of wear, or of any other cause—is so effected as to be superior to any other mode or means of fastening or attachment, and to impart to the pulley its greatest mechanical power, and yet leave it entirely separable into its own halves, and from the shaft."

The learned judge further said that, in order "to accomplish this result, there must be compression at the shaft, and contact at the rim, and the inner side of the divided spoke-arm must be separated from rim to rim." He was enabled to distinguish the anticipatory devices from the structure covered by the first claim of the Dodge patent by reason of his inability to find in them the necessary contact at the rim, which he regarded as an essential functional element in the Dodge method of attaching the pulley to the shaft. The necessity of this feature of "rim contact" and "hub separation," as the proper construction of this patent, was also emphasized by the circuit court of appeals for the Second circuit in the case of *Dodge v. Pulley Co.* (decided in December, 1898; not yet officially reported) 35 C. C. A. 140, 92 Fed. 995. The same construction was given to the patent by the circuit court of appeals for the Seventh circuit in the case of *Pulley Co. v. Dodge*, 29 C. C. A. 508, 85 Fed. 971, and reaffirmed, upon petition to rehear, in 30 C. C. A. 455, 86 Fed. 904. My own examination of the very voluminous record in this case convinces me that the construction placed by Judge Sage, and followed in the two cases cited above, is the only construction which could possibly save the first claim of this patent, if its validity was here in question.

2. The third claim is identical with the first, except that an additional element is added to the combination covered by the first. This will be at once observed by comparison, the first and third claims being as follows:

"(1) A separable pulley, whereof, when the meeting ends of the rim are in contact, the meeting faces of the spoke-bar and hub are slightly separated, as described, combined with clamp-bolts, G, whereby said hub is clamped upon the shaft in the manner set forth." "(3) A separable pulley, whereof, when the meeting ends of the rim are in contact, the meeting faces of the spoke-bar and hub are slightly separated, and clamping-bolts, G, combined with a separable split thimble interposed between said shaft and pulley, substantially as set forth."

The third claim consists, then, in the element of the first claim "combined with a separable split thimble interposed between said shaft and pulley, substantially as set forth." Now, it is clear that, if it be conceded that the devices of the defendant do contain this element of "a separable split thimble," they do not infringe, unless this element is found in combination with "a separable pulley, whereof, when the meeting ends of the rim are in contact, the meeting faces of the spoke-bars are slightly separated." In other words, as said by the court of appeals for the Second circuit in reference to this third

claim, in the case of *Dodge v. Pulley Co.*, "if the pulley itself be structurally different from the pulley of the first claim, it cannot be held to infringe the third claim solely because it contains the single additional element of that claim." But the use of bushings for adapting a pulley to a shaft which is smaller than the bore of the pulley was itself old in the art. The evidence in this record shows beyond all question that separable split iron thimbles or bushings were well-known devices in the great and small workshops of the country long before this patent was applied for. So, also, it is shown that bushings of paper and leather were used for the same purposes. The substitution of wood for these materials formerly used was not invention. It is true that Judge Sage, in *Dodge v. Post*, already cited, did hold that iron was not adapted for adapting wood split pulleys to the shaft. Upon the evidence before him this may have been the proper conclusion. But the additional evidence in this record removes all serious doubt in my mind as to the practical value of iron as a bushing material. It is not necessary to hold that wood bushings may not be better in connection with separable wood pulleys, but I am not satisfied that a mere change of material—a change to which the patentees have not chosen to limit themselves—was invention. If iron was not sufficiently yielding so as to grip the shaft tightly enough, it was not invention to substitute wood for iron, especially in view of the well-known utility of paper or leather as equivalents for iron. The use of wood as an equivalent for iron in many arts of more or less analogy deprives its substitution in this art of all claim to discovery. The subject of a mere change of material is discussed by the court of appeals for this circuit in *Kilbourne v. W. Bingham Co.*, 1 C. C. A. 617, 50 Fed. 697, and still more in point is the case of *Bushing Co. v. Doegler* (C. C.) 23 Fed. 191. The claim to a plurality of bushings does not seem to be more than a carrying forward of the original idea of a separable split thimble. It is to be borne in mind that the patentees have no claim covering this "separable split thimble" alone. It is only one of the elements in a combination, and the claim is that the combination in which this thimble or bushing is an element is new. In view of the character of the claim, it is difficult to see how the idea of a plurality of bushings or "interchangeable centers" can enter into the claim at all. The claim would be infringed just as much by a combination of the separable pulley with a single "separable split thimble" as if a whole series of such thimbles were sold or used in connection with the pulley. The idea of making the bore of such separable pulley abnormally large, so that by the use of bushing any smaller shaft might be used, does not seem to involve invention, but to pertain to the proper domain of mere mechanical skill. I do not find it necessary to pass upon the novelty of the combination of the third claim, further than to say that it cannot be sustained unless it be confined to the peculiar structural devices described and claimed for the attachment of the pulley to the shaft, and for strengthening the two halves of the pulley against vibration and strain when in motion. The feature of "rim contact" was and is the feature which enabled Judge Sage to sustain the separable pulley of the first claim against anticipation. The later decisions have not widened that claim, nor supported a broader con-

struction of that element as a part of the combination of the third claim. The devices of the defendants do not show the "meeting ends of the rim" in contact. Defendants have strengthened their pulley against strain by adopting struts at each end of their spoke-arms, so that these struts sustain all the thrusts of compression applied to the spoke-arms. The meeting ends of the rims are not in contact; for a clear space is left between them, the two halves of the pulley being held together by the spoke-arms. Complainants say that the struts which support the spoke-arms are equivalent to inward rim extension. But in this the defendants have adopted the method of the Schelkopf wheel, as shown in patent No. 168,925, of October 19, 1875. Concerning the construction and operation of that wheel, Mr. Dayton, complainants' expert, said in the case of *Dodge v. Post*, when distinguishing the Schelkopf wheel from the separable pulley of the first claim of the Dodge and Phillion patent:

"The rims of the wheel halves are purposely made to stand apart in order that the clamping-bolts referred to may exert their entire force in holding the wheel members to the shaft, and in fastening the gudgeon to the shaft end; it being obvious that, if the rims met, the braced half-wheels would oppose the clamping action of the clamping-bolts, and in some measure prevent the desired security of the wheel to the shaft, and the firm fastening of the gudgeon within the shaft. Between the outer ends of the spoke-bar, studs are inserted, and additional clamping-bolts, passing through the spoke-bars, draw them against the ends of these studs, giving rigidity to the wheel."

This end contact of the rims is a specific element of this third claim of the patent in suit. Having sustained the first claim on the ground of the novelty and effectiveness of such rim contact, it is not admissible that it should now be broadened so as to include the Schelkopf method of construction. That which infringes if later anticipates if earlier. The defendants do not infringe if complainants be limited to the specific rim contact of their claim, and this I think necessary to avoid anticipation. Let the bill be dismissed.

DODGE MFG. CO. v. OHIO VALLEY PULLEY WORKS et al.

(Circuit Court, D. Kentucky. May 1, 1899.)

1. PATENTS—INVENTION.

The third claim of the McNeal patent, No. 351,064, involved nothing but the method of strengthening the parts of a wooden separable pulley by means of a stay-bolt extending from the arms of the spoke-bars to the pulley rim. The novelty is doubtful, in view of prior analogous uses in the arts.

2. SAME—CONSTRUCTION.

The claim is entitled to only the most narrow construction, and must be confined to the stay-bolt and its screw-nut. Defendants use a wooden pin with glue to lock the parts together, and do not infringe.

3. SAME—NOVELTY.

The Phillion patent, No. 368,490, which involves the making of a pulley rim by gluing together the abutting ends of a number of segments to form an individual rim, and, second, in gluing together a number of these individual rims and subjecting them to pressure, involves no invention, in view of the Dodge and Phillion patent, No. 260,462. It is a mere carrying forward of old ideas, and does not involve invention.

4. SAME—PROCESS.

The method of uniting segments together and rims together by means of glue does not seem to constitute a process, but involves only mechanical operation.

5. SAME—NOVELTY.

The Dodge patent, No. 456,722, for an angular hub-block bored to fit a shaft, and detachably connected with the spoke-arms of a separable wood pulley, does not involve invention, in view of the prior Dodge patent, No. 260,462. The angular hub-block or bushing of the one patent is not different in function from the round thimble or bushing of the other patent. It is a change of form without producing new results.

(Syllabus by the Court.)

Lysander Hill and John W. Hill, for complainant.

E. E. Wood and Wm. R. Wood, for defendants.

LURTON, Circuit Judge. 1. This is a suit for infringement of several patents, all owned by the complainant company. The patents alleged by the bill to be infringed are (a) the Sanborn patent, of April 17, 1883, No. 275,947; (b) the McNeal patent, of October 19, 1886, No. 351,064; (c) the Phillion patent, of August 16, 1887, No. 368,490; (d) the Dodge patent of July 28, 1891, No. 456,722. The subject-matter of all the patents is pulleys and their manufacture. The complainant has dismissed its bill so far as infringement of the Sanborn patent was charged, and so far as infringement of claims 1, 2, and 3 of the McNeal patent was involved.

2. The only claim of the McNeal patent involved is the fifth, which is in these words:

"(5) A split pulley having a section A, and the arm, C, mortised into the same near its end, and provided with a stay-bolt, K, extending from said arm back to the pulley rim at a distance from its end, substantially as set forth."

This involves nothing but a method of strengthening the parts of a wooden separable pulley by means of a stay-bolt extending from the arm of the spoke-bar to the pulley rim. The novelty of the device is doubtful, but need not be decided. The history of the earlier art involved, and of analogous arts, is such as to demand the most narrow construction of this claim, whereby the patentee shall be confined to the stay-bolt in connection with a half pulley rim having a mortise near the extremity of the half rim, and having a spoke-bar with its ends within said mortise. Defendants do not use stay-bolt, K, with its screw-nut. They use a wooden pin, with glue, to lock the parts together.

3. The patent to G. Phillion, No. 368,490, for a process for the construction of pulleys, is void. It consists in two steps: First, in uniting the proper number of segments at their abutting ends by glue, to constitute individual rings capable of being handled as entireties; second, in assembling the proper number of such rings to form the rim of a pulley, and uniting them by glue applied to their contiguous faces, and subjecting them to pressure for the purpose of bringing about the proper degree of adhesion. The patent to Dodge and Phillion teaches a method of first making individual rings by uniting segments at their meeting ends "by glue or nails, or by doweling" together. The next step shown by the same patent is the adding of

similar rings after the spoke-bars are united to the middle section. These additional or external rings, it is stated in that patent, are "secured by glue, nails, or other suitable means," to the middle section. Nearly as much may be said of the patent to McNeal, No. 351,064. That it was not new to unite individual segments to form a ring or wheel by gluing them together at their abutting ends is abundantly shown by the record. Neither was it new to unite wooden structures by means of glue under compression. No new result was produced by the method of the patent. That pulleys thus made may have been more durable than those united by nails or doweling, or by glue with nails, or by glue without pressure, may be conceded. But such improvement is not invention. What Phillion has done is but the carrying forward of old ideas, and does not amount to invention. Neither am I satisfied that the process involves anything more than the operation of mechanism. The suggestion that the application of liquid glue involves chemical action is not evident. It seems to me that, under the principles of *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899, and the cases there cited, if the method was new or the result new, the process is not the subject of a patent. See, also, *Glass Co. v. Henderson*, 15 C. C. A. 84, 67 Fed. 930.

4. The patent to W. H. Dodge, No. 456,722, for improvements in band pulleys, recites that the invention consists "in an interchangeable or removable hub, whereby by removing one hub and substituting another the same pulley may be adapted to shafts of different sizes." The specification includes this statement:

"In letters patent No. 260,462, issued to me on the 4th day of July, 1882, a similar object is provided for by the employment of bushes to be interposed between the hub and the shaft, the hubs being all bored to standard sizes, and the bushes being bored to the size of the required shaft; but, as will be apparent, the employment of bushes is not always desirable, because, being an extra and interposed part, it is necessarily an element of weakness, although it is convenient and satisfactory in many cases. The object of my present improvement is to avoid the necessity for boring the hub larger than the shaft, and thereby weakening it, and at the same time to retain the advantage of an interchangeable center, so that any pulley may without trouble be fitted to any shaft. My invention, therefore, consists in a pulley having arms capable of yielding at the center, provided with removable angular hub-blocks seated in said arms, and straining-bolts to draw the arms and hub-blocks towards each other to clamp the same firmly on the shaft."

Only the first and second claims are involved. They are as follows:

"(1) In a pulley, a rim provided with spoke-arms rigidly attached at their ends to said rim, and capable of yielding at the middle, combined with angular removable hub-blocks seated on said arms, and bored to fit a shaft, and straining-bolts whereby said arms and blocks may be drawn towards the center and clamped fast upon the shaft, as set forth. (2) In a pulley, a rim and two parallel spoke-arms rigidly attached at their ends to said rim, but capable of yielding at their middle, said arms being provided with flat seats, combined with removable angular hub-blocks adapted to fit said seats and bored to fit a shaft, and straining-bolts whereby said hub-blocks and arms are drawn towards the center and clamped upon the shaft, as set forth."

It seems to me that these claims are anticipated by the Dodge and Phillion patent referred to in the specifications, which I have set out above. I cannot see anything in these claims patentably distinguish-

ing the "removable hub" from the "removable split thimble" of the older patent referred to in the specification above set out. The "separable split thimble" was not claimed, except in combination with the separable pulley of the first claim of the same patent. There is nothing in the third claim of the patent which should necessarily limit the patentees to a removable split thimble cylindric in form. The removable hub-block of this Dodge patent is nothing more than the removable thimble of the older patent made in angular form. In the later patent they are described and claimed as "removable angular hub-blocks." In the older patent the wooden devices corresponding precisely in function are described in the specifications as "removable thimbles." The function of the "removable thimble" was "to properly fit a pulley to a shaft for which it is not adapted." The function of the "removable hub," as stated in the specifications of the Dodge patent, is to adapt the same pulley "to shafts of different sizes." Even if Dodge and Philion were limited to "removable thimbles" "cylindric in form," I fail to see invention in the change of shape. No function results from the change, and no other, different, or better result is accomplished by changing the form of such removable thimbles from cylindric to angular. The change of name from "thimble" to "hub," without any change of function, cannot deceive. Whether called a "thimble" or a "hub," they are both mere "bushings," intended to fit a pulley to a shaft to which it was not adapted. The failure to claim the "removable thimble" or "interchangeable center" of the Dodge and Philion patent as in itself novel and patentable was a surrender to the public of the right to make, vend, and use such "interchangeable centers," except in combination with the other elements of the claim in which such bushings were an element. I fail to find that in this change of form there is any change of function, or that any better results are attained. The patent is therefore void for want of novelty. I do not deem it necessary to go behind the Dodge and Philion patent to find anticipation. The view I have already expressed as to the narrowness of the third claim of the Dodge and Philion patent, as briefly stated in the memorandum I have filed in the case of Dodge v. Pulley Works, 101 Fed. 581, indicates the trend of my thought touching this whole subject of bushings, whether called "separable split thimbles" or "removable hubs." The bill must be dismissed at cost of complainants.

THOMSON-HOUSTON ELECTRIC CO. v. BULLOCK ELECTRIC CO. et al.

(Circuit Court, S. D. New York. May 3, 1900.)

1. PATENTS—JURISDICTION OF SUIT FOR INFRINGEMENT—NONRESIDENT DEFENDANT.

Under Act March 3, 1897 (29 Stat. 695), which gives a circuit court jurisdiction of a suit for infringement of a patent in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business, and authorizes service upon the agent conducting such business, where a manufacturing corporation of Ohio, which there manufactures articles alleged to infringe, consigns them to a

second corporation, doing business in New York, which is given the exclusive right to sell the same within a given territory, being charged therewith at a fixed price, but privileged to return any part of the same and receive credit therefor, and the manufacturing corporation pays the cost of advertising, furnishes catalogues, etc., the latter is a participator in the sales of such articles for use in New York, and the office of the second corporation is its regular, established place of business, within the meaning of the statute.

2. SAME—VALIDITY—ELECTRIC SWITCHES.

The Thomson patent, No. 401,085, for a shield of insulating material to control the place of the arc in breaking a circuit by means of an electric switch, and which is an addition to the prior combination of a magnet with a circuit breaker for the purpose of dissipating the arc formed, discloses patentable novelty, and is valid; also, *held infringed*.

In Equity. Suit for infringement of patents. On final hearing.

Frederic H. Betts, for plaintiff.

George J. Harding, Clifton V. Edwards, and Wm. Houston Kenyon, for defendants.

WHEELER, District Judge. This suit is brought upon patents Nos. 283,167, dated August 14, 1883, for a magnetic field in an electric switch, to dissipate the arc found by breaking the circuit, and 401,085, dated April 9, 1889, for a shield of insulating material to control the place of the arc, granted to Elihu Thomson, and owned by the plaintiff. The defendant the electric manufacturing company is a corporation of Ohio. The defendant the electric company is a firm in New York, having offices at 220 Broadway.

The act of March 3, 1897 (29 Stat. 695), provides:

"That in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

The bill alleges infringement in this district by sale of machines by the electric company, as Eastern agents of the manufacturing company, and service was made upon the firm as such agents. The manufacturing company has pleaded that it ought not to be held to answer, because its factory is in Ohio, and that it has no established place of business with the electric company, engaged in conducting such business as its Eastern agents, or in this district or state. The plea has been traversed, and proofs have been taken which show that the business between these defendants is done under an agreement in writing by which the manufacturing company grants to the electric company the exclusive right in the New England states, New York, New Jersey, Pennsylvania, Delaware, Maryland, and the District of Columbia for the sale of such machinery, appliances, and material as the manufacturing company might manufacture, on the basis of discounts from the published list or lowest selling prices f. o. b. at Cincinnati

(payments to be made in 30, 60, and 90 days from date of shipment), which the electric company would handle exclusively within the territory; the manufacturing company to do the general advertising, and furnish all catalogues and other descriptive matter; and the electric company to have the privilege of returning for credit any part of the consignment stock, they being charged with whatever should be necessary for putting the stock in the same condition as when it left the manufacturing company's hands. Making, using, or selling for use, would be an infringement; and the sale for use by the electric company in New York would, of course, be such. If the manufacturing company should do no more than to sell to the electric company in Ohio, that would be an infringement ending in Ohio. But the manufacturing company does more. It controls and participates in sales in New York. Its property does not pass absolutely to the electric company in Ohio, for the latter has a right to return it before sale. So the manufacturing company essentially promotes and actively participates in the sales in New York, when made there by the electric company for use. The title of the manufacturing company first absolutely passes by that sale for use, in which it participates through the electric company. Those who partake in torts are principals, and the manufacturing company so appears to be a principal in the sales for use here, and an infringer here. The offices of the electric company here constitute a regular and established place of this business. The issue joined upon the plea is therefore found for the plaintiff, and the plea overruled.

Since the argument of this case, Judge Thomas has, in *Thomson-Houston Electric Co. v. Nassau Electric R. Co.*, 98 Fed. 105, in the circuit court of the Eastern district of New York, held patent No. 283,167 invalid for want of novelty, so far as it is in any way involved here. That decision should, of course, be followed by this court, while it stands unreversed and not overruled, and is so followed now, without attempting otherwise to reach a conclusion as to that patent in this case.

The inventor, in the remaining patent (No. 401,085), states:

"The object of my present invention is, generally speaking, to increase the efficiency and certainty of operation of arc-rupturing devices such as I have described; and, to this end, my invention consists in the application of a shield or septum of insulating material between the opposed surfaces of the arc-rupturing device and the electrodes or conducting-bodies between which the arc to be ruptured is formed, thereby preventing an arc from forming at any other portion of the electrodes or conductors than those directly subject to the arc-rupturing force, and permitting the arc-rupturing device, when of conducting material, to be applied, without danger of defective action, very closely to the electrodes. When my invention is applied to an arc-rupturing device, consisting of a magnet properly arranged with reference to the electrodes across which the arc to be ruptured is formed, the interposed insulating septum or shield may be formed by coating or covering the poles or metallic portions of the magnet with enamel, rubber, or other insulating material; enamel being preferable, on account of its incombustible nature. By this means discharges or arcs which might otherwise pass from the poles or electrodes placed in the magnetic field to the magnet-pole, thereby escaping the action of the magnet in rupturing the same, are prevented. I find it, in fact, desirable to apply the insulation-shield to all metal portions which are in proximity to the arc to be ruptured, and also to coat or cover the electrodes themselves with insulating

material at parts outside of the magnetic field, so that any possibility of a discharge or arc forming at any other portion of the conductors than those directly included in the magnetic field may be avoided. My present invention, on account of the layer of insulating material covering the poles of the magnet, allows such poles to be approached quite closely to the disrupting electrodes, thereby enhancing very much the intensity of the field. This, in fact, is one of the important results obtained in my present invention."

The claims in question are:

"(1) In an arc-rupturing device, a shield of insulating material, located between the surfaces of the electrodes, and adjacent conducting surfaces of the device by which the arc is disrupted, as and for the purpose described. (2) An arc-rupturing device having its exposed surfaces adjacent to surfaces of the arcing-electrodes or bodies shielded with insulating material. (3) The combination, with electrodes liable to abnormal arcing, of an arc-dispelling magnet and a shield of insulating material between opposed surfaces of the magnet and electrodes, as and for the purpose described. (4) In an arc-rupturing device, a magnet whose poles are covered with insulating shields. (5) In an arc-rupturing device, an intercepting shield of solid insulator between the poles of an arc-rupturing magnet and the arcing-electrodes. (6) In an arc-rupturing device, magnet portions shielded by an insulating-covering, in combination with shielded electrodes having an exposed metal portion wholly within the space between the magnet-poles."

Currents of electricity are understood to have always been guided by insulation; and if these claims were merely for the principle of insulation, or for the use of ordinary means of insulation at this place, without more, as has been argued, they would doubtless be wholly void for want of patentable novelty. They seem to be, however, for the use of a shield, composed of such insulating materials in this place about and in combination with the separated parts of the circuit and the arc-dispelling devices, to control the arc during dispersion. That such a use of such means in just such a combination for this or any purpose is new is well proved, and not understood to be really disputed; but the subject of the invention is said to have been so circumscribed by prior knowledge and use as to leave no room for anything patentably new in this direction. The nearest things appear to be patents No. 68,407, dated September 3, 1867, and issued to Arthur Barbarin, for an improvement in lightning-arresters, and No. 316,077, dated April 21, 1885, and issued to William L. Stevens, for a safety-box for electric circuits; and the Stevens patent is the nearest of those two, and the only one of them which has an insulating device as a guard. The safety-box of that patent does not appear to be any arc-dispelling device of a circuit-breaker for constant use, but to be a device for suppressing the formation of an arc under the occasional and extraordinary circumstances of electrical storms, to guard against danger from lightning. It has not any combination with a circuit-breaker and a magnetic field for dispelling an arc formed by continual breaking of the circuit in the operation of powerful electric machines. The adding of this insulating shield to the prior combination of the magnet with a circuit-breaker seems to be new and highly useful and patentable, whether the combination of the magnet with still prior machines was patentable or not. These claims are for this addition of the shield to the combination of a magnet with a circuit-breaker, thus forming a new and useful combination, which was patentable as such. In this view of the invention covered by these claims, the in-

fringement of them by the defendant does not seem to be much in question, and appears to be made out. Plea overruled. Decree dismissing bill as to prior patent, and for plaintiff as to the latter patent.

MOORE v. SUN PRINTING & PUBLISHING ASS'N.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 123.

1. **CONTRACTS IN NAME OF AGENT—ENFORCEMENT AGAINST PRINCIPAL.**

A contract may be enforced against one shown to have been the real principal therein, although it purports to be the individual contract of the agent by whom it was made.

2. **SHIPPING—CONSTRUCTION OF CHARTER—LIABILITY OF CHARTERER FOR LOSS OF VESSEL.**

A charterer, who bound himself by the contract to return the vessel at the expiration of the term of hiring in as good condition as at the beginning, "fair wear and tear from reasonable use only excepted," and who also explicitly undertook to be responsible for any loss or damage to any part of the vessel, her equipment and furniture, and to secure the owner in a specified sum against all losses and damages which might occur to her, is not relieved from the obligation to pay the owner her value as fixed in the contract on a failure to return her by the fact that she was lost without fault on his part, since such contingency might reasonably have been anticipated, and his liability in that event provided against had such been the intention of the parties.

3. **SAME—DAMAGES FOR LOSS OF VESSEL—STIPULATED VALUE.**

It is competent for the parties to a charter to fix the value of the vessel therein as a basis of damages in the event of her loss, and such valuation is conclusive upon them in the absence of fraud or mutual mistake, especially where the vessel was one built as a pleasure yacht, and having no determinable market value.

4. **SAME—CONSTRUCTION OF CHARTER.**

The charter of a yacht required the charterer to pay a stipulated sum as hire during the term of the charter, to return the vessel in good condition at the expiration of the term, to be responsible for any loss or damage to her or her equipment or furniture, and to give security in the sum of \$75,000 for the performance of the contract. It also provided that "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of \$75,000," and that the liability of the charterer should in no case exceed the sum of \$75,000. *Held*, that the provision fixing the value of the yacht was solely for the purpose of determining the damages in case of her loss or injury, and that on her total loss while in possession of the charterer the owner was entitled to recover the full sum of \$75,000, without deduction on account of the hire paid by the charterer.

Appeal from the District Court of the United States for the Southern District of New York.

George Zabriskie, for libellant.

Franklin Bartlett, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The yacht Kanapaha, owned by the libellant, was wrecked by stranding upon a reef on the northerly shore of the Island of Cuba, about 2½ miles from the shore, and about

7½ miles from Nuevitas, while proceeding westward to the port of Havana, and became a total loss. Her owner brought this action to recover her value against the Sun Printing & Publishing Association, as the charterer of the yacht, under whose control and management she was at the time. The charter provided that at the expiration of the charter term (four months,—from June 1 to October 1, 1898) the charterer would return the yacht "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted." It also provided that the charterer should be "liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture, and the like," and that the charterer should "procure security and guaranty to and for the owner in the sum of \$75,000 to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of this contract." The libel alleged the breach of these conditions, and also alleged that the yacht was lost by the negligent navigation of the charterer. The court below decreed in favor of the libelant, awarding him a recovery of \$65,000, with interest. (D. C.) 95 Fed. 485. Both parties have appealed from the decree, the defendant insisting that it was not liable at all, and the libelant insisting that the damages awarded should have been \$75,000 and interest.

That the Sun Printing & Publishing Association was the charterer of the yacht, notwithstanding Chester S. Lord was named as such in the contract, and that the corporation sanctioned and ratified his act in entering into the charter, we entertain no doubt; and we fully agree with the learned judge who decided the cause in the court below in respect to these propositions, and deem it unnecessary to enlarge upon the very satisfactory reasons assigned in his opinion. As the defendant was the real principal, the libelant was entitled to enforce the contract against it, notwithstanding it purported to be a contract of the agent. *Steamship Co. v. Harbison*, 21 Blatchf. 332, 336, 16 Fed. 688.

It is insisted for the charterer that the yacht perished without any fault on the part of those who were navigating her, and, consequently, that the case is one for the application of the principle, well settled in the law of bailments, that the hirer is absolved from further obligation where the hired thing is destroyed without his fault, so that redelivery to the bailor is impossible. This principle is deduced from the implied conditions of a contract of bailment by which the bailee only undertakes to exercise due care in the use of the article hired, and to restore it to the bailor in as good condition as when received, unless it be destroyed or deteriorated by natural decay, or by external means without his default. The rule of the law of bailments does not conflict with the general principle that where a party, by his own contract, creates a duty or obligation, upon himself, he is bound to make it good, or answer in damages, although prevented from performance by inevitable accident. This principle is applicable to contracts of hiring as well as to all other contracts, and its application is illustrated in numerous decisions in respect to a great variety of

contracts. Thus it has always been settled that when a lessee has covenanted in his lease to keep the demised premises in good order, and surrender them to the lessor at the expiration of the term in as good order as they were originally, he is bound to rebuild, although the premises are meantime destroyed by an accidental fire. *Beach v. Crain*, 2 N. Y. 86; *Hoy v. Holt*, 91 Pa. St. 88; *Leavitt v. Fletcher*, 10 Allen, 119; *Coles v. Manufacturing Co.*, 39 N. J. Law, 326; *Proctor v. Keith*, 12 B. Mon. 252; *David v. Ryan*, 47 Iowa, 642. The principle has been applied with great strictness in charter party contracts. Thus, in *Pope v. Bavidge*, 10 Exch. 73, where the charter provided that the vessel should make six specified voyages not later than a specified day, it was held to be no defense in an action by the charterer against the shipowner that during the first three voyages the vessel was so damaged by accidents of the seas and navigation that she could not be repaired in time to perform the remaining voyages. In *Burrill v. Crossman*, 35 U. S. App. 608, 16 C. C. A. 381, 69 Fed. 747, we had occasion in this court to apply it in the case of a charter party, and held that, inasmuch as the contract contained an absolute obligation to do certain acts within a time definitely fixed, nonperformance was not excused, although performance became impossible by events occurring without the fault of the promisor. In that case the defense was that performance was made impossible by the act of the public enemy,—the war vessels of a foreign power. The cases which are sometimes referred to as exceptions to the general rule are not exceptions, but were those in which impossibility of performance existed when the contract was made and its obligations were held discharged upon the ground of mutual mistake, or those where the contract itself implied a condition that performance should be dependent upon the continued existence of the subject of the contract. The general doctrine may be stated in the language of the court in *Baily v. De Crespigny*, L. R. 4 Q. B. 185:

"There can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damages for the nonperformance; and this construction is to be put upon an unqualified undertaking where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened."

A contract of hiring presupposes the continued existence of the thing hired during the term of hiring; and because the parties must have known that otherwise it could not be fulfilled, and the whole contract is founded upon that understanding, the courts have construed express promises for the redelivery of the thing in as good condition as when received as intended merely to stand for the implied condition, and not as intended to impose a more stringent liability upon the hirer. Such a case was *Young v. Leary*, 135 N. Y. 569, 32 N. E. 607. That was an action to recover of a charterer

the value of a vessel which was destroyed during the charter term by fire, and was brought for the breach of a condition in the charter to deliver the vessel to the owner at its termination "in the same good condition as she is now, ordinary wear and tear excepted." The court read the condition as intended to create no other obligation than would have been raised by implication without it, and said:

"When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it."

Decisions to the same effect are *Ames v. Belden*, 17 Barb. 513, and *Hyland v. Paul*, 33 Barb. 241. On the other hand, the supreme court of Massachusetts decided, in an action brought to recover damages to the article hired, caused by accidental injuries, where the contract contained a condition to return it "in as good order as when received, customary wear and tear excepted," that the bailee was not excused from performance. *Harvey v. Murray*, 136 Mass. 377. In *Drake v. White*, 117 Mass. 10, there was a bailment of personal property by a debtor, who pledged it as collateral security for a loan to the defendants upon the express promise of the latter "to deliver the same, or its equivalent in money," on the payment of the loan. The court, holding the creditor not discharged by the destruction of the property by fire without his fault, based its decision upon the terms of the express contract to redeliver, and used this language:

"If, in the common case of a pledge, the common-law contract was reduced to writing, it would contain, among other things, a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of such loss. In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendant's liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things: either to return the property specifically, or to pay for it in money."

The question in all cases of this kind is a question of the construction of the contract, and the defense of impossibility of performance has been sustained, not because contracts of hiring are not within the general rule, but because the terms of the particular contract were thought to withhold it from the rule. *Dexter v. Norton*, 47 N. Y. 62.

In the case of *Warth's Ex'x v. Mack*, 51 U. S. App. 133, 25 C. C. A. 235, 79 Fed. 955, this court applied the rule to a contract of bailment, and held the promisor not to be released from performance by impossibility. Our decision proceeded upon the ground that it was inferable from the various provisions of the contract that the bailee was not to be absolved in case of the destruction by fire without his fault of the subject of the bailment. In the present case the charterer not only explicitly undertook by the contract to return the yacht at the expiration of the term of hiring in as good condition as at the beginning, "fair wear and tear from reasonable and proper use only excepted," but also explicitly undertook to be responsible for any loss or damage to any part of the vessel, her equipment and

furniture, and also to secure the owner in a specified sum against all losses and damages which might occur to her. It is impossible to construe such a contract as contemplating that the loss of the yacht by vis major or inevitable accident should discharge the charterer from further liability. The case is one where the promisor must fulfill the terms of his promise, or respond in damages for a breach.

We are unable to agree with the court below that the libelant was entitled to recover only \$65,000 as damages for the loss of the yacht. The charter contained this provision: "For the purpose of this charter, the value of the yacht shall be considered and taken at the sum of \$75,000." It appears from the testimony in the record, and, indeed, the fact is one of which the court may take judicial notice, that the market value of yachts is a very uncertain quantity. These vessels, built for pleasure purposes, and to suit the tastes and caprices of the original owner, seldom command approximately their real value when offered for sale in the market, and fluctuate in the estimation of purchasers with the notions and fashions of the day. As Capt. Atkinson testifies, "A yacht has no value except a fancy valuation." It is competent for the parties themselves to fix the value of given property as the basis for ascertaining damages in the event of destruction or injury to it, and the agreement is, in the absence of fraud or mutual mistake, conclusive upon them. *Providence & S. S. Co. v. Phoenix Ins. Co.*, 89 N. Y. 559; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Graves v. Railroad Co.*, 137 Mass. 33; *Railroad Co. v. Sayles*, 58 U. S. App. 18, 32 C. C. A. 485, 87 Fed. 444. Even in cases where the question arises whether a sum fixed in the contract as damages for a breach is to be treated as a penalty or as liquidated damages the courts treat it as liquidated damages when, considering the subject-matter and nature of the agreement, and the difficulty of estimating exact damages, the intention of the parties to consider it as liquidated damages may be inferred.

The learned judge in the court below was of the opinion that the sum fixed was intended as the limit of the liability of the charterer for a breach of all the conditions of the contract, including those of the payment of the charter hire. In reaching this conclusion he placed emphasis upon another condition of the charter providing that the liability of the charterer should "in no case exceed the sum of \$75,000," and held that, inasmuch as the charter hire, \$10,000, had been paid by the charterer, the latter's liability did not exceed \$65,000.

We think it was the meaning of the provision fixing the value of the yacht to fix it for the purpose of determining her value in case of her injury or destruction as the basis of damages, and that this was practically the only purpose contemplated by the provision. It surely was unnecessary to agree upon the value of the vessel with any reference to the payment of the charter hire, or of demurrage for detention beyond the charter period, or for the fulfillment of any of the conditions in which the value of the vessel could not affect the amount of damages arising from the breach.

These conclusions require a modification of the decree in the court below. The cause is accordingly remitted to that court, with instruc-

tions to decree for the libelant in the sum of \$75,000, and interest from October 1, 1898. The libelant is entitled to the costs of this court.

THE INDRANI.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 330.

SHIPPING—INJURY TO STEVEDORE—LIABILITY OF VESSEL.

Libelant was a stevedore in the employ of a contractor engaged in loading a portion of a ship, while a separate contractor was loading a different portion. The ship had furnished libelant and those with whom he worked a safe place in which to work and a safe passage thereto, which libelant had used; but, coming out of the hold where he was at work during the night, he started to go along the deck upon the other side of the ship, which was not intended to be used as a passage and had been obstructed, and by reason of the darkness fell through an open hatchway, which had been left unguarded by employes of the other contractor, and was injured. The hatchway was in the usual place, and libelant had been employed on ships for many years. *Held*, that the ship was guilty of no negligence which rendered it liable for the injury, the proximate cause of which was libelant's own negligence.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This case comes up on an appeal from a decree of the district court of the United States for the Eastern district of Virginia, in admiralty. The steamship *Indrani*, on January 18, 1898, was lying at a wharf at Newport News. She was taking in cargo. To this end she had employed two boss stevedores, each having his own gang, and each doing separate work. One gang was engaged to load the ship with a general cargo. They were at work in hold No. 2. The other gang was engaged in loading her with grain by means of an elevator on the wharf. To this end they put a chute down through hatch No. 3. The ship, having been engaged in the cattle trade, had erected upon her upper or main deck a permanent set of cattle fittings or pens, the roof of which extended forward from, and about on a level with, the lower bridge or floor of the chart room, and was about seven feet above the main deck. This roof is referred to in the record as the "hurricane deck." In this hurricane deck hatches were cut directly over and corresponding with the hatches on the main deck, but, being required by the underwriters to be left open for the purpose of ventilation for the cattle, these hatches had no covers, even at sea. They were guarded, while in port, by a wire manrope about three feet above the deck, rove through stanchions let into holes cut in the deck at each corner of the hatch. The method of reaching the forward hurricane deck from the wharf was by means of a ladder reaching from the wharf to the lower bridge, opposite the chart room; thence by an alley around the rear of the chart room; and then forward, along its port side, out onto the deck. At about 3 o'clock on that afternoon, the vessel being ready to receive cargo, the libelant, Essex Holts, as header of a gang of stevedores, was sent into the lower (No. 2) hold, and commenced to load flour. He continued at work in this hold until 6, when the gang knocked off and went ashore for supper, returning at about 7 o'clock to their work. On each of these occasions libelant passed by hatch No. 3. Shortly after 7 o'clock a gang of men in the employ of the grain stevedore came aboard, went to the No. 3 hatch, and, taking down the manrope on the starboard side, inserted the grain chute in the hatch ready to load the grain. The chute passed down through hatch No. 8 into the main hatch. For this purpose two out of the seven subdivisions of the cover of the hatch

were removed. After putting the chute down, these men went away, leaving the manrope on the starboard side of the hatch down, with a chute in the hatch. The libellant, at work in No. 2 hold, between 9 and 10 o'clock p. m., needing dunnage, sent out a man in search of one Enright to get it. This man came back, saying that it was too dark, and he was afraid to go. He then went himself; but he did not go by way of the passage on the port side of the ship, where the way was clear. He went straight aft from No. 2 hatch, and fell into No. 3 hatch down to the bottom of the vessel, injuring himself seriously. He did not see the chute which was in this hatchway until he had reached the bottom and looked up at it. The libellant is the only witness as to the accident, and how and when it occurred. He does not himself give an understandable account of where it was in the hurricane deck hatch that he stepped in. His testimony leaves the place where he stepped in uncertain, and there is a difficulty in comprehending how, if he fell through the forward part of the hurricane deck hatch, as he testifies he did, he could possibly have gone through the main deck hatch, which was partly covered, and through the under deck and the orlop deck hatches, and have been found where he lay, in the bottom of the ship. There is conflict in the testimony upon the question of lights on the deck. There were electric lights on the wharf, and there were lights about the ship and in the chart room near No. 3 hatch. The libellant had been a member of a stevedore's gang for 27 or 28 years. The ship was lying with her starboard to the wharf.

The court below heard the witnesses and found as follows: (1) That the respondent ship was guilty of negligence in allowing its hatch No. 3, in which libellant fell and sustained the injury sued for, to be and remain open at night, without proper guard or protector on one side thereof, and also in not having the same, while in this condition, properly and sufficiently lighted, and that the injuries sustained by the libellant were the result of these conditions. (2) That although, as between the steamship and the stevedore contracting to load the ship at said hatch, the latter may be primarily liable, still the libellant is none the less entitled to recover in this case against the respondent steamship. (3) That, notwithstanding the negligence of respondent as above stated, the libellant was not himself free from fault, in that he did not exercise as high a degree of care as he might have done in moving about a ship in the dark, with which he was not acquainted, and for this reason he should only recover for one-half of the damages sustained by him. (4) That the sum of \$1,500 is a proper award to the libellant, that being such an amount as the court thinks, under all the circumstances, taking into consideration his own negligence as aforesaid, he is equitably, justly, and fairly entitled to receive; and a decree may be entered for this amount, with costs.

An appeal was allowed, and the cause is here on assignments of error directed to all the findings of the court.

Robert M. Hughes, for appellant.

W. B. Burroughs and W. H. Arrington, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

SIMONTON, Circuit Judge (after stating the facts). What was the proximate cause of this accident,—the negligence of the respondent or of the libellant? His honor, the district judge, found that there was negligence on the part of the libellant, and so he reduced the award of damages. As there has been no exception to this finding, it can be safely assumed that this fact has been established. The *Maria Martin*, 12 Wall. 40, 20 L. Ed. 251. Was the respondent also guilty of negligence? Was there the absence of that care which it was the duty of respondent to use? The action proceeds on the idea that there existed an obligation on the part of the respondent to use

care, and that there was a breach of that obligation to the injury of libellant. The libellant was not on the ship by the mere sufferance or license of the master, but for the purpose of performing a service that could not have been performed elsewhere, and in which the shipowner had an interest. The libellant had, therefore, a right to be where he was, and it follows that there was a duty on the part of the shipowner to secure him a safe place in which he could work, and a safe passage to and from that place. *Gerrity v. The Kate Cann* (D. C.) 2 Fed. 246. This was the nature and extent of this duty. No accident happened to libellant in the place in which he was at work, the No. 2 hold. The accident occurred after he had left the hold. The shipmaster had provided a safe mode of ingress and of egress to and from the hold by a gangway from the wharf to the lower bridge, opposite the chart room; thence by an alley around the rear of the chart room; and thence forward, along the port side of the ship, out to the deck. There were lights on this passage. On the starboard side of the ship the way forward towards hold No. 2 was obstructed. Although the libellant had used the passage so provided in going into the ship, he did not avail himself of it on the night of the accident. He had just been informed that it was dark on deck, yet he went out of hatch No. 2, and apparently went straight aft from it towards and on the starboard side of hatch No. 3, and fell into it. The finding of the court below that this was negligence on his part makes it clear that he had gone where he had no right to go, and so was injured. This was the proximate cause of his injury. It was the natural and probable consequence of his negligence. *Railroad Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256. The district judge, however, held that the respondent was also negligent in allowing the hatch to remain open at night without proper guard or protector on one side, and in not having a light there. The ship was being loaded by two separate contractors, each in charge of his part of the ship. To accomplish his work the stevedore loading grain occupied hatch No. 3, removed the wire man-rope on its starboard side for the purpose of putting in the chute, without which the grain could not be carried into the ship, arranged the chute in the hatch, and left it so. If there were any negligence attending that operation, it was the negligence of this contractor.

In the case of *Dwyer v. Steamship Co.* (O. C.) 4 Fed. 495, 17 Blatchf. 472, the court quotes *Packard v. Smith*, 10 C. B. (N. S.) 470, and applies the principle to the case of a stevedore injured by the act of another stevedore:

"If an independent contractor is employed to do a lawful act, and in the course of the work does some casual act of negligence, the common employer is not answerable."

In *The Wm. F. Babcock* (D. C.) 31 Fed. 419, an employé of a master stevedore, who was loading a vessel under contract, was injured by slipping into a small trimming hatch between decks while engaged in storing cargo. The light in the between decks was dim, and libellant did not know of the existence of the hatch or that it was uncovered. When the vessel was turned over to the master stevedore to be loaded,

this trimming hatch was covered. The cover was removed by the stevedore's foreman. Held, that the vessel was not liable. The court in that case says:

"Whether or not any of the crew or officers were engaged in the performance of any duties on board the ship, the taking in and stowing of the cargo was conducted under a contract made by the vessel with a master stevedore. * * * If the negligence was not that of the master, but of an independent contractor, or of the stevedore having charge of the loading of the ship, the latter, and not the owners, are liable."

The finding of the court below ignores this. It proceeds upon the idea that, notwithstanding the contracts with these two stevedores, the master had a general supervision of the ship, and that it was his duty to keep his hatches closed and guarded or lighted. It must be borne in mind that the hatchway in question was one of the usual hatches in the ship; that it is customary, when ships are in port, to keep the hatches open for the purposes of ventilation; that in this cattle ship this hatch was intended to be always open; that this vessel was being loaded, which necessitated an open hatch; that libellant had had an experience of over 25 years as stevedore, and therefore knew all this; that the master had done all in his power to prevent the use of the starboard side of the ship as a passage, by obstructing it; and that he had provided a safe passage on the port side.

There are very many cases in the federal reports bearing on cases of this character. In *Dwyer v. Steamship Co.*, supra, Judge Benedict says:

"I cannot agree with the proposition that it was a part of the defendant's duty to maintain a safe covering upon this hatchway. Hatchways are well-known features and sources of danger on a ship. They are intended to be open a large portion of the time, especially when in port, not only for the purposes of loading and unloading, but also for ventilation."

Judge Brown of New York, in *Anderson v. Scully* (D. C.) 31 Fed. 162, does not think it the duty of the master—

"To keep all parts of the boat secure against any possible accident to strangers who may hurry across it at any time and in any direction without notice or inquiry, a safe passage in another direction having been secured."

In the circuit court of appeals for the First circuit, in *Horne's Adm'x v. George H. Hammond Co.*, 33 U. S. App. 362, 18 C. C. A. 54, 71 Fed. 314, the action having been brought by the administratrix of a stevedore against the shipowner for injury by falling down an open hatch, the court quotes *Dwyer's Case*, supra, with approval and adds:

"The necessities and usages of commerce, and the uniform testimony by the admiralty courts to the existence of this rule, alike when it is in issue and when it is not, so support it, not only with reference to the main deck, but also with reference to between decks, that it cannot be gainsaid."

In the circuit court of appeals of the Fifth circuit, in *The Gladiolus*, 22 Fed. 455, the court, affirming the decree of the district court (21 Fed. 417), held that there was no duty on the part of the master and crew of a steamship, which was being loaded under contract by a stevedore, to look to the hatches and the preparations to receive car-

go; nor was there neglect of duty in leaving the hatchways uncovered, through which the stevedore, husband of libellant, fell and met his injury; that there was negligence on the part of this stevedore in going to the hatchway without a light, if light was needed; that, if there was negligence in the case, it was negligence of the stevedore and his gang, for which the ship was not responsible.

In the circuit court of appeals of the Second circuit, in *The Saratoga*, 36 C. C. A. 208, 94 Fed. 221, the court had before them a case of injury to a stevedore falling through an open hatch. Among other things the court says:

"The district judge held that the hatch coverings were customarily left open when the vessel was in port. With the knowledge of this condition of things libellant must be charged. Passengers, visitors, or workmen from shore, unaccustomed to the regulation of the ship's internal economy, who are invited by the owner, either expressly or by implication, to wander about the vicinity of such hatches, may hold the owner responsible for the results; but, so far as the regular gang of workmen from the shore, who are familiar with the location and regulation of the hatches, are concerned, their knowledge of the situation and their continuance of the work are held to be conclusive evidence that, as to the particular danger of which they are advised, they took the risk. This has been held so many times that it is unnecessary to cite authorities."

There is nothing in the testimony of this case which takes it out of the rule established by these authorities. We are of the opinion that, inasmuch as the ship had provided libellant with a safe place in which to do his work, had also provided a safe mode of ingress and of egress from and into this place, which was known to him and had been used by him, and inasmuch as he had met with his accident by not using this mode of egress, together with the fact that hatch No. 3, into which he fell, was in charge of, and the manrope on the starboard side had been let down by, an independent contractor, the ship is not responsible to the libellant for his injury.

The decree appealed from is reversed. The case is remanded to the district court, with instructions to dismiss the libel.

THE STRATHDON.

BURRELL et al. v. ARMSTRONG et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

No. 127.

1. SHIPPING.—CONTRIBUTION IN GENERAL AVERAGE.—LIABILITY OF CARRIER—EXCLUDING LOSS TO SHIP.

Although the owners of a vessel are exempt under the statutes from liability for damage to the cargo resulting from a fire due to the negligence of one of the crew, without their own neglect, they cannot maintain an affirmative action against the owner of the cargo for contribution in general average to the ship loss; but, when an action for general average is brought by the cargo owner, the damage to the ship must be taken into consideration, as otherwise the cargo owner could recover by selecting his form of proceedings for losses for which the shipowner was not responsible.

2. DAMAGE BY FIRE—BURDEN OF PROOF.

Where the theory of the complainant in an action against the owner of a steamship for damage resulting from fire to goods shipped on such vessel is that the fire originated from an overheated flue, from which the cargo was ignited, the burden is on the complainant to establish that the flue was overheated, and that the fire originated therefrom.

3. SAME—SUFFICIENCY OF FACTS.

The donkey boiler of a steamship was directly under a deck where a portion of the cargo was stored. The top of the boiler was 10 or 12 feet above the fire, and a flue in its furnace extended from its top to the main boiler funnel, its nearest point to the roof being 19 inches therefrom. The entire shell of the boiler contained water, and there were four transverse water tubes in the interior. Expert witnesses testified that it would be almost impossible for the heat in the boiler to make the flue red-hot; and that such a fire would cause the steam to explode the boiler, if the safety valve did not lift, and warn the men. The use of the boiler did not require a heat sufficient to overheat the flues, and to maintain such a heat was contrary to instruction, and the testimony of witnesses who saw the flue before and after the fire indicated that it had not been red-hot. A former employé of the steamship, who had been discharged for bad conduct, and who was shown to have sworn falsely as to other matters tending to discredit the owners, testified that the flue was red-hot. The cargo was on planks on an iron deck over the boiler room. Between the flue and the deck were three baffle plates, leaving three 3-inch air spaces and one 10½-inch air space between the flue and the roof. Experts testified that the deck could not have become hot enough to set fire to the cargo. *Held* not sufficient to warrant a finding that the cargo caught fire as a result of the flue becoming overheated.

4. SAME—WITNESS.

Where an employé of the owners of a steamship was expected to testify for them, but was discharged before the trial for bad conduct, and gave testimony on the trial adverse to the owners, but his testimony, on collateral facts tending to discredit the owners, was shown to be false, he was discredited, and his testimony of no value.

Appeal from the District Court of the United States for the Eastern District of New York.

Action by the owners of a cargo of the steamship *Strathdon* to recover contribution from the shipowners to damage to the cargo resulting from a fire on the vessel during the voyage. From a judgment of the district court for the Eastern district of New York (94 Fed. 206) in favor of defendants, the complainants appeal. Affirmed.

Lawrence Kneeland, for appellants.

J. Parker Kirlin, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal by the claimants, owners of a cargo in part destroyed by fire while in transit upon the steamship *Strathdon*, and in part saved, but damaged in extinguishing the fire, from a decree in a proceeding instituted by the shipowners for limitation of liability. The decree below adjudged that the fire was not caused by the design or neglect of the owners of the vessel, and the loss was occasioned without their privity and knowledge, and exonerated and discharged them for all loss and damage

arising from or growing out of it, except contribution in general average. The *Strathdon* sailed from Java, with a full cargo of sugar, bound for the port of New York. The cargo was shipped pursuant to a charter party by charterers who loaded it themselves or through agents, and received bills of lading reciting that it was carried pursuant to the terms of the charter party, and was deliverable to order. The charter party provided that the carrier should not be liable for loss or damage "occasioned by causes beyond its control; by the perils of the sea or other waters; by fire from any cause and wheresoever occurring; by collision, stranding, or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, from any carelessness or want of diligence by the owners of the ship, or any of them, or by the ship's husband or master." After stopping at Point de Galle and Perim for coals, the steamer arrived at Suez, and entered the canal, bound for Port Said, on the afternoon of October 31, 1893. About half past 2 in the morning of the next day it was found that the cargo in the starboard between-decks was on fire. This fire spread rapidly forward in the between-decks, and to the lower hold, notwithstanding the most energetic efforts to arrest it were made by those in charge of the steamship, and was not extinguished until the morning of November 5th. In the meantime, owing to the large quantity of water which had been pumped into her, the steamship settled on the canal bank, listing over to starboard until more than half of her main deck was under water. She remained in this position until the water was pumped out of her, November 5th, and her cargo was shifted and partly discharged, when she was enabled to proceed in tow towards Port Said. No water entered any of the holds through the hatchways except hold No. 2. But the water pumped into No. 2 hold passed through the coal bunkers and engine room through a two-inch drain pipe into hold No. 3, and into No. 1 hold through openings in the bulkhead, caused by fire. Water reached No. 4 hold through the captain's cabin. The bathroom and toilet pipes were submerged by the listing of the ship, so that water flowed through them to this cabin, and passed from there through a two-inch drain pipe leading into the bilge of hold No. 4. Large portions of the sugar in all the holds were melted, and totally lost. The portion of the cargo which was not destroyed was discharged at Port Said, this work being completed December 18, 1893. Duly-constituted surveys held on the vessel at Port Said held that she was unfit to make an Atlantic voyage without first effecting permanent repairs. The steamship remained in Port Said until January 21, 1894. At first it was supposed repairs could be made in Port Said, and some were made, beginning on November 28th. It was subsequently found that permanent repairs could not be completed, nor could a certificate of seaworthiness be obtained, without docking the ship, and that, as there was no dry dock at Port Said, she would have to proceed for repairs to some other port. A further survey recommended that

temporary repairs be made in Port Said, and that the vessel should proceed to Trieste to make permanent repairs. Temporary repairs were accordingly made at Port Said, and the steamship sailed thence for Trieste January 21st, arriving there January 27th. Work on the permanent repairs was promptly begun, and a large force was employed continuously making them, but the damage to the vessel proved to be so extensive that the repairs were not and could not be completed until April 26th. The steamer sailed from Trieste on that day, returned to Port Said, and took on board the cargo which had been stored, and then proceeded on her voyage towards New York, arriving there June 1, 1894, and thereupon delivered the remnants of the cargo to the claimants.

The claimants alleged that the fire and consequent damage to their sugar were caused by the neglect and default of the ship-owners, and that the latter were liable for the damages. They also alleged that the shipowners negligently delayed making the repairs necessary to enable the steamship to proceed after the fire, and carry the cargo to its destination, and should have caused the cargo to be transhipped and forwarded by another vessel; and that in consequence of their default, the market value of the cargo having declined, the claimants sustained large damages. Their claim for damages to the cargo was based upon the theory that the fire was caused by heat transmitted from the flue of the donkey boiler; that the steamship was not equipped with proper preventive means; and that the vessel was not provided with proper appliances for preventing the access of water to the cabin, which entered No. 4 hold from the cabin, and occasioned the injury to their cargo stored in that hold. The claimants also alleged that the steamship and freight moneys were liable to contribute in general average for the value of the sugar damaged and destroyed by the water poured into the steamship in order to extinguish the fire. The court below decided that the steamship was in all respects seaworthy; that the construction of the donkey-boiler and flue complied with all the known demands of skill and safety; that the repairs to the vessel were proceeded with as speedily as possible, that the claimants had acquiesced in having the cargo forwarded to its destination by the steamship rather than by another vessel; and decided as conclusion of law that the petitioners were not liable for any damages to the claimants. The decree appealed from proceeded upon these conclusions.

In disposing of the claim for general average, the court found as a fact that the fire was communicated to the cargo by the heat disseminating from the donkey boiler flue in consequence of the carelessness of the employes of the steamship in causing the flue to become overheated; and decided as a conclusion of law that in arriving at the general average contribution the adjustment should be made as if there had been no negligence on the part of the ship-owners. This conclusion proceeded upon the ground that the ship-owners were exonerated from liability by the statutes relieving them from liability for losses caused by fire occurring by the default of

their servants without their own neglect; and that, notwithstanding the shipowners could not compel the cargo owners to respond in general average for losses which would not have arisen except for the default of their own servants, when the cargo owner invokes a recovery for general average in such a case the shipowner is also entitled to contribution as though innocent of fault; otherwise the cargo owner would recover by selecting his form of proceeding for losses for which the shipowner was not responsible. We think that the court below made a correct disposition of the case, and concur in the main with the conclusions of fact, and fully with the conclusions of law, set forth in the very thorough and satisfactory opinion of Judge Thomas in deciding the cause; and we should deem it unnecessary to add anything to his opinion if we did not differ with him in respect to one question of fact. A careful study of the proofs leads us to conclude that it was not established that the fire originated from the donkey boiler, or was caused by negligence of those in charge of the boiler. Although this conclusion does not affect the correctness of the decree appealed from, it is proper that our reasons for it should be stated. The theory of the learned judge was that by the carelessness of those in charge of the donkey boiler the flue became overheated, or red-hot, and generated sufficient heat to set fire to the cargo stowed in the between-decks. This theory was largely based upon the circumstance that the fire could not be attributed, except conjecturally, to any other cause. It is true that the fire was first discovered in the cargo in the between-decks in the vicinity of the donkey boiler; and it is also true that, unless the fire was communicated to it by the overheated flue, no definite producing cause can be found, and it can only be conjectured that it may have been caused by a spark entering through the ventilator, and igniting the baskets in which the sugar was packed, or by the friction of the baskets, or by a match dropped among the baskets by the stevedores in loading and ignited by attrition, or by some other unknown agency. We are not satisfied that the flue was suffered to become red-hot during the night of the fire, or that, if it had been overheated to any degree for any considerable period before the fire, the heat would have sufficed to ignite the cargo; and the burden of proof was upon the claimants to establish both of these propositions. The donkey boiler occupied a room below the between-decks. It stood in a recess in the stoke hole formed by the stoke-hole bulkhead. The roof of the recess was the iron main deck forming the floor of part of the between-decks. The boiler was 14½ feet high. The crown of the boiler was about 3½ feet below the iron roof. The flue arose from the dome, was of wrought iron, was about 18 inches in diameter, and led diagonally across the ship to the funnel of the main boilers, and at the point nearest the roof was 19 inches distant therefrom. The furnace was at the bottom of the boiler, and from the top of the fire to the top of the boiler the distance was 10 or 12 feet. The entire shell of the boiler, including the dome, was constructed to contain water, and there were four transverse tubes for water, each 12 inches in diameter, leading across

the interior from side to side. The expert witnesses testified—and their testimony commends itself to our judgment—that it would be almost impossible for the heat to rise in the boiler as constructed in sufficient volume to make the flue red, at least to any appreciable extent; and also that a fire intense enough to make the flue red would cause the steam to explode the boiler, if the safety valve did not lift, and thus give warning to those in the stoke hole and engine room. It was contrary to instructions to permit the flue to get red-hot, because of the tendency to deteriorate the iron. The ordinary use of the donkey boiler did not require it to be forced so as to overheat the flue; and the preponderance of the testimony of those who saw the flue shortly before and after the time of the fire indicates that it was not, and had not been, red-hot. The only testimony to show that the flue was red on the night in question is found in the deposition of Love, a fireman, who was temporarily acting as third engineer. Before he testified for the claimants he was expected to testify for the shipowners, but, upon being discharged from the steamship for misconduct, he promptly put himself into communication with the claimants. He testified that after the fire was reported he went into the stoke hole to see what he could see, looked at the flue, and it was red “top, bottom, and all around” for three or four feet from the top of the boiler. His testimony upon collateral facts tending to the prejudice of the shipowners was proved to be untrue. We regard him as a discredited witness, whose testimony was of no value. The builders, surveyors, and all other expert witnesses were unanimously of the opinion that it was physically impossible for sufficient heat to be communicated from the boiler flue through the intervening spaces, baffle plates, and iron deck so as to set fire to the cargo. The cargo was stored in baskets, and these baskets rested on planks, and, before the baskets could have been set on fire, the heat in the iron deck must have been sufficiently intense to ignite them. The flue was in sound condition. Two curved, wrought-iron baffle plates or awnings, one-eighth of an inch thick, were attached to the flue, and extended over the whole of that part of it which was under the deck. The first one of the awnings was about 3 inches above the flue, and was attached directly to the flue by studs; and the second was about 3 inches above the first, and was attached to the first awning by studs. Still another baffle plate, $2\frac{1}{2}$ feet wide, was attached to the iron beams upon which the deck rested, and extended over the whole of that part of the flue which was under the deck. There was an air space of $10\frac{1}{2}$ inches between this baffle plate and the deck, and a space of 3 inches between it and the upper one of the two awnings which were attached to the flue. According to persuasive testimony, the air space of 19 inches between the flue and the iron floor would have protected the deck from becoming dangerously heated had there been no baffle plates. The utility of any of the baffle plates except the one attached to the deck beams was doubted by some of the witnesses, who were of the opinion that the freer circulation of air without them would have compensated for their absence. But all the wit-

nesses agree that the baffle plate attached to the beams would protect the deck from getting overheated under any circumstances, and that to whatever degree it could become heated from the flue the ample air space between it and the deck would adequately protect the deck. The witnesses were men of experience and great intelligence, and there is no reason to doubt the candor of their statements. If it should be assumed that the flue was red-hot, and should then be conjectured that the nearest baffle plate, and next the second baffle plate, became intensely hot, and that next the independent third baffle plate became intensely hot, there still remained to be bridged the air space of nearly a foot before the deck could become dangerously hot. The testimony is so cogent that it would be impossible to transmit enough heat from the flue to the deck to dangerously heat the deck that we cannot reject it. It is so inconceivable that the heat from the flue, even if the flue were red-hot, could have been communicated through the series of baffle plates and air spaces to the deck, and through the deck with intensity enough to ignite the planks, that the conjecture that it did so is no more probable than the other conjectures as to the cause of the fire. The occult causes of fire are as numerous as they are mysterious. If the flue was red-hot on the night of the fire, it may or may not have been the producing cause. If, as we think, it was not, there is no satisfactory proof of the origin of the fire. The decree is affirmed, with interest and costs.

DURCHMAN v. DUNN et al.

(District Court, S. D. New York. March 23, 1900.)

1. SHIPPING—DEMURRAGE—CONSTRUCTION OF CHARTER.

A provision, in a charter for carrying a cargo of lumber, that the cargo should be furnished "as fast as vessel can receive and properly stow same in suitable hours and weather," has reference to the hours and weather suitable for loading and stowage, and does not exclude time lost by reason of the lumber becoming wet in distant yards, and unfit for loading before it is forwarded to the ship.

2. SAME—EFFECT OF RELEASE.

A receipt in full for all claims under a charter executed by a master at the port of discharge on payment to him of only the freight due does not release the charterers from a claim for demurrage which was also made at the time by the master, and rejected, where the master was compelled to give such receipt in order to collect the freight, and did so under protest.

In Admiralty, Libel for demurrage.

Cowen, Wing, Putnam & Burlingham, for libellant.

Wilson & Wallis, for respondents.

BROWN, District Judge. The charter party of the ship Columbus for carrying a cargo of spruce lumber from Batiscan, Quebec, to Buenos Ayres, under which the demurrage for delay in loading is claimed, provided as follows:

"Cargo to be furnished at port of loading as fast as vessel can receive and properly stow same in suitable hours and weather, * * * Sundays and holidays excepted."

The ship was to be loaded with lumber at Batiscan, which was the usual place of anchorage for that region at the mouth of the Batiscan river. The ordinary course of business was that the lumber for loading was brought down on lighters from the lumber yards and mills from 12 to 14 miles up the river and transferred from lighters to the ship. The ship had nothing to do with the lighterage, or with the lighters, except to receive the lumber as brought by them. Loading commenced on the 8th of August, and as I find from the evidence was completed on Wednesday the 7th of September. Demurrage is claimed for the whole of August 29th, 30th, and 31st, for a half day each on September 1st and 2d, and for the whole of September 5th, at the rate fixed by the charter party of \$137.76 per day. September 5th, however, was a holiday. I construe the charter as excepting that day from the obligation to load; and although it appears that work might perhaps have proceeded through stevedores at the ship, notwithstanding the exception in the charter party, I think the libellant cannot hold the respondents answerable for not working or supplying lumber on that day.

1. The defense as to the other days claimed is, that the lumber to be shipped was required to be dry, on account of the length of the voyage, and that through local storms up the river, the lumber which was previously sufficiently dried at the yards where it was piled up became so wet as to be unfit for loading. I must overrule this defense, as not within the exception of the charter. The charter required the loading to proceed "as fast as vessel can properly receive and stow same in suitable hours and weather." That plainly means suitable hours and weather for loading and for storage. That clause prevents counting hours or days when by reason of the weather at the place of loading the ship, the cargo could not be put on board or stowed without being injured. It certainly has no reference to the care and preservation of the lumber either at the distant yards, where it was piled, or on board of lighters by which the respondents were to bring it to the vessel at the place of loading. Under the clause quoted that was a risk lying wholly upon the respondents and not upon the ship. *Scrutton, Charter Parties*, § 42; *Grant v. Coverdale*, 9 App. Cas. 470; *Davis v. Wallace*, 3 Clif. 131, Fed. Cas. No. 3,657; *Burrill v. Crossman*, 16 C. C. A. 381, 69 Fed. 747, 751; *Sorensen v. Keyser*, 2 C. C. A. 650, 52 Fed. 163; *McLeod v. 1,600 Tons of Nitrate of Soda (D. C.)* 55 Fed. 528; *Id.*, 10 C. C. A. 115, 61 Fed. 849; *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623.

2. The respondents were in fact agents of John & Joseph Drysdale & Co. of Buenos Ayres, who were in fact the owners of the lumber. The charter was executed by the respondents in their own names, and the fact of their agency was not known until about the time the cargo was loaded, when the master became acquainted with that fact. The claim for demurrage was made before the ship sailed, but was resisted

by the respondents, and the ship sailed without payment of the demurrage. On delivery of the cargo at Buenos Ayres the demand for demurrage was renewed upon Drysdale & Co., who refused to recognize it, and the master being unable to collect his freight except by signing a release of all demands, finally executed a receipt in full of all claims under the charter, entering at the time a protest against the same, and receiving only the precise amount due for the freight. It is urged in defense that this transaction constituted an accord and satisfaction, and a release of Drysdale & Co., and consequently an estoppel against any further claim upon the respondents, who were but agents.

No doubt under the terms of the charter party as well as the bill of lading, which provided for the payment of freight and "all other conditions as per charter party," Drysdale & Co., both as principals and as consignees and owners were liable for the demurrage. See *Burrill v. Crossman* (D. C.) 65 Fed. 104; *Id.*, 16 C. C. A. 381, 69 Fed. 747, and cases there cited. But the receipt in full, executed by the master under the circumstances above stated, did not in fact release Drysdale & Co. from their liability for demurrage. The receipt in full, as respects the claim for demurrage, was wholly without consideration. The payment made was not an accord and satisfaction of any unliquidated demand; it was simply a payment of the undisputed amount of the freight due for transportation. The case seems to be entirely within the decision of *Association v. Wickham*, 141 U. S. 564, 568, 12 Sup. Ct. 84, 35 L. Ed. 860. See, also, *Ryan v. Ward*, 48 N. Y. 204; *Burrill v. Crossman*, 33 C. C. A. 663, 91 Fed. 543; *Garfield & P. Coal Co. v. Fitchburg R. Co.*, 166 Mass. 119, 44 N. E. 119. As Drysdale & Co., therefore, are not discharged, the libellant is not estopped from asserting his claim against the respondents under their express contract, and the remedy of the respondents over against Drysdale & Co., their principals, upon payment, will be unimpaired.

Decree for libellant for four days' demurrage, amounting to \$551.04, with interest from September 8, 1898, and costs.

ANDERSON et al. v. ELLIOTT, Constable, et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 336.

1. **FEDERAL AND STATE COURTS—ARREST OF MARSHAL FOR EXECUTING PROCESS—HABEAS CORPUS.**

A United States marshal cannot be subjected to arrest and imprisonment by the authorities of a state for acts done pursuant to the commands of a writ issued to him by a court of the United States, but is protected by his process, and, if so arrested, will be discharged by a federal court on habeas corpus.

2. **SAME—JUDGMENT OF FEDERAL COURT—COLLATERAL ATTACK IN STATE COURT.**

A defendant personally served with process in a suit in a federal court to recover land, who makes default, is bound by a judgment therein awarding possession of the land to the plaintiff, and he cannot attack its validity on the ground that the land is situated in another state, and beyond the jurisdiction of the court, where the boundary line between the two states is in dispute, by instituting proceedings in the courts of the state in which he claims to reside, and causing the arrest of the marshal therein for attempting to execute such judgment.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

Charles Seymour (T. E. H. McCroskey and Norman B. Morrell, on the brief), for appellants.

James H. Merrimon (J. G. Merrimon, on the brief), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

GOFF, Circuit Judge. On the 13th day of July, 1889, in the circuit court of the United States for the Northern division of the Eastern district of Tennessee, Vernon K. Stevenson and others instituted a suit against Tip Lovingood, Ki Woody, Columbus Hoss, Jasper Fain, and William M. Marr, citizens and residents of the county of Monroe, state of Tennessee, and William M. Nixon, a citizen and resident of Hamilton county, Tenn. The object of said suit was to recover the possession of certain tracts of land situated in Monroe county, Tenn. Process was duly issued from the clerk's office of said court on the 13th day of July, 1889, returnable to August rules next following. The marshal returned that he executed the summons on Lovingood, Woody, Hoss, Marr, and Nixon, and that Fain was not to be found in the Eastern district of Tennessee. On the 2d day of September, 1889, the defendants Nixon and Marr filed their disclaimer, denying that they were in possession of the lands mentioned in the plaintiffs' declaration, and renouncing all claim, title, and interest in the same. On January 26, 1892, an order was entered in said cause reciting the service of process on the defendants Lovin-good, Woody, and Hoss, their failure to appear and make defense, and directing that as to them the bill be taken for confessed, and the cause be set for hearing ex parte, and that an alias subpoena issue as to the defendant Fain. On the 27th of January, 1892, an-

other order was duly entered by the court in said cause, of which the following is a part, viz.:

"And it appearing to the satisfaction of the court that subpoena was duly issued against Jasper Fain, one of the defendants in the above-entitled cause, and that the marshal for said district has returned that said Fain is not to be found in this district, it is ordered that said Fain be directed to appear, plead, answer, or demur to the complainants' bill on or before the 1st day of March, 1892, and that copy of this order be served on the said Jasper Fain, if practicable, wherever found, or, if such personal service is not practicable, shall be published for four consecutive weeks in the Madisonville Gazette, a newspaper published at Madisonville, in Monroe county, in said district. And it is further ordered that, in case said Fain does not appear within the time so limited, the court, upon proof of the service or publication of said order, and of the performance of the directions contained therein, will entertain jurisdiction, and proceed to the hearing and adjudication of this suit, in the same manner as if said Fain had been served with process in this district."

On the 25th February, 1892, said court entered another order in said cause, extending the time for the service of process on the defendant Fain, or the making of said publication, until the July term, 1892, of said court. On the 26th of May, 1892, the marshal for the Western district of North Carolina made return that he on that day duly served said process and notice on the said Jasper Fain by reading and delivering a copy in person to him. On the 11th August, 1892, on motion of the plaintiffs, an order was entered in said cause reciting the due service of the summons on all of the defendants, their failure to appear, plead, or demur, and then adjudging that said plaintiffs recover of the defendants Lovingood, Woody, Hoss, Fain, Marr, and Nixon the premises described in the declaration, which were particularly located by metes and bounds. In said order of judgment the court also directed that a writ of possession issue to put the plaintiffs in possession and occupation of the said lands, which were described as situated in Ocoee district, and the records, official survey, and maps of that district of the state of Tennessee were referred to for a further description of said property.

On the 10th day of February, 1893, the writ of possession so authorized was issued and placed in the hands of the marshal of the Eastern district of Tennessee, who made the following return thereon:

"Executed in full, as commanded, as to Tip Lovingood, by removing him from the premises described, and putting the companies in possession through their agent, W. D. Hale, on May 24, 1893; also executed as to Ki Woody and Columbus Hoss, May 25, 1893, in the same manner. The deft. Jasper Fain was permitted to remain through said agent, Mr. Hale, under an agreement between them. The defts. William M. Nixon and William M. Marr were not to be found in possession or on any portion of said lands, and nothing was done to them."

On the 10th day of February, 1894, an alias writ of possession was awarded by said court, the object of which was to put said plaintiffs in full possession of the lands described. This alias writ was duly issued on the 21st day of April, 1899, and was in the hands of the marshal of the Eastern district of Tennessee for execution, when one D. W. Deweese, a justice of the peace of Cherokee county, in the state of North Carolina, issued his warrant for the arrest of Murphy L. Anderson, W. N. Barr, G. W. Metcalfe, and Joe Garrett (the deputy

marshal and the posse with him), who were endeavoring to place the plaintiffs in the possession of said land, as the writ authorized them to do. The charge against them was described in said warrant "as unlawful and malicious trespass," a proceeding founded on a statute of the state of North Carolina. The "unlawful and malicious trespass," so charged, consisted of the means taken by the deputy marshal and those summoned to assist him in executing said writ, and in placing the plaintiffs in said suit in the possession of the land as decreed to them by said court. The affidavit on which the warrant was issued was made by one A. A. Fain, who claimed to be a tenant in common with said Jasper Fain and others of the land in controversy, and who charged said deputy marshal and his assistants with committing a trespass on the land when they entered upon it for the purpose of removing said Jasper Fain and his personal property therefrom. The warrant was executed by J. N. Elliott, a constable of Cherokee county, N. C., who arrested Murphy L. Anderson, the deputy marshal, and W. N. Barr and G. W. Metcalfe, two of the parties summoned to assist him, and removed them to Murphy, in said county of Cherokee, where they were delivered to said justice and held in custody. While they were so held as prisoners, they were again arrested by the sheriff of said county, on a warrant issued by the same justice of the peace, in which they were charged with assaulting the said Jasper Fain with deadly weapons, and with imprisoning him without authority of the law; and also at the same time they were served by said sheriff with process in a civil suit instituted by said Fain, in which he claimed \$10,000 damages for false imprisonment. On May 2, 1899, while they were so in the custody of said officers, who claimed to be acting under the authority of the statutes of North Carolina, the said Murphy L. Anderson, W. N. Barr, and G. W. Metcalfe presented their petition to the circuit court of the United States for the Western district of North Carolina, praying that the writ of habeas corpus might issue, directed to said sheriff and constable, and, as they alleged their unlawful detention, they asked that they might be discharged from arrest. The writ issued on that day, and came on regularly to be heard, on consideration whereof the court below, on the 20th day of May, 1899, denied the prayer of the petitioners, and remanded them to the custody of said officers of the state of North Carolina. From that action of the court below, this appeal was asked for and obtained.

Section 753 of the Revised Statutes of the United States is as follows:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

It follows, therefore, that if the petitioners were so held by said officers because of an act done by them in pursuance of a valid decree of the circuit court of the United States for the Northern division of the Eastern district of Tennessee, then they should have been discharged. That the suit mentioned by the petitioners, styled "Stevenson et al. v. Lovingood et al." (a certified copy of the record was filed as an exhibit with the petition), was duly filed in the said circuit court of the United States in the state of Tennessee is without question. All of the defendants to said suit were duly served with process within the district where the suit was brought and in which they resided, except Jasper Fain. As to him service was made under the provisions of section 8 of the judiciary act of March 3, 1875 (chapter 137, 18 Stat. 470). The defendants were all regularly summoned to appear, and ample time was given them, as required by law and the practice thereunder, in which to plead, and take all proper steps to protect their interests, as the same were affected by said writ. The said defendant Fain, after he was served with the notice of the pendency of the suit, and of the order of the court that he appear and plead, failed to do so, and permitted judgment to be entered against him. After that, when the first writ of possession was in the hands of the marshal for execution, he entered into an agreement with an agent of the plaintiffs, under and by which he was permitted to remain for a certain time on the premises in controversy. Subsequently, after the second writ of possession had been issued by the special order of the court, he resisted its execution, and now claims that said court did not have jurisdiction over the land in controversy. It appears from the evidence that for some years past a controversy has existed, at the point where said land is located, as to the true boundary line between the states of North Carolina and Tennessee, and it seems that the authorities of both of those states have claimed and exercised authority and jurisdiction over the land in controversy. The plaintiffs in said suit claimed title to the land under grants issued by the state of Tennessee, and in their bill they alleged that it was located within the boundaries of that state, and that it was within the jurisdiction of the United States circuit court for the Northern division of the Eastern district of that state. That court found as a matter of fact that the land was within its jurisdiction, and decreed that the plaintiffs were entitled to the possession of the same. It is needless, so far as the questions now at issue are involved, for us to consider the character of said suit, whether it was instituted on the equity or the law side of the court, and whether or not the proceedings therein were regularly conducted, for the reason that, so far as the parties now before us are concerned, they are bound by the decree rendered therein. Clear it is that said court has jurisdiction of such suits,—a jurisdiction expressly granted by statute,—and equally clear is it that all the parties to the controversy were regularly before it. The defendants to the suit could have made the defense before that court which they desire now to make in this proceeding,—that is, that the land as a matter of fact is situated in North Carolina, and not in Tennessee,—but for reasons of their own they failed to do so, and they will not now be permitted to raise that ques-

tion. In the matter now before us we will not consider the testimony relating to the true line of boundary between the states of Tennessee and North Carolina; for it is sufficient for us in this proceeding to know that a court of competent jurisdiction, in disposing of the land mentioned, located it in the state of Tennessee, and directed that the possession of the same be delivered to the plaintiffs in the suit it was deciding. It does not appear that the petitioners, in the discharge of their duties relating to the execution of the writ of possession, did more than was proper, under the circumstances and the requirements of the law, they should have done. The defendant Fain, in resisting the execution of the writ, placed himself in the wrong, and thereby made it necessary to use force in ejecting him. To permit the marshal and his deputies to remain in the custody of the officials of Cherokee county, N. C., on the warrants mentioned, will be to punish them for the faithful discharge of their duties, and to invite the opposition of disappointed litigants to the enforcement of the judgments of the courts of the United States in that locality. While it is undoubtedly true that the writ of habeas corpus will not be issued, as a matter of course, concerning arrests made under the laws of the states, still the power exists in the circuit courts of the United States to issue said writ, if the facts of the particular case submitted render it proper so to do. *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738, 35 L. Ed. 505; *In re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *New York v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80. The circumstances of this case, as shown by the record, bring it clearly within the rule laid down by the supreme court in the cases cited, and not only justify, but require, the discharge of the petitioners. To do otherwise would be to establish a practice under which the jurisdiction of the federal courts and the personal freedom of their officers would be relegated entirely to the decision and custody of the courts of the states. Under such practice it would be possible to review all the judgments rendered by the courts of the United States by simply raising the question of jurisdiction in the courts of the different states. A rule by which such a result could be accomplished would not only render the courts of the United States useless, but would in a short time destroy the government by which they were established. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390.

The defendant Fain, who was properly before the circuit court of the United States for the Eastern district of Tennessee, as a defendant in said case instituted by Stevenson and others, and who was at his own request at one time left in possession of a part of the land in controversy, should have appealed to the proper appellate tribunal from the judgment of said court, if convinced that it was erroneous, and not have resisted its execution by force and by procuring the ar-

rest of the officers sent to execute it. The case was pending in a court of the United States having jurisdiction of the subject-matter of the suit, and it should not in any way, by any of the parties to it, have been transferred to another jurisdiction, by either a civil or criminal proceeding. On this point the supreme court of the United States has directed the mode of procedure in cases where there is any conflict between the courts of the United States and of any of the states. In *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597, Mr. Justice Field, in delivering the opinion of the court, said:

"And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or any other state of the Union, for an offense against the laws of the state in which he was imprisoned. It is in the consideration of this distinct and independent character of the government of the United States from that of the government of the several states that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments, each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action, of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The constitution, and the laws passed in pursuance of it, are declared by the constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, 'anything in the constitution or laws of any state to the contrary notwithstanding.' Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government must have supremacy, until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. 'The constitution,' as said by Chief Justice Taney, 'was not framed merely to guard the states against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the constitution was framed, that many of the rights of sovereignty which the states then possessed should be ceded to the general government, and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities.' And the judicial power conferred extends to all cases arising under the constitution, and thus embraces every legislative act of congress, whether passed in pursuance of it or in disregard of its provisions. The constitution is under the view of the tribunals of the United States when any act of congress is brought before them for consideration."

The contention of the respondents that the petitioners were trespassers, because they were enforcing a judgment beyond the limits of the jurisdiction of the court that rendered it, is without merit; for

it is plain that, even if there was error in the conclusion reached by the court, still it was, under the circumstances, binding on the parties to said suit until reversed by an appellate tribunal. No appeal was taken, and the judgment cannot be questioned by the parties of record in a proceeding growing out of the effort to enforce it.

The cases are many in which the courts of the United States have promptly discharged from the custody of the officers of the states the federal officials who have been arrested by them, when such officials were engaged in the discharge of their duties under the laws of the United States. A few of them are here referred to as showing the course proper to be followed in cases of the character of the one we now dispose of. *Ex parte Jenkins*, 2 Wall. Jr. 521, Fed. Cas. No. 7,259; *Ex parte Robinson*, 6 McLean, 355, Fed. Cas. No. 11,935; *Ex parte Robinson*, 1 Bond, 39, Fed. Cas. No. 11,934; *In re McDonald*, 9 Am. Law Reg. 661, Fed. Cas. No. 8,751; *U. S. v. Jailer of Fayette County*, 2 Abb. (U. S.) 265, Fed. Cas. No. 15,463; *Ramsey v. Jailer of Warren Co.*, 2 Flip. 451, Fed. Cas. No. 11,547; *In re Neill*, 8 Blatchf. 156, Fed. Cas. No. 10,089; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; *Ex parte Bridges*, 2 Woods, 428, Fed. Cas. No. 1,862.

We are of opinion that the petitioners were not only authorized, but that it was their duty, to eject the defendant Fain from the land described in the writ of possession as located in the state of Tennessee, and that in doing so they were fully protected by said writ. While at one time there was considerable conflict in the courts as to the extent of protection afforded to ministerial officers, acting under authority of the orders of courts invested by law with the right to pass upon particular cases and render judgment therein, it is now no longer an open question, and such officers, acting under such orders, are fully protected thereby; and this, even though error was committed by the court in entering the judgment. *Erskine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Stutsman County v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018. The decree appealed from will be reversed, and this cause will be remanded to the court below, with directions that judgment be entered discharging the petitioners from the custody of J. N. Elliott, constable, and A. J. Martin, sheriff, of Cherokee county, N. C. **Reversed.**

WEST v. EAST COAST CEDAR CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 354.

1. PARTITION—PARTIES—INTERVENTION.

A part owner of a tract of land who is not made a party to a suit for its partition, but who claims as a tenant in common with the parties, and from the same source of title, may properly be allowed to become a party by intervention, being in fact a necessary party to a decree for its partition.

2. SAME—JURISDICTION TO DETERMINE INTERESTS OF PARTIES.

Where the title of a complainant in a suit for partition is not denied, but only the quantum of his interest is disputed, the court has jurisdiction to

determine the interests of the respective parties, and there is no occasion for ordering an issue at law, or for suspending the cause in equity until an action at law has been had, for the purpose of trying title.

3. SAME—SCOPE OF SUIT—LITIGATION OF ADVERSE TITLES.

When a party is permitted to intervene in a suit for partition because he claims to hold an estate in common with the other parties to the suit, he cannot in that suit set up a title adverse to the common title, but to assert such title he must proceed in an independent action at law.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

Thomas B. Womack (Armistead Jones and Womack & Hayes, on the brief), for appellant.

E. F. Aydllett (F. H. Busbee, on the brief), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the Eastern district of North Carolina. The proceedings began in the circuit court by a bill filed by the East Coast Cedar Company against the Richmond Cedar Works, seeking partition of certain lands in North Carolina held by these two corporations as tenants in common by several conveyances to them, respectively, from the heirs of Bannister Jarvis and Levy Walker, who had held them as tenants in common. Pending these proceedings, William A. West, the appellant, prayed leave to intervene, claiming that he also had an undivided interest in the same lands. Thereupon he filed his petition intervening, and averring that he is the owner as tenant in common of an interest equal to 1,480 $\frac{3}{4}$ acres in the tracts of land described in the bill. The cause was thereupon referred to a special master. At the references it appeared that West held under a conveyance of the interest of Caroline Walker, one of the heirs of Levy Walker; but he also claimed one-third of the land under a title, dated after the bill in this case was filed, from the heirs of one Spruill, who was co-tenant with the Sykeses, from whom it is charged that Jarvis and Walker derived title. The referee held that it was not competent in this suit for the intervener to dispute the title of the complainant and defendant, as he claims under Caroline Walker, who derived title from a common source with them. He also held, examining into the title of Jarvis and Walker, that they had a perfect title by possession under color of title, and that the claim of the heirs of Spruill was barred. He then recommended a partition between the complainant and the defendant.

The report of the referee was affirmed, and his legal conclusions adopted, by the circuit court. The intervener excepted, and the cause is here on the assignments of error. These present the questions arising out of the conclusion of law of the referee.

The facts of the case necessary for a proper understanding of these questions are as follows: On 8th April, 1796, the state of North Carolina issued a patent to John McRae of 5,080 acres, lying within the boundaries of a patent issued the year before for over 100,000 acres

to John Gay Blount. In 1809 the sheriff, under execution for taxes, sold and conveyed all McRae's right, title, and interest in this tract to John Armistead, and the same year Armistead conveyed all his title and estate in this tract to Daniel Sawyer. Sawyer, by deed 11th February, 1811, conveyed one-half of this entire tract in fee to John Sykes, Thomas Sykes, and Joseph Spence, as tenants in common. This is the northern half of the McRae patent, and includes the lands in controversy in this case. In April, 1851, Bannister H. Jarvis and Levy Walker entered into possession of this northern half of the McRae patent under two deeds,—one dated 8th April of that year, executed by one Joshua T. McCoy; the other dated 11th April of the same year, executed by one John Sykes, Jr. The undivided half interest of Bannister Jarvis by several deeds passed to, and became vested in, W. W. Archibald, and then in the East Coast Cedar Company. Levy Walker died apparently intestate, leaving as his heirs at law his children, Caroline, Elizabeth A., Emaline, and Nathan L. Walker. The interest and estate of all these persons but Caroline became vested in one or other of the two corporations, the complainant and defendant in this suit. There had been previous litigation between these persons, to which litigation Caroline Walker was not a party. It is admitted that she has an undivided interest in this northern half of the McRae patent to the extent of two-sixteenths, and that this interest vests in the intervener, William A. West. West, however, contends that Jarvis and Walker did not have a complete title to this northern half of the McRae patent; that it was conveyed in undivided thirds to John Sykes, Sr., Thomas Sykes, and Joseph Spence; that, although Jarvis and Walker could show a complete chain of title from the two Sykeses, there is a fatal break in the chain of title from Spence. In 1812, Spence conveyed all his estate in this tract to Samuel Spruill. The next deed is Samuel Spruill, by H. G. Spruill, to Willoughby Foreman, and no authority is produced whereby H. G. Spruill executed the deed for Samuel Spruill. Nor is any deed produced from Willoughby Foreman. The only mention of it is in a deed from Joshua T. McCoy to Jarvis and Walker, which recites that the land conveyed in that deed is the same that was conveyed to McCoy by the heirs of Willoughby Foreman. It must be noted that in their testimony these corporations, the complainant and defendant, who claim under Jarvis and Walker, do not set up any paper title. They claim to be the owners of their interest by reason of actual, notorious, and adverse possession, using the lands as their own under color of title for more than seven years, and that this gives them a good title as against all adverse claimants. They admit that Caroline Walker and her assigns are not barred. In this contention they are supported by the referee, and his opinion was confirmed by the court. The intervener, on the other hand, insists that holding these conveyances they do assert title by deed, and that, the chain being imperfect, there is outstanding a title in the heirs of Samuel Spruill. He offered in evidence a conveyance of all these heirs to him of the undivided third part of this land held by their ancestor. In other words, his position is that Jarvis and Walker have a clear title to two thirds only of the land, and that the

remaining third rests in him. That Caroline Walker, therefore, instead of being entitled to two-sixteenths of the whole, is entitled only to two-sixteenths of two-thirds, and that in the decree of partition the court should either allow him this two-sixteenths of two-thirds, and the one-third of the whole tract sought to be partitioned, or suspend the proceedings in partition until he can establish his title at law.

The original proceedings for partition in this case were between the East Coast Cedar Company and the Richmond Cedar Works. William A. West filed his petition for leave to intervene. In so doing he recognizes the jurisdiction of the court in this as a partition case, and submits himself to its decree. He was and is a necessary party to this suit. He claims an undivided interest in the lands sought to be partitioned, recognizing that the parties complainant and defendant also have an undivided interest in the same lands. In other words, he claims to be a tenant in common with them. This assertion on his part is recognized, and only the extent of his interest claimed is denied. He certainly is a necessary party. In *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825, the question was discussed. Mr. Justice Miller puts co-tenants in common in a suit for partition in that class of persons whose relations to the suit are such that, if their interest and their absence were formally brought to the attention of the court, it will require them to be made parties, if within the jurisdiction, before deciding the case. The reasons given by the learned justice are very strong, and may assist in the further elucidation of this case. He says:

"If a decree is made which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit and have no opportunity to be heard. But, as the decree cannot bind them, for that very reason the court cannot afford the relief asked to the other parties. If, for instance, the decree should partition the lands, * * * the particular pieces of land allotted to the parties before the court would still be undivided as to those parties whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by any decree in this case, because they cannot be bound by a decree to which they are not parties."

In *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. Ed. 644, a tenant in common whose title in an undivided share of the land is clear, is entitled to a partition as a matter of right.

This being the case, the circuit court very properly allowed the petitioner to intervene for his interest and to become a party defendant to the suit. In his answer he sets up his claim, and seeks to support it by testimony. He claims an interest in the land equal to 1,480 $\frac{3}{4}$ acres, made up of the interest of Caroline Walker therein now held by him, and of an undivided third therein as alienee of the heirs of Samuel Spruill.

It is objected to this claim that the intervener is estopped from making it as he claims under Caroline Walker, and this assertion of a title in one-third of the tract as alienee of Spruill's heirs is in derogation of her title. But there is nothing in the record which shows how much of this land he claimed by or for Caroline Walker. The intervener holds her right, title, and interest therein, without designation of what that right, title, and interest is. And, if she did claim

an undivided interest in the whole fee in the entire tract, there can be no legal objection to his attempt to strengthen his own title by the purchase of an outstanding claim. *Freem. Co-Ten.* § 154 et seq. The most that the other parties can assert is the right to secure the benefit of this by offering to pay and by paying their proper proportion of the expense. *Id.* As they have done neither, it is not necessary to pass on this question. *Id.* § 156.

The intervener being properly a party, does his assertion of an interest greater than that which the complainant and defendant admit that he has render it necessary to suspend the case and await a trial of the title at law? It must be noted that the intervener does not deny that the complainant and defendant each has an interest in common in the land,—an undivided interest. His sole contention is as to the amount of such interest. Nor does he claim in any other character than as a co-tenant. He is co-tenant with them by virtue of his holding the share to which Caroline Walker was entitled. He alleges that he is co-tenant with them by virtue of his holding the undivided share of Samuel Spruill, who was co-tenant with their grantor, the Sykeses. So, the real question is not on a conflict of title, but on a quantum of interest. In every suit for partition between parties admitted to be tenants in common, the court, for the purposes of partition, must ascertain and determine the aliquot share of each part owner. This is absolutely necessary to the proper exercise of its jurisdiction, and is one of the reasons given for the requirement that every part owner must be before the court. "In all cases of partition," says Mr. Justice Story, "a court of equity does not act merely in a ministerial character and in obedience to the call of the parties who have a right to the partition, but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex æquo et bono* according to its own notions of general justice and equity between the parties. It will therefore, by its decree, adjust all the equitable rights of the parties interested in the estate, and courts of equity, in making these adjustments, will not confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate which have been derived from any of the original tenants in common." Quoted by Campbell, J., in *McCall v. Carpenter*, 18 How. at page 306, 15 L. Ed. 392; *Story, Eq. Jur.* § 6566.

The intervener asked the court below to hold its hand until the question of title could be tried at law. It is true that when the title of a complainant is disputed, and his right to maintain his bill for partition is denied, a court of equity will suspend its interference until the question of legal title has been determined at law. *Pom. Eq. Jur.* §§ 1388, 1392; *Vint v. King*, *Fed. Cas. No.* 16,950; *Brown v. Coal Co.*, 25 U. S. App. 112, 13 C. C. A. 66, 65 Fed. 636. The complainant in a bill for partition has no standing in court unless his title as co-tenant is admitted or has been established at law. But in this case there is no denial of the title of the complainant, nor of its right or of the right of the defendant to a partition. The tenancy in common is admitted, and these two parties and the intervener are without question the tenants in common. The position of the inter-

vener is this: By reason of his acquisition of the interest of Caroline Walker, he is co-tenant with them in all the land held by Jarvis and Walker. By reason of the acquisition by him of the interest of the heirs of Samuel Spruill, he is co-tenant with them in the tract, as they hold under Sykes, who, as he claims, was co-tenant with Samuel Spruill. So the question is not one of title affecting the right to ask a partition, without establishing which partition could not be allowed; but, granting that such a title exists in complainant as would entitle it to sustain a bill for partition, the issue is as to quantum of interest in each co-tenant,—how much must be allotted to the complainant and defendant and the intervener as their shares, respectively, in this land. So, in this case the circuit court sitting in equity could go into this inquiry by its own methods, and could determine the question. The court did not err in refusing to hold the case, and await a trial at law. *Agar v. Fairfax*, 17 Ves. 533; *Adam*, Eq. § 231. The circuit court referred the question to a special master, one of the most experienced and learned members of the bar of its district. He found against so much of the contention of the intervener as claimed that he was entitled to an undivided one-third of the land.

Jarvis and Walker claimed the fee in the whole of the northern half of the McRae patent. Their claim was of all the land embraced in deeds executed to them by John Sykes, Jr., in 1851, and Joshua T. McCoy on April 8, 1851. These deeds covered the entire northern half of the McRae tract. This McCoy deed cannot be connected with any preceding deeds. Jarvis and Walker entered into actual possession of these lands, under color of these deeds, showing the boundaries and extent of their claim. This was their color of title. They claimed it against the world. Their joint possession was until Walker's death, about 1868, and Jarvis remained in possession until his death, May 20, 1878. By the law of North Carolina, seven years' adverse possession under color of title makes a good title. *Battle's Reversal*, tit. "Limitation of Actions," c. 17, §§ 20, 23, 147. As against a tenant in common, the possession must be 21 years. *McCulloh v. Daniel*, 102 N. C. 530, 9 S. E. 413.

It is said that the deeds under which Jarvis and Walker entered do not show a perfect chain of title, and are defective or inoperative. This does not affect them when produced to show color of title. "The courts," says the supreme court in *Wright v. Mattison*, 18 How. 56, 15 L. Ed. 283, "have concurred, it is believed without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent colorable title. The inquiry with them has been whether there was an apparent or colorable title under which an entry or a claim has been made in good faith." In *Pillow v. Roberts*, 13 How. 477, 14 L. Ed. 231, the law is thus stated:

"Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have

a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseisor. One who enters upon a vacant possession, claiming for himself upon any pretense or color of title, is equally protected with the forcible disseisor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner, in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse, and it is difficult to apprehend why evidence offered, and competent to prove that fact, should be rejected till the fact is otherwise proven."

In *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431 (quoted in 1 Am. & Eng. Enc. Law [2d Ed.] p. 852), it is put thus:

"It makes no difference that the grantor had neither title nor possession, provided the deed is not void on its face, and the parties relying upon it believe in good faith that he has acquired an interest under it."

Manufacturing Co. v. Brooks, 106 N. C. 107, 11 S. E. 456.

It is insisted, however, that Jarvis and Walker hold under Samuel Spruill, and that they are bound by the deeds to claim through him. But the record shows that they claimed title under color, in conveyances of the entire tract from John Sykes, Jr., and Joshua McCoy, and that on possession under this they rely. They cannot connect themselves with Samuel Spruill, and have not done so. Indeed, the only standing in court on this issue on the part of the intervener is that the complainant and defendant have no title from Spruill. If they had such title, the heirs of Spruill could convey nothing. It is contended, however, that Sykes was a tenant in common with Spruill, and that as Jarvis and Walker hold under Sykes their possession must be for 20 years to bar the co-tenant of Sykes. But Jarvis and Walker use the Sykes deed simply to show the extent and character of their possession as color of title. They do not insist upon—they are not called upon to show—any validity in that deed or any right of Sykes to make it. They rely on their possession and claim title against the world. Beside this, they show also as color of title the deed of Joshua McCoy, which, under the testimony, has no validity in the chain of title. And with this deed and the Sykes deed, showing the extent and boundaries of their claim, they set up title by possession for more than seven years. Beside this, if it be held that the Jarvis and Walker title must depend upon the deed of John Sykes, Jr., from this point of view the intervener has no title. That deed was executed on April 22, 1851. It is recorded. It conveys the whole tract. McCoy's deed in the same year conveys the whole tract also. Jarvis and Walker went into actual possession, and held joint possession until Walker's death, and then Jarvis continued the possession until his death in May, 1878. These deeds of Sykes and McCoy constitute disseisin of Spruill, if he had any right. *Clapp v. Bromagham*, 9 Cow. 554. The possession of Jarvis and Walker, adverse and continuous thereunder, jointly until 1868, and of Jarvis until 1878, his possession inuring for the benefit of the heirs of Walker,

his co-tenant, gives them an absolute title. *Day v. Howard*, 73 N. C. 1; *Neely v. Neely*, 79 N. C. 478.

In our opinion, the circuit court committed no error in confirming the conclusion of the referee. We express no opinion upon the conclusion expressed by the referee, and confirmed by the court, that the intervener, claiming under *Caroline Walker*, was estopped from asserting the title of the heirs of *Spruill*, which he had afterwards purchased. The conclusion reached by the circuit court is affirmed.

On Rehearing.

(May 16, 1900.)

A petition for rehearing has been filed in this case, and has received careful consideration. Two points have been decided in this case: First. That in a bill for partition, in which the title of the complainant seeking partition is not denied, and only the quantum of his estate is disputed, there is no reason for ordering an issue at law, or for suspending the cause in equity until an action at law has been had, for the purpose of trying title. It being admitted that complainant has title, the jurisdiction of the court cannot be disputed. Second. When a party is permitted to intervene in a suit for partition, because he claims to hold an estate in common with the other parties to the suit, he cannot in that suit set up a title adverse to the common title. To do this he must proceed in an independent action at law. The *East Coast Cedar Company* filed its bill against the *Richmond Cedar Works*, seeking partition of certain lands in the state of North Carolina, in which the parties complainant and defendant were tenants in common. They claim these lands under mesne conveyances from the heirs of *Bannister Jarvis* and *Levy Walker*, who had held the tract of land sought to be partitioned as tenants in common. The purpose of the suit was the partition of the *Jarvis* and *Walker* title. After this suit was instituted, *William A. West*, the appellant, sought to intervene therein. He could do so only because of his claim to represent a portion of the *Walker* interest as alienee of *Caroline Walker*, one of the heirs of *Levy Walker*. Except for his claim as tenant in common with the other parties to the suit in the *Jarvis-Walker* lands, he could have had no standing in a suit in equity for partition of this title. Proceedings for partition are not appropriate for a contest in respect to title. *McCall v. Carpenter*, 18 How. 297, 15 L. Ed. 389. Had he claim in this land from an adverse source, his remedy was at law, in an action to try the title. His prayer to intervene was allowed. He did intervene and filed his answer, claiming a large part of the land. He based his claim upon the assertion that *Jarvis* and *Walker* were not sole owners of the tract sought to be partitioned, but that there was an outstanding adverse title in one *Spruill* to the one-third of this tract, which title, he averred, was now in him. The court below held, in effect, that the proceeding before it was the partition of the *Jarvis-Walker* title; that to this suit only those persons claiming as tenants in common under that title were necessary parties; that the intervener had been admitted only because he claimed through an heir of *Walker*; and

that in that suit he could not set up a title adverse to the Jarvis and Walker title. In this conclusion this court concurred, and the opinion filed limits its affirmation of the decree of the circuit court to this conclusion. With some of the conclusions of law of the special master, approved by the court, this court did not concur, and so expressed itself in its opinion. In one of these specially, to wit, that the intervenor was estopped from asserting the title of the heirs of Spruill, because he had had a conveyance of the interest of Caroline Walker, this court carefully refrained from expressing any conclusion. In the opinion filed by this court, the writer of the opinion discusses the validity of the claim of the heirs of Spruill, and expresses the conclusion that Jarvis and Walker had an absolute title. This, perhaps, was a discussion aside from the real points decided, and may be obiter dictum. But in the conclusion reached by the court, that in this proceeding for partition in equity an intervenor who is admitted as a party because he claims under a common title with the other parties cannot, after he comes in, set up an outstanding title adverse to that under which the other parties claim, we see no error. If the intervenor wishes to establish such a title, he must proceed in a separate action at law.

CINCINNATI, N. O. & T. P. RY. CO. et al. v. GRAY.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 793.

1. LIMITATIONS—COMMENCEMENT OF ACTION—AMENDMENTS.

Amendments to a petition against a railroad receiver to recover damages for the death of an employé do not constitute new suits for the purpose of limitations, where the substantive cause of action in both original and amended petitions was the negligence of the receiver.

2. MASTER AND SERVANT—FELLOW SERVANTS.

The general yard master and a yard foreman in the switch yards of a railroad company are fellow servants.

3. SAME—NEW APPLIANCES—FAILURE TO INSTRUCT SERVANT.

The receiver of a railroad substituted a new and different switch for one formerly used in a switch yard. The new switch was a reasonably safe appliance, and properly constructed, but it operated in a different manner from the former one, and, under very probable conditions, was dangerous to those using it, and not acquainted with its operation, but no regulations as to its use or other instructions were given the employés in the yard. Within two or three days after the switch was put in a car was derailed in attempting to pass over it, and a yard foreman who was riding thereon was killed, under circumstances clearly indicating that, if he had known the manner in which the switch was operated, the accident would not have occurred. *Held*, that the receiver was liable for having failed in his duty to give proper instructions.

Appeal from the Circuit Court of the United States for the District of Kentucky.

Samuel Thomas, as complainant, instituted a suit in equity in the court below, having for its chief purpose the foreclosure of a mortgage on the Cincinnati, New Orleans & Texas Pacific Railway. Pending the litigation, the appellant S. M. Felton was appointed the receiver of the court in the cause, and was charged with the duty of continuing the operations of the railroad. An

order was entered requiring all persons having claims against the receiver to file them with the master, Richard P. Ernst, Esq., instead of formally suing upon them; and he was directed to report thereon. In pursuance of this requirement the appellee, whose intestate husband was killed while in the service of the receiver, filed a petition before the master, setting up her claim to damages, and no objection was made to this form of proceeding. The petition was several times amended during the progress of the hearings, and again with leave of the court at the trial. The material facts of the case, as we find them from the record, are that the petitioner's intestate, Fletcher B. Gray, was a yard foreman in the service of the receiver, in the extensive yards of the railway company at Somerset, Ky., on Sunday, March 26, 1893; that two or three days before that date the receiver for the first time had placed in the track of the railroad in the yards at that point what is called an "automatic switch," in substitution for one of a different sort, but had made no rules to govern its use, nor had the receiver given any notice of its dangerous character under certain probable conditions, nor any other instructions upon the subject, and it is not shown that Gray knew anything which was not apparent of the nature of the new appliance further than that one Fred. Cook, the general yard master, had informed the employes that the switch worked automatically; that in fact, however, the switch was not intended by the receiver to be left to work itself automatically, but it was intended that it should always be set by hand; that it was in some sense a switch for emergencies, though our view of the precise character of the switch will be stated further along; that the said Cook was general yard master and in complete control of the yards; that upon the date named he got upon an engine, attached to the front of which were two caboose cars, and to the rear another caboose, which was many tons lighter than the engine; that the train thus made up was moved backward, the engine being reversed, thus throwing the single caboose in front of the train as it was moved rapidly south along the main track through the yards; that the engine, in the temporary absence of the regular engineer, was operated by Cook, who, however, was not an experienced engineer; that Gray was on the front caboose of the moving train; that the switch was open; that Gray's attention was called to this fact as the train approached it, but he said it was all right, a remark probably made because he relied upon what Cook, the general yard master, had told the employes, to the effect that the switch worked automatically; that the train, moving at the rate of 18 or 20 miles an hour, went upon the switch; that it was not thrown by the caboose in front, but that the latter mounted the rail, and went off the track upon the right side, while the force and weight of the engine following threw the switch as it went through it, thereby keeping the engine and the other caboose cars upon the track until the engine was thrown off to the left by the front caboose in consequence of its derailment; that there was at the time a box car standing on another and parallel track, and the caboose upon which Gray was riding when it was derailed came in collision with the box car, whereby he was mortally wounded, and soon afterwards died. It is also claimed that the plates upon which the switch was to move, in being opened and closed, were not oiled, but were impeded by the presence of loose cinders or slag, which prevented the prompt closing of the switch. It is shown that this character of switch had been in use upon other railroads for many years; that the one in use here was well constructed and of good quality, and that it had been carefully selected, and was up to the standard of such appliances. It also appears that the railroad track was in good condition at the time. Upon these facts the master reported that the receiver should pay the administratrix of Gray the sum of \$8,000 as damages, the circuit court approved this action of the master, judgment was entered accordingly, and, a petition for rehearing having been denied, the case comes here upon appeal from that judgment.

Edward Colston, for appellants.

C. M. Cist, for appellee.

Before LURTON and DAY, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge, after stating the facts as above, delivered the opinion of the court.

Error is assigned by appellant upon the action of the court below in permitting the filing of certain amended petitions, but, as these were matters entirely within the sound discretion of the trial court, the authorities are uniform to the effect that such action is not reviewable upon appeal. This rule applies quite as forcefully to the amended petition permitted to be filed at or near the final hearing of the case as to the others. Corrections and amendments of pleadings are liberally allowed in order to subserve the ends of justice, and to secure a thorough presentation of the claim or defense, so that its merits may be fully disclosed. There was therefore no reviewable error in the action of the circuit court in this respect.

After the judgment in the court below the appellant's counsel presented a petition for a rehearing, which was denied, and error is also assigned upon that action of the court. We need not do more than say that the cases all agree that the action of the trial court, upon petitions of this character and upon motions for new trials, is not assignable for error. They are matters of discretion entirely. It is unnecessary to cite authorities upon this point.

Nor do we think that the Kentucky statute of limitations bars the claim of the petitioner. The claim arose when the injury occurred, on March 26, 1893. The original petition was filed September 18, 1893, much less than the required one year after the injury. The second amended petition was filed on December 26, 1895, a former one not appearing in the record, and the third was, by express leave of the court, filed on April 25, 1899. The last amendment was possibly designed rather to make the pleadings conform to the proof than for any other purpose. It may be, and doubtless is, true that, when an amended petition sets up an entirely new and distinct cause of action, time, under the statute, will not cease to run until the date of filing it. *Cecil v. Sowards*, 10 Bush, 96; *Leatherman v. Times Co.*, 88 Ky. 292, 11 S. W. 12. But this rule by no means applies to a case such as we have before us, in which the original and real cause of action, namely, the negligence by which Gray was injured, was never departed from nor abandoned. The plaintiff only restated the circumstances of the injury as the investigation appeared to develop them; but these were the particulars, the details merely, of the substantive claim, stated in general terms, that the injury to Gray was due to the inculpatory negligence of the receiver.

The action itself, to recover damages for that negligence and its results, was the principal thing, whatever may have been the details incident thereto, and was commenced within one year, and was not barred by the statute of limitations by reason of the supplying, by amendment, of any omission, or by correcting any error in the original statement of the petitioner's claim that her intestate was injured by the receiver's negligence, whether the details of its happening were one way or another. For the injuries complained of the suit was, without any objection to its form, instituted before the master in the way already mentioned, and, although the means and manner of the

infliction of these injuries were variously stated, the appellee, as we have seen, always relied upon the original claim that her intestate was injured by the negligence of the receiver. It does not appear, therefore, that this assignment of error is well taken. The action was brought within the year allowed by the Kentucky statute. It has been prosecuted continuously from that time until now, and the generic cause of action has always been the same.

It was insisted in the circuit court, as it is here, that Cook was not a fellow servant of Gray, but a vice principal, and that his negligence in running the train through the switch when it was open, and his failure to accurately instruct the employes of the receiver as to the limitations upon its use, were not the negligent acts merely of a fellow servant in the same employment with the decedent, but were those of the master himself, in whose employ as vice principal it was claimed Cook in these respects stood. We cannot accept this view, but agree with the learned circuit judge in his opinion that Cook was the fellow servant of Gray, and that no liability arose out of what he did at the time of the accident nor previously in reference to the switch. This conclusion seems unavoidable upon the authority of many cases. Among them we need only cite *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 944; *Railroad Co. v. Baugh*, 149 U. S. 369, 13 Sup. Ct. 914, 37 L. Ed. 772; *Same v. Camp*, 31 U. S. App. 236, 13 C. C. A. 233, 65 Fed. 952.

In accepting a voluntary employment, a servant, as is well understood, assumes all the ordinary and obvious risks of such employment, including those arising from the negligence of his fellow servants; but, in the view we take of the facts of this case, our decision must rest upon another phase of it. As we have seen, the form of switch, which is called automatic, while long, successfully, and safely used by other roads, had been in use in the yards of this railroad, when Gray was injured, only two or three days, and it is not shown that he personally had any previous knowledge of the workings or operations of such a switch, particularly in so far as they differed from the old one, which it had replaced. No instructions had been given by the receiver explaining the uses of this new appliance; nor had any notice been given of the possible dangers of its use under certain altogether probable circumstances; nor had any regulations whatever been promulgated respecting its operations, although in some important respects they were very different from those of the old one. True, the switch cannot be regarded as dangerous per se, but certainly there were conditions upon which it might become most dangerous, and these were unknown to Gray. They existed, but he was not notified of it. Though possibly unfortunately called an "automatic switch," it was not intended to do its own work, but was intended always to be set by hand, though its automatic feature was expected to be a useful safeguard in any time of emergency due to a negligent or accidental omission to set it by hand. In this sense, and in this sense only, it was an emergency switch. It is not shown that Gray had notice of these facts. On the contrary, the little information he had about the operations of the switch tended rather to show him that it was a labor-saving device, which was designed to avoid the work of setting it by hand,

and leave it to be operated upon by the force of moving cars and engines as they came upon it, thus doing its own work.

It is true that the general purpose and operations of an ordinary railroad switch were perfectly understood by Gray, and that if there had been nothing more in this case than the act of a fellow servant in running a train through a switch, known and seen to be open, there would not be the slightest right to recover for the injury inflicted in that way. But here there was a new kind of switch, very recently put in. The methods of its operation, particularly wherein they differed from those of the former switch, had not been explained to Gray, and were not obvious. The name "automatic" possibly, and even probably, carried an idea which gave weight to the general yard master's statement to the employes that the new switch would work itself, though, in fact, the receiver never intended that it should be operated in that manner. No notice was given that put the employes generally, or Gray especially, in possession of the fact that the switch, while automatic in name, did not operate, and was not intended to operate, of itself, nor otherwise than in such manner as required it always to be set by hand; nor had there been made or published any general regulations upon the subject for the guidance of the servants who were to use the new switch. It is by no means certain that the name or description of the new switch as "automatic" was not so far misleading and dangerous as to give stress to the necessity for notice and instruction.

Upon the facts shown, we think it is not difficult to deduce from the authorities the rules which fix the duties of the master in cases like this, and determine the tests of his responsibilities to his servants. The considerations which demand that the master shall furnish for his employes reasonably safe appliances for doing the work imposed upon them necessarily reach to and include the requirement that when new, and, so far as they differ and as far as the particular work is concerned, unknown and untried, appliances are substituted for old ones, he shall give full and plain instructions to employes as to the parts of such appliances which are new in operation, in order that a servant may have a fair opportunity, before incurring danger, to understand the difference which might, if unknown, produce it. This obligation on the master is equally as strong when appliances are put in which differ only in some respects from old ones for which they are substituted as it is when there is the beginning of a work or when appliances are more radically or even entirely changed. And, indeed, this duty of the employer is emphasized when ignorance of the points of novelty, either of design or of operation, in the substituted appliance may, as here, involve the most serious consequences affecting the safety and lives of the servants. The obvious fact is that if instruction or notice of the exact situation, in respect to the new switch and its operations, had been given in this case, the accident would not have occurred, at least in the way it did. This illustrates the extreme importance of the duty of the master in regard to making known the difference between the workings of the new and the old machinery, especially where that difference is the one which, if unknown, might bring about dangerous conditions or consequences. The servant in such cases is entitled to

notice and information upon these points, and it is the duty of the master to give it. His failure to do so is negligence. In the case before us there was negligence in this respect, and we do not doubt that it was the proximate cause of the injury to Gray.

In speaking of the general rule that the master is exempt from liability to one servant for injuries caused by the negligence of a fellow servant in the same employment, and of certain exceptions thereto, the supreme court, in the case of *Hough v. Railroad Co.*, 100 U. S. 217, 25 L. Ed. 615, said:

"One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which is the carelessness of those, at least, in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk; for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master."

In the case of *Mather v. Rillston*, 156 U. S. 399, 15 Sup. Ct. 467, 39 L. Ed. 470, where the circumstances were such as to call for strong and emphatic language, the court said:

"Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances, readily attainable, known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced. Further than this, it is plain from what has already been stated that the plaintiff knew nothing of the special dangers attending his work, or that he was at all informed by the defendants on the subject. His testimony is positive on this point, and is not contradicted by any one. With that fact shown, there was no ground for any charge of contributory negligence on his part."

While the facts of that case were quite different from those in the case before us, the general principles announced as to the duty of the master may well find application here to the extent, at least, that such application is called for. It may be that the principles enforced there would create a rule of liability beyond that demanded in this case, and they might establish a test of duty for the master much more exacting than is required in the operations of a railroad where the dangers to experienced employes are much less than those shown under the facts in that case. Still those principles do, in their scope, embrace cases like the present, where the master so certainly failed in the discharge of his duty in the respect already indicated.

In the case of *Railroad Co. v. Herbert*, 116 U. S., at page 648, 6 Sup. Ct. 593, 29 L. Ed. 758, in speaking of the correlative duties and rights of master and servant in regard to machinery, appliances, etc., the supreme court in one sentence epitomizes a phase of the subject in this language: "His [the servant's] contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him." Doubtless the dangers alluded to were unnecessary or unknown dangers, but this statement from the court's opinion gives a clear idea of the master's duty in the case before us. The master should have taken adequate measures to make known the dangers which persons ignorant of the workings of the new switch might incur by its use.

Many other cases from the supreme court might be referred to illustrative of the general principles we are discussing, but we will only name that of *Railway Co. v. Archibald*, 170 U. S. 669, 18 Sup. Ct. 777, 42 L. Ed. 1188, and that of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, where, on page 382, 112 U. S., page 186, 5 Sup. Ct., and page 790, 28 L. Ed., the court, after alluding to the arguments by which the doctrine that the servant assumes the known and ordinary risks of his employment are supported, said:

"But, however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, while claiming such exemption, he must not himself be guilty of contributory negligence."

In 1 *Shear. & R. Neg.* (5th Ed.) § 202, the authors say:

"A master who employs servants in a dangerous and complicated business is personally bound to prescribe rules sufficient for its orderly and safe management, and to keep his servants informed of these rules, so far as may be needful for their guidance."

And they amplify the principles applicable to this case in section 203 in the following language:

"It is also the personal duty of the master, so far as he can, by the use of ordinary care, to avoid exposing his servants to extraordinary risks which they could not reasonably anticipate, although he is not bound to guaranty them against such risks, nor to guard against an accident which is not at all likely to happen. The master must therefore give warning to his servants of

all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business in the matter and ordinary course of affairs, though more than this is not required of him. It makes no difference what is the nature of the peculiar peril, or whether it is or is not beyond the master's control. And it is not enough for the master to use care and pains to give such notice. He must see that it is actually given. If, therefore, he fails to give such warning, in terms sufficiently clear to call the attention of his servants to a peril of which he is or ought to be aware, he is liable to them for any injury which they suffer thereby without contributory negligence. Such notice must be timely; that is, given in sufficient time to enable the servant to profit by it. It is therefore the duty of the master to give adequate and timely warnings of changes in the situation involving new dangers."

The last proposition announced in the paragraph just quoted is supported by several cases, such as *Railroad Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117; *Donahoe v. Railroad Co.*, 153 Mass. 356, 26 N. E. 868; *Stephenson v. Ravenscroft*, 25 Neb. 678, 41 N. W. 652; *Milling Co. v. Sharp*, 5 Colo. App. 321, 38 Pac. 850. Elliott, in his work on Railroads (volume 3, §§ 1268, 1272, 1273), lays down the recognized general propositions in regard to the duty of the master to furnish safe appliances and safe places for the servant to work in, but we do not deem it necessary to cite other authorities.

We conclude that while the railroad track in the yard at Somerset, and even the new switch itself, were in good physical condition, and while it is shown that the receiver used at least ordinary care to have them so, still that the existence of the latent dangers connected with the operation, by ignorant persons, of the new form of switch just put in, must have been known to the receiver, and that such information must have been acquired by him, when he was purchasing the switch and preparing to put it in use in the yard. At all events, that he must be charged with having such information we cannot doubt. If this is true, it follows that it was his duty to give notice of those dangers to Gray by explanation in some form, or by rules or regulations brought to his attention. There does not seem to have been anything of this kind done. If notice in any form of the exact facts had come to Gray before he went upon the train, his going would then have been at his own risk, and his not signaling the engineer to stop the train when he saw that the switch was open would then have been his own folly. Not to have endeavored to stop the train under such circumstances, and if he had known of the danger arising from the switch being open, would have been suicidal; but not to have made an effort to have the engineer stop, under the actual facts as disclosed by the evidence, shows the utter ignorance of Gray of the danger about which the master should have seen that he was accurately informed.

The general and correct propositions of law that an employer does not insure the safety of his employé; that if the latter knows of risks, and voluntarily subjects himself to them, the master is not liable for the injury thereby incurred; and that, generally, all that is required of the master is to provide reasonably safe appliances for the use of his employés in their work, and reasonably safe places for them to work in,—are in no wise questioned. The sole ground upon which we rest our judgment upon this case is that there was a latent and unapparent, but a very certain and material, danger to uninformed employés, ac-

customed to operating the other form of switch, in the use, without sufficient knowledge, of the new so-called "automatic switch," under the circumstances of this case, of which danger it was the duty of the receiver, who must have known of it, to give, in some way, clear and unmistakable information to his employes, including Gray. The failure of the receiver to do this by regulation, rule, notice, or otherwise was such negligence upon his part as renders him liable for the injuries to Gray, who was evidently subjected to a great risk and hazard, the existence of which he did not suspect, but which could have been obviated very easily by notice to him from the better-informed receiver. It results that the judgment of the circuit court must be affirmed.

On Petition for Rehearing.

(June 11, 1900.)

In an elaborate petition the court has been asked by the appellant to rehear this case, mainly upon the ground that the statute of limitations barred the remedy of the appellee. In support of this contention he relies chiefly upon the opinion of the supreme court in the case of *Railway Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983. This question had already received the careful consideration of the court, and there is nothing in the opinion referred to which makes it necessary for us to change our judgment. In that action against the railway company for damages, the plaintiff based his claim upon the general law of master and servant and his rights thereunder. During the progress of the suit an amended petition was filed, by which a cause of action was set up growing out of the same facts, but based upon the rights and liabilities created and existing under a statute of the state of Kansas. The statute which supported the claim made in the amended petition had created a cause of action entirely different from the one arising at common law, set up on the original petition. The court, upon that ground alone, held that there was a departure, and that the plea of the statute of limitations would therefore prevent the relief sought by the amended petition. To the case before us that ruling cannot apply, because, if for no other reason, there was no departure. The principle upon which this case must turn is very different. In *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829, the original petition claimed, as appears from the record, that the injury resulted "because of the defective condition of the cross-ties and of the roadbed, through the negligence of the receivers." In the amended petition it was averred that "Cox, in coupling the cars, as it was his duty to do, was injured on account of the drawhead and coupling pin not being suitable for the purposes for which they were to be used, he being ignorant thereof, and of the defective condition of the track." The statute of limitations being pleaded to the amendment, the court adjudged that it did not apply. The facts in the case before us do not seem to differ in any material respect from those in the *Case of Cox*, just referred to, so far as our decision must depend upon them. Here, as in the *Cox Case*, the original petition specified certain acts of negligence. The amended petition specified certain others

which contributed to or concurred in producing the one injury complained of, namely, the death of Gray.

The Kentucky practice is quite as instructive and controlling. In *Greer v. Railroad Co.*, 94 Ky. 169, 21 S. W. 649, the only negligence alleged in the original petition related to the act of driving or operating the train. An amended petition was tendered, setting up as additional acts of negligence that the guard rail and coupling pin were defective. The inferior court refused to permit the filing of this amendment, which action of the court, under the Kentucky practice, was reviewable. The court of appeals held that it was error to refuse permission to file the amendment, upon the ground that the proposed amendment was not a departure, inasmuch as the cause of action was not changed, and as the alleged acts of negligence may all have concurred to cause the injury.

In *Smith v. Railway Co.*, 5 C. C. A. 557, 56 Fed. 458, it was held by the circuit court of appeals of the Eighth circuit that:

"Where, in an action against a railroad company for causing the death of an employe, the original petition proceeds entirely on the ground of the company's negligence in employing an engineer of known incompetence, an amendment which alleges that the engineer was negligent, and that he and the deceased were not fellow servants, does not introduce a new cause of action, but is only an amplification of the original one, and is a proper amendment."

The circuit court of appeals for the Fifth circuit, in *Cross v. Evans*, 29 C. C. A. 523, 86 Fed. 6, distinctly held that the assignment of additional specifications of negligence in an amended petition does not create a new cause of action, so as to let in the plea of limitations. Under section 134 of the Kentucky Civil Code of Practice amendments are most liberally allowed to promote the ends of justice, and we adhere to the view, already expressed, that the amended petitions filed in the case were but amplifications of the one cause of action.

It is not necessary to notice specifically the other grounds upon which the rehearing is asked. The petition is dismissed.

ST. LOUIS TRUST CO. v. DES MOINES, N. & W. RY. CO. et al.

(Circuit Court, S. D. Iowa, C. D. May 18, 1900.)

RAILROADS—REORGANIZATION IN FRAUD OF CREDITORS.

The transfer of the property of a railroad company, through foreclosure proceedings, to a reorganized company, in accordance with an agreement between the principal stockholders and bondholders (who were for the most part the same persons and also the officers of the company), by which the new company was to issue its bonds to the old bondholders and its stock to the stockholders of the old company, cannot be made effective to relieve such property from the claims of general creditors of the old company, whose rights therein are superior to those of its stockholders, and such transfer will be set aside in equity, so far as necessary to protect the equitable rights of such creditors.

In Equity. Submitted on pleadings and proofs.

Baily, Ballereick & Preston, for complainant.

Cummins, Hewitt & Wright, for defendants.

SHIRAS, District Judge. From the record and evidence in this case it appears that in 1893 one Thomas J. Moss, then a resident of St. Louis, Mo., contracted to furnish to the Des Moines, Northern & Western Railway Company a certain number of railroad ties, and, the company having failed to pay the sum due for the ties furnished, a suit therefor was brought in this court in the name of the St. Louis Trust Company, as administrator of the estate of Thomas J. Moss, whose death occurred in August, 1893, and on the 8th day of June, 1896, a judgment in the sum of \$2,839.10 was rendered against the railway company. It further appears that the Des Moines, Northern & Western Railway Company was organized under the laws of Iowa, on the 14th day of December, 1891, by the consolidation of two pre-existing companies, known as the Des Moines & Northern and Des Moines & Northwestern Railway Companies, and upon the completion of its organization it executed to the Metropolitan Trust Company of New York a trust deed upon the consolidated lines of railway to secure the payment of \$2,770,000 of bonds issued by the grantor railway company. The deed thus executed contained a clause providing that, if default in the payment of the interest on the bonds should occur and continue for the period of six months, then a majority of the bondholders could demand a foreclosure of the mortgage or trust deed. Default in payment of the interest having occurred, a written request, under date of August 30, 1894, was made upon the trustee by a majority of the bondholders, asking that foreclosure proceedings be instituted, and for the purpose of controlling the proceedings an agreement in writing was entered into which, among other things, provided for the appointment of three of the bondholders who were to act as a purchasing committee; it being further provided that the committee should cause to be incorporated under the laws of the state of Iowa a railway corporation competent to own and operate the line of railway covered by the trust deed proposed to be foreclosed; that at the foreclosure sale the committee, on behalf of the bondholders, should bid upon the property, and, if the committee became the purchaser, then the title of the property so purchased should be vested in the newly-created corporation, it being further provided that the latter-named company should issue and deliver to the purchasing committee its coupon bonds in an amount sufficient to cover the total sum due to the bondholders secured by the trust deed about to be foreclosed, and also to cover all sums paid out by the committee in completing the foreclosure proceedings, and should also issue and deliver to the committee capital stock in an amount equal to 50 per cent. in excess of the bonds to be issued. It was further provided that, upon receiving the bonds and stock, the purchasing committee should sell sufficient of the bonds to cover the cash outlay incurred by the committee, the remainder of the bonds being distributed among the holders of the bonds secured by the mortgage about to be foreclosed, and the stock received by the committee should be distributed among and delivered to the stockholders of the Des Moines, Northern & Western Railway Company. Shortly after this agreement was entered into, and on the 22d day of October, 1894, a bill for the foreclosure of the trust deed was filed

in this court by the Metropolitan Trust Company, and an answer admitting the allegations of the bill was immediately filed on behalf of the railway company, and on the 7th day of November, 1894, being 16 days after the filing of the bill, a decree foreclosing the mortgage was entered, and on the 18th day of December, 1894, the mortgaged property was sold by the master in pursuance of the terms of the decree, and was bought in by the purchasing committee. It further appears that, at the time the proceedings for the foreclosure of the trust deed were instituted, the large majority of the bonds were owned by the president and other officers of the railway company, and who were at the same time the owners of nearly the whole of the capital stock, so that it is made to appear that the agreement providing for the reorganization of the railway, and in pursuance of which the decree of foreclosure was had, was an agreement entered into by parties who at the time were the principal officers of the debtor corporation, the principal owners of the mortgage bonds, and the principal owners of the capital stock of the corporation. Shortly after the confirmation of the master's sale of the mortgaged property, a corporation under the name of the Des Moines, Northern & Western Railway Company was organized under the laws of Iowa, and the purchasing committee conveyed to that company the property purchased at the master's sale, and the company executed and delivered to the committee bonds, in the sum of \$2,915,000, secured by a trust deed to the Metropolitan Trust Company upon the purchased property, and also issued and delivered to the purchasing committee \$4,372,500 of capital stock, which, in pursuance of the agreement heretofore recited, was by the committee distributed among the stockholders of the Des Moines, Northern & Western Railway Company. On the 2d of November, 1896, the bill in the present case was filed by the administrator of the estate of Thomas J. Moss, in which, after reciting at length the facts already stated, and averring that the judgment rendered against the railway company remains unpaid, and that execution thereon has been issued and returned unsatisfied, it is prayed that the transfer of the property of the Des Moines, Northern & Western Railway Company be declared of no effect as against the claim of complainant; that the judgment of June 8, 1896, be declared a lien on the property so transferred, subject only to the lien of the Metropolitan Trust Company as trustee under the deed of December 15, 1891; that a receiver of the property be appointed; and, if necessary, that a sale of the property be ordered. To this bill the Des Moines, Northern & Western Railway Company, the Des Moines, Northern & Western Railroad Company, the Metropolitan Trust Company, and the members of the purchasing committee are made parties defendant.

As already stated, the evidence shows that the proceedings for the foreclosure of the trust deed of December 15, 1891, were in the nature of an amicable suit, and were instituted and carried through under the provisions of the written agreement signed by the officers of the company and its principal bondholders and stockholders. If the foreclosure decree and the transfer based thereon are allowed to stand in full force, the result is that the property of the railway company

will be appropriated to the benefit of the bondholders and stockholders of that company, to the exclusion of the creditors of the company; and the question is whether, in equity, a transfer of this character can be maintained in favor of the stockholders as against creditors. The answer to this question is found in the opinion of the supreme court in *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 174 U. S. 674, 683, 19 Sup. Ct. 830, 43 L. Ed. 1134, wherein it is said:

"Assuming that foreclosure proceedings may be carried on, to some extent at least, in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholders and stockholders), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve an interest in the stockholders, without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose, and exclude inferior lienholders or general unsecured creditors and stockholders, he may do so; but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors,—first of secured, and then of unsecured, creditors,—and any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

In the case now before the court it is clearly proven that by agreement between the bondholders and stockholders, and with the assent of the officers of the corporation, a decree of foreclosure was entered, and a sale thereunder was had, which protected the interests of the stockholders in the debtor corporation, without giving recognition or protection to the creditors, whose rights and equities are superior to those of the stockholders, and therefore a case is made for invoking equitable relief for the protection of the rights of the creditors. *Railroad Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117. The prayer of the bill is that the judgment of complainant be declared a lien upon the property transferred to the Des Moines, Northern & Western Railroad Company, subject only to the lien of the trust deed of December 15, 1891. The evidence shows that the subsequent and now-existing trust deed to the Metropolitan Trust Company covers bonds to an amount representing the face value of the prior issue of bonds, the accrued interest thereon, and the sum of \$13,000; being the expenses of the foreclosure proceedings. It further appears that the last issue of bonds bears interest at 1 per cent. less rate than the bonds for which they were exchanged. It is therefore entirely probable that the amount of the lien held by the bondholders will be less under the second trust deed than it would be under the terms of the first, as the difference in interest will more than compensate for the sum added to cover the foreclosure expenses, and therefore the protection of the rights of the creditor as against the stockholders does not require an interference with the rights acquired by the bondholders through the foreclosure sale. The equities of the complainant will be sufficiently guarded by the entry of a decree declaring the judgment held by complainant to be an equitable lien upon the property formerly belonging to the Des Moines, Northern & Western

Railway Company and now held by the Des Moines, Northern & Western Railroad Company, subject to the lien created by the trust deed executed by the latter company; that if the judgment, interest, and costs are not paid to complainant by the 1st day of July, 1900, complainant may apply to the court for further relief looking to the enforcement of its rights in the premises; and that complainant recover judgment for the taxable costs of this proceeding against the defendant railroad company.

LYMAN v. KANSAS CITY & A. R. CO. et al.

(Circuit Court, W. D. Missouri. May 7, 1900.)

1. MORTGAGES—RELEASE—STATUTORY REQUIREMENTS.

The Missouri statute (Laws 1897, p. 3) which provides that the recorder of deeds shall require the releasor of a mortgage to present for cancellation the notes secured, or make affidavit of their loss, if applicable in any case to a mortgage securing railroad bonds, cannot be given a retrospective effect, so as to render invalid the release of such a mortgage previously executed, where such release was made in accordance with the express provisions of the mortgage itself.

2. RAILROADS—CONDITIONS OF MORTGAGE—ESTOPPEL OF BONDHOLDER BY ACQUIESCENCE.

The several creditors of a debtor, holding security on separate properties, among which was an unfinished line of railroad, united in a general scheme of reorganization, and organized a corporation to buy in the several properties at foreclosure sale, and hold the same in trust for the benefit of all. In accordance with further plans, the several creditors executed proxies or powers of attorney to the trustee, authorizing it to form a railroad company to take the properties, and to issue stock and first and second mortgage bonds, to be apportioned among the creditors in final settlement of their claims against the trust property. The plan as then outlined contemplated that, on default in payment of interest on the second mortgage bonds, control of the property of the railroad company should be given to the holders of such bonds, who should manage the same until it was in a condition to meet future payments; but the proxies expressly authorized and ratified any modification of the plan which the directors of the trustee corporation should deem advisable, and in the exercise of such authority the trustee modified the plan by providing in the second mortgage, which was by reference made a part of each bond, that on default in payment of interest the stock of the railroad company should be transferred unconditionally to the trustee named in the mortgage, for the pro rata benefit of the holders of the second mortgage bonds, and the mortgage should then be canceled. *Held*, that such modification was within the authority granted, but that, even if in excess of such authority, a single creditor, holding less than 2 per cent. of the indebtedness, who accepted the bonds allotted to him thereunder, and retained them without objection for more than four years, and until after a default had occurred, the stock had been transferred, and the mortgage canceled by the trustee, could not then maintain a suit in equity to reinstate the mortgage, and eliminate such provision therefrom, as having been inserted without authority.

3. STATEMENTS OF COUNSEL—EFFECT.

Statements made by counsel at the trial bind the client as effectually as if made in the formal pleading.

4. CONTRACT—CONSTRUCTION.

There is no safer rule for the construction of written instruments than that placed upon them by the parties thereto before any controversy arose between them.

5. RAILROAD MORTGAGE—BONDHOLDERS.

Each bondholder, as in a mortgaged railroad, sustains a contractual relation to every other bondholder, so that, in dealing with the common security, he cannot pursue a wholly selfish course, prejudicial to the interests of the community in interest.

This was a suit in equity by a holder of bonds of the defendant railroad company to set aside a release of the mortgage securing the same, made by the trustee in accordance with the terms of the mortgage.

C. H. Nearing, for complainant.

Kenneth McC. De Weese, Thomas R. Morrow, Robert W. Quarles, and Lathrop, Morrow, Fox & Moore, for defendants.

PHILIPS, District Judge. This controversy grows out of the acknowledgment of satisfaction of a second mortgage deed executed by the defendant railroad company to the defendant the Massachusetts Loan & Trust Company. Under the provisions of the mortgage, in case of default in the payment of interest or principal of the bonds secured, for a specified period, the trustee, upon request of a majority of the bondholders, instead of foreclosing and selling, could require the railroad company to procure, make, and cause to be made, a transfer and assignment of all outstanding shares of the capital stock of the railroad company (excepting 13 shares, to be held for qualifying the local directors) to the said trustee, in trust for the pro rata benefit of the said bondholders, so as thereby to convert the mortgage bonds into capital stock of the railroad company. Upon the issue of said stock the trustee was to accept the same in full satisfaction of the mortgage, and execute a proper deed of release of the mortgage. This provision of the mortgage was carried out by the trustee on default of payment of interest and principal of the bonds. The complainant, who received \$19,000 of the (say, in round numbers) \$1,700,000 of the bonds, instituted suit October 26, 1897, against the said railroad company, the said trustee, and O. M. Queal, recorder of deeds of Jackson county, Mo., where the mortgage was recorded, the purpose of which was merely to set aside said acknowledgment of satisfaction on the ground that the satisfaction was not made in conformity to the requirements of the statute of the state (Laws Mo. 1897, p. 3), which provides that the recorder of deeds shall require thereleasor of a mortgage to present to the recorder for cancellation the notes secured, or affidavit of their loss. The applicability of this statute to the deed of release in question having arisen in limine before this court, it held, as it now holds, that the validity of the release is not affected by said statute. In the first place, this statute was enacted in 1897,—several years subsequent to the execution of the mortgage deed and its admission to record. To subject this mortgage to the operation of this statute would obstruct the plan for satisfying the mortgage provided for in the antecedent contract. The mortgage provided that the trustee should do certain things when requested thereto by a majority of the bondholders, and the mode of satisfaction was prescribed thereby. Under the constitution of the state, the legislature is prohibited from enacting any law with a retrospective operation. Furthermore, as applied to railroad mortgage bonds, scattered, as they usually are, over

the commercial world, the practice prescribed by this statute would be quite impracticable. *Dickerman v. Trust Co.*, 20 Sup. Ct. 311, Adv. S. U. S. 311, 44 L. Ed. — The history of the abuses, wrongs, and complications this statute was intended to rectify furnishes persuasive proof that it was not the legislative mind to apply the act to the instance of a release made under the provisions of such antecedent mortgage as this. Complainant does not, in his brief, insist upon this objection. After said expression of opinion by the court, the complainant filed an amended bill, but not until after the defendants had made answer to the original bill, and without making replication. This amended bill was filed on the 7th day of July, 1898, in which, for the first time, he attacked the provision of the mortgage respecting the exchange of the bonds for capital stock of the road, and the manner of releasing the mortgage lien, on the ground of lack of authority to insert such provision in the mortgage. Without going into details, suffice it to say that prior to 1893 there existed in the vicinity of Kansas City, Mo., various properties, commonly known as the "Winner Properties," consisting of a short line railroad, an unfinished railroad bridge over the Missouri river, and large tracts of land, all of which were incumbered in sums aggregating several millions of dollars. The complainant was among the many creditors of one of these estates. These properties, after passing through receivership, foreclosures, and sales, by convention of the creditors passed to one Samuel Snow in trust. Plans for reorganization and the conservation of the rights and interests of the many creditors of these various properties were proposed, which eventuated in the creation of a corporation known as the Union Security Company, which was to become the depository of the legal title to said properties in working out the plan of reorganization. To this end, the active promoters of the enterprise from time to time presented to the interested creditors plans, in the form of proxies or powers of attorney, to be executed to said Union Security Company. This culminated in what is known as "Proxy C," the substantive effect of which was that the title to said properties should be placed in said Union Security Company. The railroad aforesaid was to be chartered as the Kansas City & Atlantic Railroad Company, to which new company the Union Security Company was to convey all the said properties, whereupon the railroad company was to issue its first and second mortgage bonds in favor of the said creditors, ratably, secured by mortgage on said railroad property, with said Massachusetts Company trustee. The second mortgage bonds aggregated something over \$1,700,000.

Stripped of infinite verbiage and involved statement, when reduced to its legal analysis the only additional issue presented by the amended bill is that the power of attorney, or proxy, given by the complainant to the Union Security Company, did not authorize the insertion of the provision in the second mortgage deed under which the trustee released the mortgage, and provided for the conversion of the bonds into shares of stock. There are some general statements, more of the nature of innuendoes than averments of facts, by which the pleader, as may be inferred from the trend of counsel's argument, insinuates fraud in the conveyance of the property to the Kansas City & Atlantic Rail-

road Company, and kindred matters. But these are little more than matters arguendo by counsel. General innuendoes in pleading are not sufficient to raise questions of fraud. The specific acts must be charged, constitutive of fraud. *U. S. v. Atherton*, 102 U. S. 372, 26 L. Ed. 213; *U. S. v. Norsch* (C. C.) 42 Fed. 417. No ambiguity in the proxies is alleged, to remove which the interposition of a court of equity is invoked. On the contrary, at the argument of this case counsel for complainant distinctly disclaimed any purpose of the bill to have either modified or set aside either proxy C or D. Such statement, made in open court, binds the party,—as much so as if specifically pleaded. *Oscanyon v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Butler v. National Home*, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. Ed. 346. If, therefore, the language of the proxies, when read by their four corners, is broad enough to authorize the terms inserted in the mortgage, it silences the complaint.

Proxy C was printed on the back of the plan of reorganization, and therefore the two instruments may be considered together. By the fifth paragraph of the plan, the trustee under the second mortgage is given large discretionary powers, among which is the power:

"While said interest shall remain unpaid on said mortgage bonds," he "may take possession of the properties, including said first mortgage bonds, not then sold or disposed of, to have, hold, and use the same, finishing the construction and equipment of said properties, and operating and conducting the business thereof, and caring for and making such alterations, additions, extensions, changes, or improvements thereof as may be necessary to the convenient and advantageous use of the same, with such incidental and further powers and rights in said trustee as may be usual in like cases, or which said Union Security Company may deem appropriate to and for the protection of each and every interest under this plan of reorganization; and, second, said mortgage deed may likewise provide for a transfer in trust of all the capital stock issued in pursuance of this plan, which shall give the second mortgage bondholders right and power to choose a board of directors, thereby conferring upon said second mortgage bondholders substantial possession and complete legal control of all the property, until the net earnings thereof are sufficient to pay the interest on all said second mortgage bonds, regularly and continually."

The seventh paragraph is as follows:

"Provided, if the Union Security Company should deem it necessary or advisable, in order to conform to the provisions of Missouri law, then the provisions herein contained for the issue of the capital stock and bonds of said new company may be modified in any manner, and so far as can be done without affecting the relative rights of the several security holders who by the provisions herein set forth are entitled to receive second mortgage bonds."

The power of attorney, printed on the front of this plan, contained the following comprehensive term respecting the authority of the agent, the Union Security Company:

"To take any and all measures necessary or proper, in its discretion, to carry out the plan of reorganization printed on the back hereof."

In its ultimate results, the difference between what would probably have worked out under plan C, as interpreted by complainant, and the provision in question inserted in the second mortgage, is rather theoretical than practical in importance. Under the former, while the interest on the mortgage bonds remained unpaid the trustee might take possession of the property and any undisposed of first mortgage

bonds, and hold and use the same for finishing, operating, and improving the property, or said mortgage deed might provide for such transfer of all the capital stock of said properties issued under this plan, so as to enable the second mortgage bondholders to choose a board of directors, with the ulterior object in view of giving them substantial possession and control of the property "until the net earnings thereof are sufficient to pay the interest on all said second mortgage bonds, regularly and continually"; whereas, under the mortgage as drawn, after default for a given period the trustee, instead of closing in and taking possession, was authorized to call in the bonds, and exchange them ratably for stock in the railroad, which represented all the property. Upon this being consummated, the stockholders, by operation of law, would be entitled to the possession and absolute control of the property, to manage it in their own way, giving them right to the entire proceeds, but, just as they would have held under plan C, subject to all priorities of the first mortgage bondholders. The obtaining of any interest on the bonds by reason of the possession and control of the road would depend entirely upon the same contingencies, either under plan C, or the provisions of the mortgage; that is, as to whether or not there would be any residue applicable after taking care of the interest under the first mortgage bonds, and the running expenses. So that the holding of the stock of the company, and operating the property by the stockholders under the mortgage, or taking possession and operating under plan C, would about reach the same result in the end.

Whatever, however, may be said technically respecting the limitations of the discretion lodged in the agent by proxy C, it must be conceded that his discretionary authority was effectively extended by proxy D, executed by the complainant and the other bondholders on the 17th of May, 1893, subsequent to proxy C, and before the issue of the mortgage bonds. After reciting the fact of the acceptance of said plan C, and the expectation that the new railroad company, which was being promoted by the Union Security Company, would purchase said properties, and that arrangements were being made for the issue of certain bonds by said new railroad company, to be secured by mortgage on said acquired properties, etc., and after reciting that the Union Security Company had computed the amount of second mortgage bonds, "and my proportion thereof, face value, is \$19,000," this power of attorney proceeds:

"Now, therefore, I, A. B. Lyman, * * * do hereby accept said amount of said bonds from the Union Security Company as my full, just, and equitable part of the whole issue of said second mortgage bonds under any and all plans, proxies, or powers of attorney made or granted by me. And I also hereby consent, and accept and adopt, and do hereby fully authorize, any and all such modifications in the details of any and all said plans for organizing said Kansas City & Atlantic Railroad Company, and the fixing of the amounts, and the issuing and disposal of its capital stock and mortgage bonds, as the directors of the Union Security Company may deem advisable, giving and hereby granting unto the directors of the Union Security Company full discretion and authority in and about the premises; and I do hereby further agree to accept the above-named amount, namely, \$19,000 of said second mortgage bonds of said railroad, when they shall be ready for delivery, in full payment and satisfaction of all my rights and interests under any and all said plans

of reorganization; and, on such delivery or tender, I hereby release and discharge the said Union Security Company, etc., from any and all claims and demands, of any and every nature whatsoever, which I have or may have had, or may be entitled to, against the Union Security Company, except as to my interest as a stockholder in said Union Security Company, or as to my interest in the first mortgage bonds of the Kansas City & Atlantic Railroad Company, which I have agreed to receive in exchange for my said stock in the Union Security Company."

Under this *carte blanche* the complainant consented, not only to accept the mortgage bonds issued, but consented to and authorized "any and all such modifications in the details of any and all plans, and the fixing of the amounts, the issuing and disposal of its capital stock and mortgage bonds, as the directors of the Union Security Company might deem advisable"; giving to them "full discretion and authority in and about the premises." The bonds drawn and mortgage made were, as the proof shows, in accordance with the direction of the Union Security Company, the complainant's agent, and upon their face the bonds had written:

"This bond is one of a series of three thousand six hundred bonds of like tenor and amount, and of even date herewith, issued by said railroad company, amounting in the aggregate to one million eight hundred thousand dollars; each and all of said bonds and coupons being secured by and subject to all the terms, provisions, and conditions of a second mortgage deed of trust, which is hereby referred to and made a part of this bond, bearing date July 1st, 1893, given by said Kansas City & Atlantic Railroad Company to said Massachusetts Loan & Trust Company as trustee for the holder of said bonds, upon that part of the corporate properties, franchises, rights, and privileges of said railroad company which is thereby conveyed."

Complainant received his quota of said bonds on the 10th day of January, 1894. He is presumed, as matter of law, to have read the recitations of the bond, and was thus advised of the provisions of the mortgage. *Caylus v. Railroad Co.*, 10 Hun, 295, affirmed in 76 N. Y. 609; *Stanton v. Railroad Co.*, 2 Woods, 523, Fed. Cas. No. 13,297; *Morton v. Railway Co.*, 79 Ala. 590; *Jones, Corp. Bonds & Mortg.* § 196. No better or safer rule has been established for the construction of a contract than that placed upon it by the conduct and acts of the parties themselves before any controversy arose between them. *Lumber Co. v. Stump*, 30 C. C. A. 260-264, 86 Fed. 578, and cases cited. The Union Security Company and the railroad company, when they wrote into the mortgage the provision in question, most certainly understood that they were authorized to do so under the proxies from the beneficiaries. And when the complainant accepted his bonds, referring on their face to the mortgage, and retained them for over four years, without question of the authority under which they were drawn, he must be held to have acquiesced in and ratified the construction placed on his power of attorney by the other parties. So did all the other bondholders construe it by their acquiescence.

Aside from these considerations, it does seem to the court that upon principles of common right, equality, and good conscience, this complainant has no standing in a court of equity. He was not only advised of the purpose of the reorganization, but he knew that the Union Security Company was the constituted agent of all the bondholders in the old companies, through which the organization of the new railroad

company was to be accomplished; and he acquiesced for nearly five years in what his agent had done in the premises. It therefore comes without grace for him to point out the freckles, warts, and ugly features of the child of his adoption,—the Union Security Company. With full knowledge of the sole purpose of its creation he made it his agent to consummate the mortgage contract with the railroad, and accepted and pocketed, and yet holds, the bonds secured under the provisions of the mortgage. If the language of his commission to his agent was in any degree ambiguous, it should be most strongly construed against him, in favor of those who acted upon it, and especially so in favor of third parties, where rights have supervened. As already stated, he received these bonds, referring him directly to the provisions of the mortgage executed simultaneously, in January, 1894; and not until the amended bill was filed herein, four and a half years afterwards, did he ever challenge the authority of his agent to direct and assent to such mortgage. It is the accepted doctrine that, in respect of railroad bonded indebtedness, each bondholder, by implication, is brought into contractual relations with every other bondholder, analogous to that of stockholders. As such, his individual notions and interests are so wrapped up and identified with those of his fellows that they must be measurably subordinated to the judgment and interests of the composite body. The single bondholder, representing only 2 per cent. of the aggregate debt, like this complainant, may not, therefore, pursue such course in self-seeking as will be ruinous to the interests and rights of his fellow bondholders. "He is not a partner with them, nor strictly a tenant in common, but the relation with which he introduces himself by his purchase imposes upon him some duties. Having a common interest with others in the security of the mortgage, he is under the duty of so acting as not to destroy its value. He has a right to make use of the mortgage to enforce the payment of his bonds, but not to obtain an advantage over the other bondholders." Short, Ry. Bonds, §§ 20-27. Consequently, in the absence of fraud and unfairness, the minority may not defeat the wishes of the whole body of associates respecting the security common to all. *Shaw v. Railroad Co.*, 100 U. S. 605, 25 L. Ed. 757. How much more should this rule of equity apply to this case, where all the bonded creditors, jointly interested in the salvage from the wreckage of the Winner properties, united in a general scheme of reorganization, and constituted a common agent, under like power of attorney, in whose action 98 per cent. of the bondholders acquiesced, and when to undo what this great majority have assented to would amount to disorganization and inextricable confusion! Neither law nor the sense of fair play will permit this single bondholder to stand by for years, and observe the up and down vacillations of railroad property, before deciding whether or not he prefers to hold onto his bond to accepting the stock, while all the time conscious, as the law presumes him to have been, of the fact that the other stockholders and the railroad company were proceeding upon the assumption that the mortgage was wiped out, and the bonds converted into stock. The conversion, he well knew, to be effective, must be as to all the bonds. It must be a unit or a failure. Therefore this complainant owed it to every other bond-

holder, the moment his bond advised him on its face of the provisions of the mortgage securing it, to speak out, if he reprobated the act of his agent, or to forever keep his mouth shut. What would be the consequences of granting the prayer of this bill? It would vacate the deed of release of the mortgage, and, of consequence, restore the mortgage. This would be followed by the further relief prayed for,—of eliminating from the mortgage the provision for converting the bonds into stock, when 98 per cent. of the bonds have been so converted for six years. What then? Would the mortgage be foreclosed at the suit of Mr. Lyman, solely for his benefit? How does he propose to restore the status quo? He does not even deign, by his bill or suggestion aliunde, to disclose what his mind or plan is in this respect. The bill is framed in too selfish a spirit to admit of any sentiment of altruism,—to live and let live. What changes may have taken place in the status of this property since January, 1894, and what rights of third parties may have supervened, touching the corpus of the railroad, since the satisfaction of the mortgage, are something more than mere imagination or conjecture. A part of the road, it is suggested, has passed into other hands. The complainant does not even offer to return the bonds he has held, to delight his eyes, all these years, while repudiating in his bill the mortgage upon which the execution of the bonds was dependent. He seems to care naught about how confounded the confusion, how far-reaching the disaster of the disruption, to result from his late discontent, if, only, like his prototype in the Merchant of Venice, he can have his bond. The strictures of the learned judge in *Symmes v. Trust Co.* (C. C.) 60 Fed. 830–855,—a case quite similar in some of the principles involved,—are applicable to the double and questionable attitude of this complainant.

Much of the discussion on behalf of the complainant, while creditable to the research and industry of counsel, is quite academic, and outside of the real issues presented by the pleadings. This is especially so as to the discussion respecting the validity of contracts made between two corporations represented by practically the same officers. Dealings between corporations are not necessarily affected or vitiated by reason of the knowledge such officers may have acquired independently of their official relations to the corporate body. Nor does a sale of the property of one corporation to a new corporation, the majority of whose governing officers are common, vitiate the sale. *Goodwin v. Canal Co.*, 18 Ohio St. 169; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige, 126; *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38, 10 S. W. 865; *Miller v. Railroad*, 24 Barb. 312; *Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064. Most certainly, such transaction will not be set aside without proper pleading, nor without showing special resultant damages, by a stockholder. But it is a sufficient answer to do this and like innuendoes throughout the brief of complainant's counsel to say that Mr. Lyman took his bonds with full knowledge of Bates' and Amory's relation to the entire scheme of reorganization, and the general plan and method of consummating it.

There is one further matter worthy of consideration, in the way of granting the relief sought by this bill. It will be observed, on refer-

ence to proxy D given by complainant, that it is recited that the said Union Security Company "is promoting the organization of a corporation to be called the Kansas City & Atlantic Railroad Company, which new railroad company, it is expected, will purchase the properties, franchises, and privileges which said Union Security caused to be bid in and acquired at foreclosure sales for the purpose of said plan; and, whereas, arrangements are being made for the issue by said railroad company of certain bonds, to be secured by mortgages on said acquired properties, franchises," etc. So it appears that when said plans and proxies were being formulated and executed the defendant railroad company was but in embryo. It was not a party to the plan, or the proxy. When it came to the issue of bonds and the execution of the mortgage, it certainly was a factor to be consulted as to the form, substance, and provisions of both the bonds and the mortgage. The constituency of the new railroad were different from the creditors of any one of the Winner properties which passed through the Union Security Company to the new railroad company. The latter received the properties in which the different creditors were interested as distinct bondholders. Its board of directors was not the same as that of the Union Security Company. It made the mortgage by convention between it and the Union Security Company. The mortgage contract, in so far as the railroad company is concerned, is a unit. The railroad company, a distinct legal entity, has been guilty of neither fraud nor deceit in executing the mortgage. It made it in conformity with the wishes of the Union Security Company. It came to no other compact. How, then, can this mortgage be set aside, in respect of so material provision as that for the exchange of the stock of the company for the bonds, instead of a foreclosure and sale, without vacating the entire instrument? Once vacated, it is not within the power of the bondholders to compel the giving of any other character of mortgage by the railroad company. Indeed, under the express terms of the plan of reorganization, the bonds and the mortgage are interdependent contracts. Destroy the mortgage, and the bonds go the same way. "A corporation is not responsible for acts performed or contracts entered into before it came into existence, by promoters or other persons, assuming to bind the company in advance. Such contracts only bind the individuals who make them." *Stanton v. Railway Co.* (Sup.) 2 N. Y. Supp. 298-301; 1 Mor. Priv. Corp. par. 547, note; *Munson v. Railroad Co.*, 103 N. Y. 58, 8 N. E. 355. To give effective relief to the complainant's contention in argument, the court would have to rewrite the mortgage and the bonds. It would have to strike out of the mortgage the entire condition pertaining to default and the powers of the trustee, and write in its stead the conditions of proxy C as now interpreted by the complainant. The court would have to ignore proxy D, which committed to the agent, the Union Security Company, the discretion of modifying the plan. Necessarily, all the second mortgage bonds would have to be recast, because, as now executed, they refer to, and make part of themselves, the provisions of the mortgage securing them. How could the court undertake such radical and revolutionary work, affecting all the old bondholders, as well as the present holders of stock, for which 98 per cent. of the new bonds were

exchanged, without the presence of all these interested parties, and giving them their day in court? They are not, for such purpose, represented here by the trustee named in the mortgage. That trustee has fully executed the trust created by the mortgage instrument, and therefore has become *functus officio*,—at least, as to all the bondholders who surrendered their bonds in exchange for the stock of the railroad company. On the whole case, this bill should be dismissed. Decree accordingly.

NASH v. INGALLS.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 690.

1. LIMITATIONS—APPLICATION BY COURT OF EQUITY.

A court of equity, in a suit to charge the defendant, as trustee, with a sum which might have been recovered in an action at law, will apply the statute of limitations which would have governed the action at law.

2. SAME—CONTRACTS BY RECEIVER.

The statute of limitations applies to a contract made by a receiver, the same as though it had been made in his individual capacity.

3. SAME—PLEADING.

The defense of limitation, as well as of laches, may be taken by demurrer in equity, where the lapse of time requisite to bar the suit under the statute appears from the bill, and no circumstances are shown to excuse the delay.

4. SAME—SUIT AGAINST RECEIVER.

A bill against the receiver of a railroad alleged that defendant sublet to complainant certain premises held by the railroad company under a lease, and that it was agreed that the price of certain railroad materials furnished the receiver by complainant should be applied in payment of his rent, as well as the rent that should become due to the owner of the property, but that defendant failed to apply the same to the rent due to the owner of the property, by reason of which the lease to the company was forfeited and complainant evicted. It was sought to charge the receiver, as trustee for the complainant, with the amounts so received which the defendant had failed to apply in accordance with his duty. The suit was not commenced until 18 years after the default had occurred and complainant had been evicted, during which time, however, some payments had been made to complainant by the defendant on account of his claim, but none within the last 9 years, while the statute of the state limited the time for bringing such actions, whether for legal or equitable relief, to 6 years. *Held*, that the suit was governed by the state statute, and was barred by limitations as well as by the complainant's laches.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a suit originally brought in the superior court of Cincinnati, and thence removed, upon the petition of the defendant, into the circuit court of the United States for the Southern district of Ohio, in the Western division thereof. By the plaintiff's petition, filed under the Practice Code of the state, he sought to recover a sum of money alleged to be due to him from the defendant on account of certain transactions had between them and other persons connected with such transactions, during the years from 1866 to 1888. It is unnecessary here to detail the particulars of the matters then alleged, in view of the fact that, pursuant to leave granted by the United States circuit court, the pleadings were recast, and considerable variations were made in the statement of the case. Upon the removal the case was placed upon the

equity docket of the circuit court. The defendant demurred to the petition, and upon the hearing of the demurrer it was sustained; the court being of opinion that the case, as stated, was not of an equitable nature, but was cognizable only at law. Leave was granted to transfer the case to the law side of the court, or to amend by converting it into a bill in equity; stating any facts which the plaintiff might be able to show, bringing it within the equitable jurisdiction, as the plaintiff might elect. The plaintiff elected the latter course, by filing a bill in which he alleged that in 1867 the Indianapolis, Cincinnati & Lafayette Railroad Company was a corporation of Indiana, constituted by the consolidation of the Indianapolis & Cincinnati Railroad Company and the Lafayette & Indianapolis Railroad Company, and on the 1st day of June, 1869, issued \$2,000,000 of its bonds, bearing interest, and executed its mortgage of all its property to Hoadly and Smith, as trustees, to secure the payment of the bonds; that on the 1st day of October, 1868, one Butler leased to the Cincinnati & Indiana Railroad Company certain described land on the corner of Carr and Smith streets, in Cincinnati, for 99 years, for a rental of \$3,504, payable semiannually on the 1st days of April and October, respectively; that on December 23, 1871, the last-named company sublet the leased property to the plaintiff for the term of 20 years, at an annual rental of \$3,700, payable quarterly; that the plaintiff, for the purpose of manufacturing car wheels and castings, erected buildings thereon at a cost of \$25,000, being more than twice the value of the land; that at the time of the making of this sublease to the plaintiff the defendant, Ingalls, was receiver of the Indianapolis, Cincinnati & Lafayette Railroad Company; that he made the lease as the agent of the Cincinnati & Indiana Railroad Company, the lessee of Butler, the stock of which last-named company was owned by the former, and whose road was also operated in conjunction with the road of the former company; that, as an inducement of the plaintiff's taking the lease, Ingalls, receiver as aforesaid, promised to purchase of the plaintiff the car wheels and castings necessary for operating his road, and to apply the purchase money coming due therefor, "first, to the discharge of all rental obligations accruing upon said leases, and the remainder to be paid in money to said Nash, in case the purchases exceeded in amount the rental obligations upon said leaseholds, and, in case the purchases fell short of the leasehold obligations, the complainant was to pay the difference in money"; that from 1872 to April 1, 1876, there were mutual accounts between the plaintiff and Ingalls, as receiver, and that about the last-mentioned date the receiver, without the plaintiff's knowledge, defaulted in the payment of the rent due to Butler; that on the 1st day of August following, one John S. Kennedy instituted in the circuit court of the United States for the Southern district of Ohio a suit against the Indianapolis, Cincinnati & Lafayette Railroad Company, the Cincinnati & Indiana Railroad Company and Hoadly, trustee, to foreclose the mortgage above mentioned, and that in that suit Ingalls was appointed receiver of both said railroad companies; that he accepted the appointment; that that suit is still pending and undetermined; that during the years 1876 and 1877 the plaintiff sold and delivered to Ingalls, receiver, a large quantity of car wheels and castings, the moneys arising from which sales were to be applied in accordance with the contract above stated, and that there was more than enough to pay said leasehold indebtedness, but that Ingalls failed to pay to Butler the amount due to him on the lease to the Cincinnati & Indiana Railroad Company, and left it unpaid during those years; that in January, 1878, the representatives of Butler filed a petition in the foreclosure suit above mentioned, claiming that the rent due on the lease from him was in arrears, and for relief, and that such proceedings were had upon said petition that under the order of the court the leasehold interest and the buildings erected upon the land by the plaintiff were sold for about \$10,000, which were applied in part to pay the rent due to Butler, but that no part of the \$10,000 was ever paid to the plaintiff; that, by reason of the failure of Ingalls to pay the rent due to Butler out of the proceeds of the car wheels and castings, the plaintiff's leasehold and improvements were sacrificed at a grossly inadequate price, and that he claims to be subrogated to Butler's right to have the earnings of the railroad companies applied in payment of the rent due to him, as part of the running expenses of the road, and, further, that the sales by him to the receiver in

1876 and 1877 amounted to about \$5,000, and that the sum due, therefore, was a privileged debt, payable from current earnings, as part of operating expenses; that, by neglecting to pay over the proceeds of the sales of car wheels and castings in 1876 and 1877 to satisfy the rent to Butler, Ingalls committed a breach of trust, "and in equity became a trustee of the complainant for the amount of all moneys in his hands then belonging to the complainant"; that the said defendant has never accounted for the sales made in the years 1876 and 1877, but made a number of small payments, the last of which was in October, 1887, amounting in the aggregate to about \$2,200. The bill further alleges "that since October, 1887, and before the month of November, 1895, the complainant called repeatedly upon the said Ingalls, seeking a settlement of their accounts, and that the said defendant, by delays and evasions from time to time, excusing himself by press of business from going into a settlement, yet promising to do so, and to pay the remainder of said account which should be found due this complainant, delayed and deceived this complainant until the month of November, 1895, when the complainant demanded a settlement and the payment of the sum which should be found due him, and the said defendant then wholly refused to render an account to the complainant, or pay him the money claimed to be due, or any part thereof." The complainant prays for a discovery of the accounts as shown by the books of the defendant, "and that the receiver be adjudged a trustee of all the moneys arising from said sales of car wheels and castings, and the proceeds of the sale of said leasehold and improvements, and required to account for the same," and for general relief. To this bill the defendant, Ingalls, interposed a general demurrer, which, upon the hearing, was sustained (79 Fed. 510), upon the ground that the plaintiff had been guilty of inexcusable laches, whereupon the bill was dismissed. The plaintiff brings the case here upon appeal.

David Stuart Hounshell, for appellant.

Edward Colston, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and RICKS, District Judge.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

The gravamen of the amended bill consists of the charge that the defendant committed a breach of trust in neglecting to apply the proceeds of the sales of car wheels and castings made to him, as receiver, by the plaintiff, in 1876 and 1877, to the payment of the rent accruing on the leases mentioned in the preceding statement, and especially that he failed to pay from such proceeds the rent due to Butler on the lease of the latter to the railroad company, in consequence of which it is claimed the plaintiff lost the benefit of his own lease, and all the improvements he put upon the premises on the faith thereof. In the circuit court the bill was dismissed upon the ground of laches on the part of the plaintiff in seeking a remedy for the wrong complained of. It is not sought by the plaintiff, in his bill, to recover special damages from the receiver for the consequences of the loss of the benefits of his lease or the loss of his improvements; but the object is to obtain an accounting by the receiver for the money remaining in his hands by reason of the alleged breach of trust, and a decree requiring him to pay it to the plaintiff. The failure of the receiver to apply the funds in his hands to the payment of the rent due on the Butler lease occurred as early as 1877, or early in the following year, for the proceedings taken by the representatives of Butler on account of nonpayment of the rent were commenced on January 26, 1878; and it is as-

sented by the bill "that by reason of the said defendant's failure, neglect, and omission to pay over the proceeds of said sales made to him in the said years of 1876 and 1877 to the holders of the leasehold obligations, in discharge of their debt, the said M. E. Ingalls was guilty of a breach of trust, and in equity became a trustee of the complainant for the amount of all moneys in his hands then belonging to the complainant." In the nature of things, the complainant could not have been ignorant of the proceedings on the filing of the Butler petition; for they affected his own possession, and he was ousted by them. Indeed, the bill alleges nothing to show that he was not, at the time of its occurrence, aware that the breach he complains of was being committed. The law requires that, in order to relieve himself from the consequence of delay in seeking a remedy for a wrong, the party should have given reasonable attention to his own affairs, and he is chargeable with knowledge of such facts as such reasonable attention would have afforded him. *Foster v. Railroad Co.*, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899.

The statute of limitations in Ohio creates a bar to a suit for a cause of action like this after the lapse of 6 years. This suit was commenced June 12, 1896,—18 years, at least, after the original cause of action accrued. But certain partial payments were made from time to time, the last of which was in the month of October, 1887, since which time there has been neither payment, nor written acknowledgment nor promise to pay, signed by the defendant, such as is required by the Ohio statute to keep the liability from being barred. In that state the distinction between legal and equitable forms of action is abolished, and the statute of limitations applies as well to liabilities which were formerly enforced by suits in equity as to those which were the subjects of actions at law. But the plaintiff seeks to excuse himself from the operation of the statute as follows: He says that the trust set up by the bill was an express trust, and the suit was brought within the proper time after its repudiation. As an abstract proposition, the doctrine is correctly stated, where no other facts are stated which create a cause of action at an earlier date. But here a distinct violation of the trust is alleged to have occurred as early as the beginning of 1878, and this is the ground of the suit. The injury occurred at that time, and the cause of action immediately arose. The plaintiff had then the right to complain and seek redress. The object of the trust having been already defeated, it was open to him to sue for and recover the funds remaining in the hands of the trustee. If an accounting was necessary, that could have been demanded in his suit. His right to maintain such suit was no more perfect when he commenced the present suit than it had been for nearly 20 years before that time. No fact material to his right of action had occurred in the interval, and it would have been entirely competent for him to have maintained an action in the similitude of an action at law for money had and received at any time before it had become barred by the statute. There are several old cases in the early English chancery reports, in which it was declared in general terms that trusts were not within the statute. But later on the proper distinction was recognized and acted upon, and the distinction is this: That where the right was one purely of

equitable nature, and remediable only in the court of chancery, the statute does not apply; but, where the right is one upon which an action at law would lie, equity follows the law, and applies the statute to suits brought in that forum. In *Kane v. Bloodgood*, 7 Johns. Ch. 90, Chancellor Kent gave this subject prolonged consideration, and the authorities were fully examined. The deduction which he made from all of them was in accordance with the principles above stated. In *Badger v. Badger*, 2 Wall. 87, 94, 17 L. Ed. 836, Mr. Justice Grier, in delivering the opinion of the court, summarizes the doctrine thus:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases; and this rather in obedience to the statutes than by analogy."

And see 2 Story, Eq. Jur. § 1520; *Godden v. Kimmell*, 99 U. S. 201, 25 L. Ed. 431; *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807.

The reasons for the application of the statute to the contract of a receiver are the same as those which apply to the contract of any other party. In *Seagram v. Tuck*, 18 Ch. Div. 296,—a case much relied upon by counsel for appellant,—the suit was brought, not on a contract made by the receiver, but upon his liability to account to the court for a part of the assets which he had collected; and it was held that the cause of action did not arise until the passing of his final accounts, wherein he failed to charge himself with the item in question. It is settled that the defense afforded by the statute, as well as the defense arising from laches merely, may be taken by demurrer, where the facts stated in the bill show that the time within which suit should be brought has elapsed, and no circumstance is shown to indicate any valid excuse for not having brought it within that time. *Hovenden v. Lord Annesley*, 2 Schoales & L. 607; *Badger v. Badger*, 2 Wall. 87, 95, 17 L. Ed. 836; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. 437, 31 L. Ed. 396. The only reason assigned by the plaintiff for his delay is that the defendant, when called upon for a settlement, put him off from time to time, "excusing himself by press of business from going into settlement, yet promising to do so, and to pay the remainder of said account which should be found due this complainant," whereby the plaintiff was "delayed and deceived." This was insufficient to affect the running of the statute. In *Hume v. Beale's Ex'x*, 17 Wall. 336, 21 L. Ed. 602, the plaintiff in that case, by way of excuse for delaying his suit, averred "that she called on Beale repeatedly to settle, and that he promised to do so, and that these promises induced her not to sue him." But the supreme court held that this was too vague and general to avoid the bar of the statute of limitations. That was a much stronger case for relieving the plaintiff than the present; for the defendant was a lawyer, and the cestuis que trustent were women. But a short answer is that the statute which we are bound to apply does not prolong the time for bringing suit on account of a mere verbal promise, however positive, and the plain implication from the language of the bill is that what passed was in conversation on a personal interview. The result is that the decree dismissing the bill was right, and it is accordingly affirmed.

HILL et al. v. PHELPS et al.

(Circuit Court of Appeals, Eighth Circuit. April 9, 1900.)

No. 1,292.

1. EQUITY—BILL OF REVIEW—GROUNDS.

There are but three grounds upon which a bill of review can be sustained: First, error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence (and such error must consist of the violation of some statute or rule of law or equity, and not merely in matter of form or in the propriety of the decree); second, new matter which has arisen since the decree; and, third, newly-discovered evidence, which could not have been found and produced, by the use of reasonable diligence, before the decree was rendered.

2. SAME.

A court of equity is not required to go beyond what is necessary to secure to the complainant the relief to which he shows himself entitled in the suit, and a complainant cannot, by a bill of review, assail a decree which enforces payment of the only claim he presented to the court because it did not make further adjudications or grant further relief.

3. SAME.

Complainants filed a bill in equity, the purpose of which was to obtain payment of a judgment against one of the defendants, upon which execution had been returned nulla bona. They prayed that another defendant be decreed jointly liable for the debt, and also that a conveyance of property by the judgment debtor to others of the defendants be set aside as fraudulent. The court held the second defendant liable for the debt, and decreed its payment by him, and, on the ground that such relief was adequate, refused to go further and set aside the conveyance. *Held*, the decree having been satisfied, that the fact that complainants held another judgment against the same defendant, as against which they also claimed the conveyance to be fraudulent, but which, although in existence, was not set up in their bill, did not entitle them to maintain a bill of review to secure a modification of the decree on the ground that it constituted an adjudication which barred a second suit to set aside such conveyance; and this whether or not such ground was well taken.

4. DECREE—ESTOPPEL TO REVIEW—ACCEPTANCE OF BENEFITS.

A party who has accepted the benefits of a decree is thereby estopped from reviewing it, or from escaping from its burdens.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This is an appeal from an order which dismissed a bill of review upon demurrer. The bill was filed on April 20, 1898, and sought a modification of a decree of the court below rendered on December 22, 1897. The material facts it set forth were these: On July 3, 1894, J. M. Phelps and A. C. Phelps made their promissory note for \$5,927.70 on account of a debt which they owed to the appellants. Afterwards A. C. Phelps made his individual note for this indebtedness, and induced the appellants, by false representations, to accept that note in lieu of the joint note. On June 8, 1896, the appellants obtained a judgment against A. C. Phelps upon this note for \$6,881.25, and caused an execution to be issued thereon, which was returned nulla bona. Meanwhile A. C. Phelps, for the purpose of defrauding the appellants out of their debt, made to the appellee Adolph Sloan, as trustee, a deed of trust of his lands to secure an alleged indebtedness of \$10,279.38 to the appellee the Lawrence County Bank, and alleged debts of \$1,000 to each of the appellees F. G. Williams, Mary A. Lester, and J. M. Cook; and the bank, for the purpose of defrauding the appellants, of preventing them from collecting their debt, and of covering up the land, extended the time of payment of its claim of \$10,279.38 for five years. Thereupon the appellants brought suit in the court below to

reinstate the joint note of A. C. Phelps and J. M. Phelps in place of the separate note of A. C. Phelps, and to set aside the trust deed; and on December 22, 1897, a decree was rendered in that suit to the effect that the joint note should be substituted for the separate note, and that J. M. Phelps should pay it. The evidence in that suit indicated that the deed of trust to secure the Lawrence County Bank was made to hinder and delay the collection of the appellants' debt, but the court declared that as J. M. Phelps was amply solvent, and the decree against him would be sufficient to enable the appellants to recover the debt, it would not carry the adjudication further than was necessary to attain the ends of justice, and for this reason it denied any further relief. The appellants prayed an appeal from this decree, but the appellees paid off the decree, so that they could not prosecute their appeal to a hearing. At the time of the execution of the trust deed, A. C. Phelps owed another debt to the appellants, upon which they recovered judgment on December 26, 1896, for \$58,641.41. On June 18, 1897, \$40,708.60 was paid on this judgment, and the balance has not been paid. The appellants allege that they could not include this latter judgment in their suit without making their bill multifarious, and that the decree refusing to set aside the deed of trust in that suit is a conclusive adjudication against them, and bars a new suit for that purpose upon their second judgment; and for this reason they pray that the decree of December 22, 1897, be so modified as to adjudge the trust deed to Adolph Sloan to have been fraudulent in so far as it undertook to secure the payment of the debt to the Lawrence County Bank; that the land described in that deed be sold, and the proceeds thereof, so far as the interest of the bank is concerned, be applied to the payment of the second debt to the appellants, or, if this relief cannot be granted, that the decree be so modified as to dismiss the suit in which it was rendered, without prejudice to the rights of the appellants to proceed against the bank and Sloan.

G. B. Rose (U. M. Rose and W. E. Hemingway, on the brief), for appellants.

H. S. Ponder, J. W. Phillips, Charles Coffin, John W. Blackwood, and J. E. Williams, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and ROGERS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The purpose of a bill of review is to obtain a reversal or modification of a final decree. There are but three grounds upon which such a bill can be sustained. They are (1) error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence; (2) new matter which has arisen since the decree; and (3) newly-discovered evidence, which could not have been found and produced, by the use of reasonable diligence, before the decree was rendered. No departure has ever been made from the rules applicable to such a bill, which were declared by Lord Chancellor Bacon, in the first of his ordinances in chancery, in these words:

"No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review. And no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, upon new proof, that is come to life after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise."

Beames, Orders Ch. 1; Story, Eq. Pl. § 404; 2 Daniel, Pl. & Prac. p. *1575; Kennedy v. Bank, 49 U. S. 586, 609, 12 L. Ed. 1209.

The error in law which will maintain a bill of review must consist of the violation of some statutory enactment, or of some recognized or established principle or rule of law or equity, or of the settled practice of the court. Error in matter of form or in the propriety of a decree, which is not contrary to any statute, rule of law, or to the settled practice of the court, is not sufficient to maintain a suit to review a final decree. Freeman v. Clay, 2 U. S. App. 254, 267, 2 C. C. A. 587, 593, 52 Fed. 1, 7; Hoffman v. Pearson, 8 U. S. App. 19, 38, 1 C. C. A. 535, 541, 50 Fed. 484, 490. Resort cannot be had to the evidence to discover this error of law. It must be apparent from the pleadings, proceedings, and decree, without a reference to the evidence, or it will not avail to sustain a bill of review. Whiting v. Bank, 13 Pet. 5, 14, 10 L. Ed. 33; Kennedy v. Bank, 49 U. S. 586, 609, 12 L. Ed. 1209; Putnam v. Day, 22 Wall. 60, 66, 22 L. Ed. 764; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381. The new matter which will authorize a review of a final decree must have arisen after its rendition. The newly-discovered evidence which may form the basis of such a review must be, not only evidence which was not known, but also such as could not, with reasonable diligence, have been found before the decree was made. City of Omaha v. Redick, 27 U. S. App. 204, 211, 11 C. C. A. 1, 6, 63 Fed. 1, 6; Dias v. Merle, 4 Paige, 259, 261; Henry v. Insurance Co. (C. C.) 45 Fed. 299, 303; Story, Eq. Pl. §§ 338a, 423; 1 Barb. Ch. Prac. 363, 364; 1 Hoff. Ch. Prac. 398; Fost. Fed. Prac. § 188, note 19.

The sole purpose of the original suit in equity in this case was to enforce the collection of the claim of the appellants for the \$6,881.25 evidenced by their judgment of June 3, 1896. In order to accomplish this purpose, they asked that the court would reinstate the joint indebtedness of J. M. Phelps and A. C. Phelps in the place of the separate debt of A. C. Phelps, upon which that judgment was rendered, and that it would set aside the trust deed of the lands of Phelps to Sloan, which was made to secure the indebtedness of the Lawrence County Bank. The court granted all the relief necessary to effect the object of the suit. It substituted the joint debt for the separate debt, and adjudged that J. M. Phelps should pay it. He did so, and the entire purpose of that litigation had been served. The court refused to avoid the trust deed, because J. M. Phelps was solvent, and because the relief which it granted was ample, without more, to enforce the collection of the only claim which appeared in that suit. The bill of review seeks a modification of this decree on the sole ground that the failure of the court to grant this unnecessary relief may estop the appellants from avoiding this trust deed, and thereby enforcing the collection of their second claim, evidenced by their judgment of December 26, 1896, which was in existence during the entire pendency of their suit in equity upon their first claim, but which was neither pleaded, proved, nor presented to the court in any way in that suit. There may be some doubt whether or not the decree, as it stands, has the effect to estop the appellants from avoiding the trust deed, for fraud, in a suit brought upon their sec-

ond claim. While such a suit will be between the same parties and those in privity with the same parties named in the first suit, it will be upon a different cause of action, and the decree in the first suit will operate as an estoppel only upon the points and questions which were actually litigated and determined in it. Whether or not the fraudulent character of the trust deed, as against the second claim of the appellants, was actually raised, litigated, and determined in their suit in equity upon their first claim, may be the subject of pleading and proof. *Board v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270, 274; *Cromwell v. Sac Co.*, 94 U. S. 351, 352, 24 L. Ed. 195; *Nesbit v. District*, 144 U. S. 610, 618, 12 Sup. Ct. 746, 36 L. Ed. 562; *Board v. Platt*, 49 U. S. App. 216, 223, 25 C. C. A. 87, 91, 79 Fed. 567, 571.

Conceding, however, but not deciding, that the decree in the suit upon the first claim renders the question whether or not the trust deed should be avoided for fraud *res adjudicata* in a subsequent suit for that purpose on the second claim, no ground for review or modification of the decree is presented by the allegations of the bill before us. There was no error in law in that decree. It followed the pleadings, and determined all the issues which they presented. Whether or not it was warranted by the evidence, and whether or not the evidence authorized other or further relief, are questions that are not open for consideration here, because the error that will sustain a bill of review must be apparent upon the pleadings, the proceedings, and the decree, without reference to the evidence. There was no error in the failure of the court to grant more relief than the substitution of the joint debt for the separate debt, because it granted ample relief to accomplish the purpose of the suit, and because, in the absence of the evidence, which we cannot consider, it does not appear that the proofs would have sustained any other relief. One cannot successfully assail the decree of a court of chancery, which has procured him all the resulting benefit he sought, because the court did not make further adjudications and grant other relief, which were not necessary to the accomplishment of the purpose which he disclosed to the court. It is not error for a court of chancery, which grants sufficient relief to enable a complainant to reap all the fruits which he seeks by his litigation, to refuse to exercise all its powers and make other and unnecessary adjudications. The court granted relief which enforced the collection of the only claim which the complainants presented to it. They have received payment of that claim. They suffered nothing in that suit from the failure of the court to avoid the trust deed, because they could have obtained nothing more if it had done so. Courts of equity do not attempt to right wrongs at the suit of those who have suffered nothing from them, or to grant decrees that can give their suitors no relief. *Darragh v. Manufacturing Co.*, 49 U. S. App. 1, 16, 23 C. C. A. 609, 618, 78 Fed. 7, 16. No error appears in the pleadings, proceedings, or decree on account of the fact that the latter may have the effect to estop the appellants from collecting their second claim, by avoiding the trust deed for fraud, because that claim was not pleaded, proved, or presented in the suit upon which the decree is based, and its existence was unknown to the court when it rendered

its decree. As the question of the effect of its decree upon this second claim was not presented to, considered or decided by, the court below when it entered its decree, it could not have erred upon that question. The bill of review discloses no error in law in the decree which it assails. Nor does the bill disclose any new matter or any newly-discovered evidence which will warrant the relief it seeks. The sole ground for that relief is that the decree of December 22, 1897, estops the appellants from enforcing the collection of their judgment of December 26, 1896, by an avoidance of the trust deed for fraud. But the debt upon which that judgment is founded existed during the entire pendency of the suit in equity upon the first claim of the appellants, and all the facts which condition the effect of the decree in that suit upon their second claim were as well known to the appellants at the time that decree was rendered as they ever have been since. Mr. Justice Story, at section 423 of his Equity Pleadings, says:

"If, therefore, the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on those facts; for it was his own laches not to have brought them forward at an earlier stage of the cause."

The decree cannot be modified on account of new matter or newly-discovered evidence, because the matter set forth in the bill existed, and the evidence it pleads was known, before the decree was rendered.

There is another reason why the decree in this case cannot be reviewed. It is that the appellees have paid, and the appellants have accepted, the entire debt which the decree was rendered to enforce. One who accepts the benefits of a verdict, decree, or judgment is thereby estopped from reviewing it, or from escaping from its burdens. *Albright v. Oyster*, 19 U. S. App. 651, 9 C. C. A. 173, 60 Fed. 644; *Chase v. Driver*, 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Brigham City v. Toltec Ranch Co.* (C. C. A.) 101 Fed. 85. The decree below is affirmed.

LOGAN v. GOODWIN et al.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1900.)

No. 1,387.

1. APPEAL.—SUPERSEDEAS.

By virtue of section 11 of the act creating the circuit courts of appeals (Supp. Rev. St. p. 905), Rev. St. § 1007, is made applicable to appeals to and writs of error issued by such courts, and, unless an appeal is perfected, or a writ of error sued out, and served within 60 days, Sundays excluded, after the rendition of the decree or judgment complained of, it is not within the power of a judge of the circuit court of appeals to allow a supersedeas.

*** GARNISHMENT IN ATTACHMENT SUIT—EFFECT OF JUDGMENT FOR ONE DEFENDANT.**

The rendition of judgment in favor of one of several defendants in an attachment suit does not operate to terminate proceedings against a garnishee, who, by his answer, denied indebtedness to any except such defendant, where the plaintiff claims his indebtedness to other defendants.

against whom judgment was rendered, and has taken the proper steps to join issue upon the garnishee's answer.

3. APPEAL—REVIEW OF JUDGMENT DISCHARGING GARNISHEE—KANSAS STATUTE.

Gen. St. Kan. 1889, p. 1521, § 567, which provides that a writ of error to review an order discharging or modifying an attachment or a temporary injunction shall be filed within a time to be fixed by the court, not exceeding 30 days from the time such order was made, otherwise the order shall become operative, and be carried into effect, has reference only to interlocutory orders, and does not affect the time within which a writ of error may be filed to review a final judgment which has the effect of releasing a garnishee, which is governed by the general provisions for the review of judgments.

4. SAME—RULES GOVERNING IN FEDERAL COURTS—STATE STATUTES.

Section 11 of the act creating the circuit courts of appeals, which permits a writ of error to be sued out for the review of a judgment at law at any time within six months, and Rev. St. § 1007, authorizing the allowance of a supersedeas within 60 days, govern as to the time within which a writ of error must be issued or a supersedeas obtained in that court, regardless of the provisions of state statutes.

In Error to the Circuit Court of the United States for the District of Kansas.

W. C. Perry, for plaintiff in error.

Edwin A. Austin, for defendants in error.

Before THAYER, Circuit Judge, and ADAMS, District Judge.

PER CURIAM. In this case two motions have been filed; one to dismiss the writ of error, and the other to vacate the supersedeas heretofore obtained by the giving of a supersedeas bond. By the transcript of the record heretofore lodged in this court the following facts are disclosed: On April 23, 1897, F. G. Logan, the plaintiff in error, brought a suit by attachment against A. G. Goodwin and W. L. Chamberlain, and against I. Goodwin, the wife of A. G. Goodwin, and against Grace Chamberlain, the wife of W. L. Chamberlain. Process of garnishment was issued in said suit against D. W. Mulvane, requiring him to appear and answer whether he was indebted to or had in his possession or under his control any property, real or personal, belonging to the defendants in said suit. Thereafter the garnishee appeared, and answered, in substance, that he was in no manner indebted to any of the defendants, unless it was by reason of his having \$2,000 in his possession at the time process of garnishment was served, which sum was obtained by him from the Bank of Topeka in payment of a certificate of deposit that was issued by said bank to the defendant I. Goodwin. On June 9, 1899, a final judgment was rendered in the attachment suit against the male defendants, to wit, A. G. Goodwin and W. L. Chamberlain, for the sum of \$3,991.21, and in favor of the female defendants, that is to say, in favor of I. Goodwin and Grace Chamberlain, who were adjudged to go hence without day, and recover their costs from the plaintiff. Thereafter a controversy appears to have arisen concerning the question whether the plaintiff in the attachment suit had served a notice on Mulvane, the garnishee, that he had elected to take issue with him on his answer as respects his

indebtedness to A. G. Goodwin, one of the defendants in the attachment suit. The trial court seems to have decided that no such notice had been served on the garnishee, and that by reason of that fact the garnishee's answer must be taken as true. It therefore ordered that the answer of the garnishee stand as conclusive of the facts therein stated, that the garnishee pay over the money in his hands as disclosed by his answer to the said I. Goodwin, and that the plaintiff pay the costs of the garnishment proceedings. This order or judgment was entered of record on August 30, 1899. To reverse the last-mentioned order a writ of error was sued out on January 9, 1900, and in connection therewith a bond was executed by the plaintiff in error in the penal sum of \$3,000, which was approved by one of the judges of this court, and ordered to operate as a supersedeas. The motion to vacate the supersedeas is doubtless well taken. In *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810, it was held by the supreme court (construing section 1007 of the Revised Statutes) that, unless an appeal is perfected, or a writ of error sued out and served, within 60 days, Sundays exclusive, after the rendition of the decree or judgment complained of, it is not within the power of a justice of the supreme court to allow a supersedeas. The same rule applies, we think, to appeals taken to and writs of error issued by the circuit courts of appeals by virtue of section 11 of the act creating those courts. Supp. Rev. St. p. 905. That section contains the following provision:

"All provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the condition of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

This provision of the act creating the circuit courts of appeals without doubt makes the provisions of section 1007 applicable to them as well as the supreme court. It follows, therefore, that the order directing that the bond taken on January 9, 1900, should operate as a supersedeas is ineffectual for that purpose.

The motion to dismiss the writ of error is based on two grounds: First. It is claimed that the rendition of a judgment in favor of I. Goodwin on June 9, 1899, operated to terminate the garnishment proceedings against the garnishee, Mulvane, as of that date; and that, because it had such effect, the writ of error should have been sued out within six months thereafter, to wit, on or before December 9, 1899. This position we regard as untenable. The garnishee was interrogated by the plaintiff in the attachment suit as to his indebtedness not only to I. Goodwin, but as respects his indebtedness to all of the defendants; and he denied that he was indebted to any of them except the wife of A. G. Goodwin. A judgment was recovered as against two of the defendants, and if it be true, as the plaintiff contends, that he served a notice on the garnishee of his inten-

tion to controvert the facts stated in his answer, then an issue remained to be tried as between the plaintiff and the garnishee after the issues in the attachment suit had been disposed of by the judgment rendered on June 9, 1899. If I. Goodwin had been the sole defendant in the attachment suit, or if the garnishee had been interrogated only as to his indebtedness to her, it may well be that the final judgment in her favor in the main case would have had the effect claimed for it. But it cannot be said to have had that operation when it appears that a judgment was recovered against two of the defendants, and the plaintiff insists that he has given the requisite notice, which, under the statutes of the state of Kansas, entitles him to challenge all of the facts alleged in the garnishee's answer. While the garnishment proceeding is incidental to the attachment suit, yet it is a separate proceeding, in which an independent judgment may be rendered either for or against the garnishee, which judgment may be reviewed by a writ of error sued out by either party thereto.

It is further claimed that, although a writ of error could be brought to review the order of August 30, 1899, yet that the present writ was brought too late, although it was sued out within the six months limited for prosecuting writs to this court. This contention is founded on section 567 (Gen. St. Kan. 1889, p. 1521), which, as it is claimed, has been adopted and made obligatory upon the federal courts in garnishment proceedings by section 933 of the Revised Statutes of the United States. The Kansas statute provides that:

"When an order discharging or modifying an attachment or a temporary injunction shall be made in any case and the party who obtained such attachment or injunction shall except to such order for the purpose of having the same reviewed in the supreme court upon petition in error, the court or judge granting such order shall upon application of the proper party fix the time, not exceeding thirty days from the discharge or modification of said attachment or injunction, within which such petition in error shall be filed. * * * If such petition in error shall not be filed within the time limited the order of discharge shall become operative and be carried into effect. * * *

The statute in question has reference, we think, to interlocutory orders made during the progress of a case, which either discharge or modify an attachment or a temporary injunction. It has no reference, we think, to a final judgment entered in an attachment suit or in a garnishment proceeding, such as the order or judgment involved in the case at bar, which has the effect of releasing attached property or discharging a garnishee. In such cases an appeal may be taken, or a writ of error prosecuted, within the time ordinarily allowed to prosecute an appeal from a final judgment or decree. But, if this were not so, section 11 of the act creating the circuit courts of appeals (Supp. Rev. St. p. 905) permits a writ of error to be sued out to review a judgment at law at any time within 6 months after the entry of the judgment, and section 1007 of the Revised Statutes permits a party desiring to have a judgment reviewed to obtain a supersedeas by giving the requisite bond within 60 days, and these provisions of the federal statute cannot be regarded as overborne by the local law of the state prescribing a different period within which a writ of error must be brought to re-

view a final judgment. If there is any conflict between the local statute and the federal statute, the latter must prevail. In this case, however, there is no such conflict, inasmuch as the local statute has reference, as we think, to interlocutory orders made during the progress of a case whereby an attachment is discharged, and not to a final judgment which has that effect. The motion to dismiss the writ of error is accordingly denied. But the motion to vacate the supersedeas is allowed, and an order will be entered to the effect that the bond heretofore given on January 9, 1900, shall from this time stand as an obligation for costs, and shall have no other force or effect.

EVANS-SNIDER-BUEL CO. v. McCASKILL.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1900.)

No. 1,283.

1. CIRCUIT COURT—JURISDICTION—REVIEW.

The act creating the circuit courts of appeals does not give such courts jurisdiction to review a judgment of a circuit court which sustains an objection to its jurisdiction and dismisses the suit on that ground, but the plaintiff should have the question of jurisdiction certified, and take his appeal or writ of error directly to the supreme court.

2. SAME—APPEAL—CERTIFIED QUESTION.

If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it.

3. SAME—RIGHTS OF DEFENDANT.

If the question of jurisdiction is in issue, and the jurisdiction sustained, and the judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and go directly to the supreme court, or to bring the whole case to the circuit court of appeals, and the question of jurisdiction may then be certified by that court.

4. SAME—CROSS APPEAL.

If, in the case last supposed, the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits by cross appeal or writ of error if the defendant has taken the case there, or independently if the defendant has carried the case to the supreme court on the question of jurisdiction alone; and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined.

5. SAME.

The same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment upon the merits.

6. SAME—CERTIFICATE TO SUPREME COURT.

The power of the circuit court of appeals to certify the question of jurisdiction to the supreme court necessarily includes the power in that court to decide the question, and in every case in which the complaining party has the right, or has and exercises the option, to carry his case to the circuit court of appeals for review, that court may decide the question of jurisdiction.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

H. M. Pollard and C. L. Mott, for plaintiff in error.

William S. Anthony and James Orchard, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The Evans-Snider-Buel Company, the plaintiff in error, brought an action in the Eastern district of Missouri against the defendant in error, J. C. McCaskill. The plaintiff in error alleged that it was a corporation of the state of Illinois, and that McCaskill was a resident and citizen of the Eastern district of the state of Missouri. McCaskill filed a plea to the jurisdiction of the circuit court, in which he alleged that he was not at the time of filing the complaint, and had not been at any time since, a resident of that district, but that he was a resident of the Western judicial district of the state of Missouri, and prayed the court to dismiss the case against him for the reason that it was without jurisdiction thereof. The circuit court found the plea to be true, and dismissed the case against the defendant in error on the ground that it had no jurisdiction over him, because he was a resident and citizen of the Western district of Missouri. This writ of error was sued out to reverse this judgment of dismissal. The defendant in error moved to dismiss the writ on the ground that this court has no jurisdiction to determine the question it presents.

The act of March 3, 1891 (26 Stat. c. 517, p. 826), which established the circuit courts of appeals, provides in its fourth section that "the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same"; in section 5, that "appeals or writs of error may be taken from * * * the existing circuit courts direct to the supreme court * * * in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision"; in section 6, that the circuit courts of appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the * * * existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final * * * in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states, * * * excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record

and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal," and excepting also that the supreme court might require, by certiorari or otherwise, that any case in which the decision of the circuit court of appeals was made final should be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to that court. In the case of *U. S. v. Jahn*, 155 U. S. 109, 114, 15 Sup. Ct. 41, 39 L. Ed. 90, the supreme court laid down the rules which determine the respective jurisdictions of the supreme court and the circuit courts of appeals under the foregoing provisions of the act of congress in these words:

"(1) If the jurisdiction of the circuit court is in issue, and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified, and take his appeal or writ of error directly to this court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and the judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified, and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross appeal or writ of error if the defendant has taken the case there, or independently if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits. (6) In every case in which the complaining party has the right or has and exercises the option to carry his case to the circuit court of appeals for review, that court may decide the question of jurisdiction as well as the question on the merits, for the power of that court to certify the question of jurisdiction to the supreme court assumes the power to decide it." *U. S. v. Jahn*, 155 U. S. 109, 113, 15 Sup. Ct. 39, 39 L. Ed. 87.

The case at bar falls under the first rule announced by the supreme court. The jurisdiction of the circuit court was in issue. It was decided in favor of the defendant. That decision disposed of the case. The supreme court had jurisdiction to review that decision under section 5 of the act of March 3, 1891, and the plaintiff in error had the right to have the question certified, and to take his appeal or writ of error directly to that court. Under section 6 of the act this court has jurisdiction to review a final decision of the circuit court only in a case other than those provided for in section 5 of the act. As this was provided for in section 5, and jurisdiction to review the judgment here was there given to the supreme court, this court has no jurisdiction to review it, and the motion to dismiss the writ must be granted. It is so ordered.

FIVE TRACTS OF LAND IN CUMBERLAND TP., ADAMS CO., PA., v.
UNITED STATES.

(Circuit Court of Appeals, Third Circuit. April 25, 1900.)

No. 32.

1. EMINENT DOMAIN—MEASURE OF COMPENSATION FOR PROPERTY TAKEN—
MARKET VALUE.

In estimating the compensation to which a landowner is entitled on the taking of his property for a public use, the adaptability of the property in its present state and surroundings for other and more valuable purposes than those to which it has been put is a proper element to be considered in determining its market value; but its possible value under circumstances and conditions which do not exist, but which the owner may intend to create, cannot be considered.

2. SAME.

In proceedings by the United States for the condemnation, for the purpose of a national park, of land which formed a part of a battlefield, the measure of compensation to which the owner is entitled is the market value of the land, and, if such value is enhanced by its historical associations, such fact is a proper element to be considered; but the fact that the land is desired by the United States for a particular purpose is not an element of market value, and evidence of prices paid for land on other battlefields, purchased for similar purposes, is inadmissible to furnish a basis of comparison by which to establish the market value of that in question.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

William McClean and Wm. Arck McClean, for plaintiff in error.
James M. Beck, for the United States.

Before ACHESON and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

GRAY, Circuit Judge. The United States presented its petition to the judges of the circuit court of the United States for the Eastern district of Pennsylvania, setting out the act of congress of August 1, 1888, entitled "An act to authorize condemnation of land for sites of public buildings and other purposes," the act of general assembly of the state of Pennsylvania approved June 8, 1874, entitled "An act providing a mode by which the title to all estates and interests in land in the state of Pennsylvania may be vested in the United States when no agreement can be made with the owners of the same for the purchase thereof," and the act of congress approved February 11, 1895, entitled "An act to establish a national military park at Gettysburg, Pennsylvania," and describing five certain tracts of land in Cumberland township, Adams county, Pa., the title to which it was necessary that the United States acquire, in order to carry out the purpose of said last-mentioned act of congress; that the five tracts of land are contained in map prepared by Maj. Gen. Daniel E. Sickles, United States army, of the battlefield of Gettysburg, and were occupied by the infantry, cavalry, and artillery on the 1st, 2d, and 3d days of July, A. D. 1863, and praying for the appointment of a jury to view, estimate, and determine the value of the said lands.

The act of congress of August 1, 1888 (section 2), above referred to, provides that:

"The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held; any rule of the court to the contrary notwithstanding."

The act of the general assembly of the state of Pennsylvania of June 8, 1874, above referred to, provides that, when it shall happen that the United States cannot agree with the owner or owners thereof for the purchase of lands proposed to be taken as part of the premises which the United States are or may be authorized to acquire in said commonwealth for any public use or purpose, a petition may be filed in the court of common pleas of the county, in behalf of the United States, and after notice to owners, etc., the said court is authorized to appoint seven freeholders, who, upon due qualification and giving due notice, shall estimate and determine the fair value of the estates or interest in lands so proposed to be taken for the use of the United States, shall designate the several owners thereof, and shall report the same to the said court; and their award is made subject to appeal. After the passage of the act of congress of February 11, 1895, entitled "An act to establish a national military park, at Gettysburg, Pennsylvania," James M. Beck, Esq., district attorney of the United States, in behalf of the United States, and pursuant to the act of congress of August 1, 1888, above referred to, made application to the circuit court of the United States for the Eastern district of Pennsylvania, conforming in said application, and in the proceedings pursuant thereto, as near as possible, to the requirements of the act of the general assembly of the state of Pennsylvania of June 8, 1874. The jury of viewers appointed by the said court met for the discharge of their duties, and filed their report in the said court. The landowners appealed from the report of the said jury of viewers, and their appeal came on for trial in the circuit court of the United States, before his honor, George M. Dallas, at the October term of said court, 1898. In the course of the trial in the circuit court the landowners called as a witness Gen. H. V. Boynton. Counsel for the government requested that it should be stated what was proposed to be proved by Gen. Boynton. Counsel for the landowners stated that he would make the offer, if it was understood that it would be with the same force and effect as if the witness had been sworn.

"The Court: There being no objection, the offer will be made as if the witness had been called and sworn, and will be so treated."

Counsel for the landowners then made the offer as follows:

"The owners of these tracts of land propose to show that the witness who has been called was a distinguished officer in the service during the Civil War; that he at present is in the volunteer service, with the rank of brigadier general, located at Chickamauga; that for a number of years he served as clerk to the Chickamauga commission and the Chattanooga commission; and was interested in the acquisition of the lands which have been acquired by the government on the field of Chickamauga and at Chattanooga Park; that after serving as clerk to this commission for a period of

five years, during which time the Chickamauga and Chattanooga enterprise began, and through which it was continued, he was appointed chairman of the Chickamauga commission, and now holds that position; that he is thoroughly familiar with the battlefield of Gettysburg, having visited it on a number of occasions purely for the purpose of inspecting the field; that he has taken an interest in the improvement of the field of Gettysburg in connection with his official duties at Chickamauga; that he is acquainted, from actual observation of the contracts, with the prices paid by the United States for ground of a similar character at Chickamauga and at Chattanooga. We propose to offer his testimony, relying on his intimate acquaintance with the purchases there and with the field at Gettysburg, in the nature of expert testimony as to the market value of lands of a similar character to these, which we claim have a peculiar value. The Court: That is to say, to prove by a gentleman who derives his knowledge from familiarity with Chattanooga and Chickamauga, to which is superadded an occasional visit to the field of Gettysburg, what prices were paid for what he would say was similar property in this other place. Counsel for Landowners: Yes, sir; in this other place. (Objected to.) The Court: The offer which has been made, and which it has been agreed by counsel shall be treated by the court as if the witness had been called to the stand and duly sworn, is an offer to prove by an expert the value of land. The first objection to the offer that impresses the court is that it does not appear sufficiently that the gentleman called would be an expert with respect to the value of the land in question. But there is a more far-reaching question, that perhaps might as well be dealt with now as later. The court has no doubt, as at present advised,—that the present issue is to determine the market value of the land which the government proposes to take,—that into the market value there does not enter every element which contributes to constitute the market value. If the market value of the land has been enhanced by reason of its patriotic or historic associations, that is as much, in the judgment of the court, an element to be considered, as if there were an open mine upon it, or any other matter of a similar nature had contributed to increase its value. But this discrimination, as it occurs to the court, must be borne in mind: that the question still is as to market value, and not its peculiar value to the single, peculiar purchaser,—the government of the United States. Its market value cannot be increased because the United States proposes to purchase it for any one purpose or another. * * * In other words, I repeat, the market value is to be ascertained, and, no matter what may be the thing which enhances or diminishes market value, the jury are entitled to have it and consider it, but they are not entitled to consider this property as being of increased value because the United States is purchaser for a purpose. The offer is therefore overruled. (Exception noted in each case for the landowners.)"

It does not appear that Gen. Boynton was a resident of the county where the lands lie, or even a citizen of the state of Pennsylvania, and he did not profess to have knowledge of the market value of the lands in question, except as above stated, all of which is true in regard to the next witness offered by counsel for plaintiff in error, as follows:

"We offer General Ezra A. Carman, a member of the Antietam battlefield commission, who is at present in charge of the work of that commission, and who fought at the battle of Gettysburg, who is thoroughly familiar with the field, who has visited the field a number of times since the war, and who conducted the business of purchasing land on the battlefield of Antietam for the government, for the purpose of showing prices paid by the United States for lands of a character similar to these about to be taken, although on a different field, for the same purpose as stated in my preceding offer of General Boynton. (Objected to.) The Court: It is difficult to distinguish this offer, in principle, from the one ruled upon. Therefore, for the same reasons, this offer is rejected. (Exceptions noted in each case for the landowners.)"

The landowners then called as a witness J. Emory Bair, and an offer was made to prove by the witness the organization of the Gettysburg Springs & Hotel Company, the owner of tracts 1 and 2; acts already done by the said company in the development of their property; the intended uses of the land bought by the said company, including uses to be made of the land sought to be condemned, which would show the relation of said five tracts to the other land of the company; and the interference with the work of the company by the United States and its representatives,—that all these facts were admissible, not only as parts of the *res gestæ*, and to show the actual state of the matter, for the consideration of the jury, but also as an element in determining the damages to the landowners. The court rejected the testimony, and noted an exception for the landowners. The landowners filed bill of exceptions to the action of the court in the rejection of the testimony of the three witnesses as offered, and afterwards assigned for error such rulings of the learned court below. The grounds of their exceptions are, in substance, as follows: (1) The rejection of the offer to prove by Gen. H. V. Boynton the value of the lands in question; (2) the rejection of the offer to prove by Ezra A. Carman the value of the lands in question; (3) the rejection of the offer to prove by J. Emory Bair acts already done by the Gettysburg Springs & Hotel Company, and the intended uses of the lands (Nos. 1 and 2) bought by said company. The first two grounds of exception are precisely similar.

The court, in its charge to the jury, which we think was exceedingly fair to both sides of the controversy, stated with accuracy and fully the rules by which they were to ascertain the value of the lands in question. Among other things, the court said:

"Market value is not to be determined by what a property would bring at an enforced sale, where the owner was compelled to part with it, without consideration as to whether anybody desired to purchase it or not. That would not make a market, and therefore the resulting price would not be a market price. What the owner is entitled to receive, at your hands in each of these cases is the price that would in all probability—the probability being based upon the evidence in the case—result from fair negotiation, where the seller is willing to sell, and the buyer desires to buy. * * * As to availability for building lots, permit me to say this for your guidance: That present existing adaptability to purposes more advantageous than those to which the land is now put may be considered. By that the court means that you are not compelled, because land is now, for instance, used only for agricultural purposes, to exclude entirely from your consideration any present, existing adaptability which it may have for a more profitable purpose. But in all cases this value must be actual, not speculative merely. The land is not to be valued as if the possible were in existence, but at its present worth in view of the possibility."

After considering the case where it is not proposed to buy all of the land in the tract, a part of which is proposed to be condemned, and laying down the correct rule for ascertaining, not only the value of the part taken, but any damage that may result from the taking to the part left, the court proceeds to the discussion of another phase of the question to be considered by the jury, and says:

"Upon these subjects, however, while they will not, perhaps, be free from difficulty, you will, I assume, have less difficulty than upon the remaining element of value which is insisted upon, namely, that which has been spoken

of as 'historic value.' There is no doubt that historic association may enter into the market value of the land, but you are not to give, as separate items—First, market value; and, second, historic value. If you did that, you would depart from what I have said to you the law has established as the measure of just compensation, which is market value. But, as I said to counsel during the course of the cause, if a piece of land has in the market a value because there are trees upon it, a value because there are stones upon it, a value because it may be used to raise cereals, a value for any other physical peculiarity of the property, if it also has in the market a value based upon its historical associations, that as much enters into market value as would a mine opened upon the property, or a well dug upon it. It is a part of the different matters that go to contribute to the sum total of market value. Just in that way you are entitled to consider historic value, if you believe from the evidence that market value is at all enhanced by historical value. * * * Nor, keeping your minds always to market value, are you to consider the valuation with reference to the necessities of the government of the United States to take the property, or the particular purposes to which the United States government proposes to put it. * * * You are getting at the market value. Therefore observe, not what the United States might be willing to pay in order to carry out the purpose which it has in view,—that is not the question,—but what in the market would any purchaser desiring to buy this property be willing to give for it, considering all the elements that have been stated, in order to acquire it from a seller willing to sell."

In the passages quoted, we think the learned judge in the court below has clearly and correctly stated the rules of law which should govern a jury in the ascertainment of the value of the land proposed to be taken by the United States, and the damages resulting therefrom. We are also of opinion that the proffers of testimony, above stated, and which were rejected by the court and made the causes of exception, were properly rejected, for the reasons given. We therefore feel that it is only necessary to refer to these rulings, and the reasons given therefor, as well as to the charge of the court to the jury, as in accord with our own judgment, and as a sufficient statement of the reasons controlling this court in affirming the judgment of the court below. The judgment in this case is hereby affirmed.

RANSOM v. CITY OF PIERRE.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,305.

1. RES JUDICATA—PLEADING FORMER JUDGMENT AS BAR—IDENTITY OF PARTIES.

An action by a bondholder of a city against the city treasurer in his official capacity for a mandamus to compel payment of interest coupons out of money in his hands already collected for that purpose is virtually an action against the city, and a judgment therein adjudging the coupons void may be pleaded in bar of a subsequent action brought by the plaintiff against the city by name to recover judgment on the same coupons.

2. SAME—EFFECT OF PENDENCY OF APPEAL.

When a case removed to an appellate court by a writ of error or an appeal is not there tried de novo, but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, or prevent it from being pleaded, and given in evidence, as an estoppel upon issues which were tried and determined, in the absence of a statute providing that it shall not be so used pending appeal. A supersedeas bond merely stays

process for enforcement of the judgment, and does not vacate the judgment, or change its effect as an estoppel.

2. SAME—STATUTORY PROVISIONS.

Comp. Laws Dak. 1887, § 5343, providing that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied," was intended to apply only to the question of lis pendens, and it does not prevent a final judgment of one of the courts of the state of superior jurisdiction from being pleaded in bar of another suit between the same parties, and upon the same cause of action, during the pendency of an appeal therefrom. Sanborn, Circuit Judge, dissenting.

4. APPEAL—DISPOSITION OF CAUSE—EFFECT OF CHANGE IN STATE OF FACTS.

Where a judgment of a state court, which has been successfully pleaded in bar of another suit between the same parties in a circuit court of the United States, is reversed on appeal by the supreme court of the state during the pendency of proceedings to review the judgment of the circuit court on a writ of error from the circuit court of appeals, the latter court may properly depart from the ordinary rule which requires it to determine the cause upon the facts as shown by the record, and, upon being advised in an authentic manner of the action of the state court, may, in the exercise of its discretionary power, vacate the judgment below, although the record discloses no error, where such action will shorten litigation, and best subserve the ends of justice.

In Error to the Circuit Court of the United States for the District of South Dakota.

This case is before this court for decision upon the following facts and circumstances: The action is founded upon 500 coupons clipped from 100 bonds which were issued by the city of Pierre, S. D., on October 1, 1891, to refund its then outstanding indebtedness. One hundred of the coupons in suit matured October 1, 1895, and an equal number of the remainder on April 1, 1896, October 1, 1896, April 1, 1897, and October 1, 1897, respectively. On September 23, 1896, James J. Ransom, the plaintiff in error, who was also the plaintiff below, began an action by mandamus in the circuit court for the Sixth judicial circuit of the state of South Dakota against Corwin D. Mead, as city treasurer of the city of Pierre, to compel him to apply the sum of \$8,481.10, then in his hands as city treasurer, to the payment of those of the aforesaid coupons which matured October 1, 1895, and April 1, 1896, being those that were then overdue. This money in the treasurer's hands had been collected, as it seems, by taxation to pay said coupons. The treasurer, in his official capacity, pleaded to the information for the writ that the coupons which he was asked to pay were void for the reason that the bonds from which they had been detached had been issued by the city of Pierre without authority of law, at a time when its indebtedness exceeded the amount of indebtedness that it was authorized to contract under the constitution of the state, and that said coupons and the bonds from which they were detached were for that reason utterly void. There was a trial upon the issues so tendered in the mandamus proceeding, and a finding by the court that the coupons were illegal and void, as alleged, and a judgment that the mandamus proceedings be dismissed at the plaintiff's cost. From this judgment, rendered on June 29, 1897, Ransom, the plaintiff in error, perfected an appeal to the supreme court of South Dakota on September 24, 1897, giving a supersedeas bond. The suit at bar was commenced in the circuit court of the United States for the Southern division of the district of South Dakota on February 23, 1898, while the appeal in the before-mentioned suit was pending and undetermined. In its answer to the suit at bar the city of Pierre pleaded, among other defenses, the judgment theretofore rendered in favor of its city treasurer on June 27, 1887, by the circuit court for the Sixth judicial circuit of the state of South Dakota, as a bar to a recovery. This defense was sustained by the trial court, and a judgment was accordingly rendered dismissing the complaint. The plaintiff below thereupon removed the record to this court by a writ of error. When the

trial in the case at bar took place, the mandamus proceeding above mentioned was still pending and undetermined in the supreme court of South Dakota, and it was so pending and undetermined when the case was argued in this court.

Robert W. Stewart (Henry R. Horner, on the brief), for plaintiff in error.

Ivan W. Goodner, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This cause having been decided below in favor of the defendant city on the ground that the judgment of the circuit court for the Sixth judicial circuit of the state of South Dakota in the mandamus suit brought by James J. Ransom, the present plaintiff in error, against Corwin D. Mead, the city treasurer of the city of Pierre, conclusively established that the coupons in suit were issued without authority of law, and were, therefore, void, the principal question that was discussed on the argument was whether the judgment of the state court in the mandamus suit could be pleaded and received in evidence in the present action as a former adjudication. It is true that counsel for the city endeavored to support the judgment below on the additional ground that the coupons in suit must be regarded as void irrespective of the former adjudication, because at the time the bonds were issued the city had already exceeded the limit of valid indebtedness; but the trial court overruled the latter contention, and its action in that respect was strictly in accordance with two decisions of this court where the various points urged by the city in support of the latter defense were fully considered and decided adversely to its contention. *Board of Education of City of Huron v. National Life Ins. Co.*, 36 C. C. A. 278, 94 Fed. 324; *City of Huron v. Second Ward Sav. Bank*, 57 U. S. App. 593, 30 C. C. A. 38, 86 Fed. 272. We discover no reasons for altering in any respect the views heretofore expressed by this court in the cases last cited, and accordingly agree with the learned trial judge that but for the rendition of the judgment in the mandamus proceeding the plaintiff would have been entitled to a verdict for the full amount of the coupons in suit. Since this case was argued, and while it has been under advisement, the supreme court of South Dakota has decided the mandamus case against the city treasurer of the city of Pierre, and we have been furnished with a certified copy of its decision, which was promulgated on March 2, 1900, but is not as yet officially reported. *Insurance Co. v. Mead*, 82 N. W. 78. An examination of that decision, which contains a careful review of all the questions involved in the controversy between the city and the bondholder, shows that the supreme court of the state has decided the following propositions: First, that the city of Pierre, under its charter, did have the power to issue bonds for the purpose of funding its outstanding indebtedness, which appears to have been one of the mooted points in the mandamus suit; second, that, although the territorial limits of the city of Pierre and the school district embracing the city were coextensive, yet the debts of the latter cannot be added to those

of the former for the purpose of ascertaining if the city indebtedness exceeded the legal limit,—the two corporations, the city and the school district, being separate legal entities; third, that the bonds issued being for the sum of \$150,000, and 5 per cent. of the assessed value of city property being \$161,144.40, the bonds did not show on their face that the debt occasioned thereby would exceed the legal limit of city indebtedness; fourth, that the issuance of bonds for the purpose of taking up and retiring an outstanding indebtedness does not in the state of South Dakota create a new or additional debt, within the meaning of the statutory or constitutional inhibitions of that state against creating an indebtedness in excess of 5 per cent. of the assessed valuation of municipal property, and that this is true whether such bonds be exchanged directly for outstanding obligations, or whether the bonds be sold, and the proceeds used to retire such obligations; and, lastly, that upon the facts disclosed by the record before the supreme court of the state the bonds in controversy were valid obligations of the city. The judgment of the circuit court of the state in the mandamus suit was accordingly reversed, and a new trial ordered.

On the argument of this cause it was urged on behalf of the plaintiff in error that the trial court erred in holding that the judgment in the mandamus proceeding was conclusive as respects the validity of the bonds in controversy—First, because section 5343 of the Compiled Laws of Dakota of 1887 declares that “an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied”; and, second, because the parties to the mandamus suit and the subject-matter of that suit were not the same as in the case at bar. The majority of the members of this court entertain the view, however, that neither of these propositions is tenable. Concerning the second of these contentions, it may be said that, while the mandamus suit was brought against the city treasurer, and not against the city by name, yet that officer was sued in his official capacity, and not as an individual. He did not defend the action for his personal benefit, but in right of the city, and, as custodian of its funds, to protect them against an illegal demand. The city permitted him to so defend, and the defense was doubtless made at the city's expense. In that proceeding the city of Pierre was in reality challenging the validity of the bonds now in controversy in the name of its treasurer, and for its own benefit and advantage. If that suit had resulted differently, the city would not have been heard to say that it was not bound by the judgment, because it was not sued in its corporate name, but in the name of one of its officers. The record also shows that the defenses interposed, litigated, and decided in that proceeding were identically the same as those which were interposed and litigated in the case at bar, except the issue tendered by the plea of a former adjudication. Under these circumstances the last-mentioned plea was well made, and was sustained by the record made in the mandamus suit, which was introduced in evidence. *Holt Co. v. National Life Ins. Co.*, 25 C. C. A. 469, 80 Fed. 686; *Scotland Co. v. Hill*, 112 U. S. 183, 5 Sup. Ct. 93, 28 L. Ed. 692;

In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Harmon v. Auditor*, 123 Ill. 122, 13 N. E. 161; 1 Herm. Estop. p. 166.

The first contention of the plaintiff in error, stated above, presents a question of greater difficulty. In many cases the question has been mooted whether, when a writ of error has been sued out, or when an appeal has been taken which operates essentially as a writ of error, to review a judgment at nisi prius, and a supersedeas bond has been given to stay proceedings, such a judgment may be received in evidence in another suit between the same parties in support of the plea of *res judicata*; and, while the decisions upon this question have not been uniform, yet, in our judgment, the weight of judicial opinion, as well as sound reason, is that, when a case which is removed to an appellate court by a writ of error or an appeal is not there tried *de novo*, but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, or prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, unless some local statute provides that it shall not be so used pending the appeal. A supersedeas bond merely operates to stay an execution or other final process on the judgment. It does not vacate the judgment, nor prevent either party thereto from invoking it as an estoppel. *Railway Co. v. Twombly*, 100 U. S. 78, 81, 25 L. Ed. 550; *Willard v. Ostrander*, 51 Kan. 481, 32 Pac. 1092; *Parkhurst v. Berdell*, 110 N. Y. 386, 392, 18 N. E. 123; *Scheible v. Slagle*, 89 Ind. 328; *Faber v. Hovey*, 117 Mass. 107; *Thompson v. Griffin*, 69 Tex. 139, 6 S. W. 410; *Moore v. Williams*, 132 Ill. 589, 24 N. E. 619; *Bank v. Wheeler*, 28 Conn. 433; *Oregonian Ry. Co. v. Oregon Railway & Navigation Co. (C. C.)* 27 Fed. 277, 284; *Cloud v. Wiley*, 29 Ark. 80; *Cain v. Williams*, 16 Nev. 429; *Freem. Judgm.* § 328; *Elliott, App. Proc.* § 544, and citations.

It is insisted, however, as before stated, that the statute of South Dakota quoted above was intended to prevent a judgment from being pleaded as an estoppel during the pendency of an appeal, and that view of the effect of the statute is supported by certain California decisions, in which state a similar statute has been enacted. *Naftzger v. Gregg*, 99 Cal. 83, 33 Pac. 758; *In re Blythe's Estate*, 99 Cal. 472, 34 Pac. 108; *Story v. Commercial Co.*, 100 Cal. 41, 34 Pac. 675. On the other hand, in the state of Oregon, where substantially the same statute is in force, it is held that the statute was not designed to prevent a judgment from being pleaded in bar of another suit on the same cause of action during the pendency of an appeal from the judgment. *Day v. Holland*, 15 Or. 464, 468, 469, 15 Pac. 855. The statute now under consideration was enacted in the Dakotas before it was enacted in California, so that it cannot be said that the California doctrine became the law of the territory of Dakota by adoption. The decisions in California and Oregon are merely persuasive authority. While the supreme court of the state of South Dakota has never as yet placed an authoritative construction upon the statute in a case where a judgment that had been obtained in a civil action was pleaded in bar to another suit between the same parties during the pendency of an appeal from the judgment, yet it has held, notwithstanding the

statute in question, that a judgment in a criminal case may be given in evidence in another case as conclusive evidence of a conviction for a crime, during the pendency of an appeal from the judgment. In re Kirby, 10 S. D. 322, 330, 331, 73 N. W. 92.

In this state of the authorities and upon an independent consideration of the question we have reached the conclusion that the Dakota statute to which the discussion relates was not intended to prevent a final judgment of one of its courts of superior jurisdiction from being pleaded in bar to another suit between the same parties and upon the same cause of action during the pendency of an appeal therefrom, but that its purpose was to affect purchasers of property which is in litigation with notice of the litigation until the litigation is ended. It is well known that courts have at times disagreed as to whether one who purchases property which is in litigation intermediate a judgment at nisi prius and the expiration of the time limited for suing out a writ of error or taking an appeal should be regarded as a bona fide purchaser, or as affected with notice by lis pendens if an appeal is subsequently taken. Some courts have answered this question in the affirmative, others in the negative. *Rector v. Fitzgerald*, 19 U. S. App. 423, 427, 428, 8 C. C. A. 257, 59 Fed. 808, 810, 811; *Taylor's Lessee v. Boyd*, 3 Ohio, 337, 352; *Eldridge v. Walker*, 80 Ill. 270; *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 350; *Pierce v. Stinde*, 11 Mo. App. 364; *McCormick v. McClure*, 6 Blackf. 466; *Debell v. Foxworthy's Heirs*, 9 B. Mon. 228; *Harle v. Langdon's Heirs*, 60 Tex. 555, 562; *Marks v. Cowles*, 61 Ala. 299. We accordingly incline to the view that the statute was intended to settle this debatable point in South Dakota by saying, in effect, that one who purchases property after a judgment, but prior to the expiration of the time limited for an appeal, shall be deemed a purchaser pendente lite. In the absence of the statute aforesaid, the suing out of a writ of error or the taking of an appeal might be regarded as the institution of a new suit, and as having no effect on a title acquired before an appeal was taken. In our judgment, the statute was not designed to have any other force and effect than that last stated. It can hardly be supposed that it was intended to encourage litigants to bring repeated suits to settle the same controversy, and it ought not to be given an erroneous interpretation because by so doing the ends of justice would perhaps be subserved in the present instance.

In view, however, of the recent decision by the supreme court of South Dakota, the substance of which has been heretofore stated, the question to be decided at this time is not in all respects the same as the one which was discussed on the trial below and at the hearing in this court. Assuming, in view of what has already been said, that the judgment in the mandamus suit was pleadable in bar, and determinative of the plaintiff's rights in the case now in hand so long as that judgment was unreversed, we are nevertheless confronted with the inquiry whether it should be given that effect when it is shown by a duly-certified copy of the opinion of the supreme court of South Dakota that the judgment in question has been vacated and annulled for error. As a general proposition, it is doubtless true that

an appellate court is required to determine whether a judgment which is challenged by a writ of error is erroneous upon the facts disclosed by the record, and upon the facts as they existed when the judgment was rendered. But, inasmuch as all rules of procedure are intended to secure the administration of justice in an orderly manner, it does not seem reasonable that a rule of procedure should be observed when it is apparent that a strict adherence thereto will work injustice. When an appellate court has the power to vacate a judgment rendered by a *nisi prius* court, over whose proceedings it exercises supervision and control, and its attention is called in an authentic manner to something that has transpired since the trial, which renders it inequitable to permit the judgment to be carried into effect, we think that it may lawfully exercise its power to annul the judgment and remit the record to the lower court for such further proceedings as may be necessary. It is essential, of course, that there should be a general observance of rules of procedure, but compliance with a particular rule ought not to be required when a literal compliance therewith would defeat, rather than promote, the ends of justice. As a general proposition, the rights of the parties to a suit are to be determined upon the facts as they exist when the action is commenced, or at least when the issues have been formulated by pleadings. Nevertheless, the common law has always permitted a defendant to take advantage of a defense growing out of what subsequently transpires by a plea *puis darrein continuance*. Andrews, *Pl.* § 77; Chit. *Pl.* (16th Am. Ed.) pp. 689, 690. In the state of New York, where the doctrine prevails that the taking of an appeal from a judgment does not prevent the judgment from being pleaded in bar to another action between the same parties, it is held that if, after a judgment has been successfully pleaded in the second suit, it is reversed on appeal, the judgment in the second action may be set aside by the trial court for that reason, although no error was committed on the trial. *Parkhurst v. Berdell*, 110 N. Y. 386, 392, 18 N. E. 123. In the case of *Humphreys v. Leggett*, 9 How. 296, 311, 13 L. Ed. 145 (see, also, *Leggett v. Humphreys*, 21 How. 66, 71, 16 L. Ed. 50), the facts appear to have been that, while a writ of error was pending in the supreme court of the United States to reverse a judgment in favor of a surety on a sheriff's bond, the whole penalty of the bond was collected of the surety under a judgment regularly obtained in a state court. The supreme court of the United States reversed the judgment in favor of the surety, and sent down its mandate directing the entry of a judgment against the surety for a specified sum. The surety thereupon pleaded *puis darrein continuance* the payment of the full penalty of the bond in obedience to the judgment of the state court, but the trial court disallowed the plea, and entered judgment according to the mandate. The surety then filed a bill to restrain the enforcement of the latter judgment, and it was held that he was entitled to the relief prayed for, inasmuch as the surety had been guilty of no laches, and it would be inequitable to permit an amount in excess of the penalty of the bond to be collected from him. Under the doctrine enunciated in that case it would seem that, if this court

should affirm the judgment below on the ground that it cannot take cognizance of the recent decision of the supreme court of the state of South Dakota, equitable relief might be afforded against the judgment. But, even if such relief might be obtained, why should this court affirm the judgment, and compel the institution of a new suit, when it is advised in an authentic manner that the judgment which served to prevent the plaintiff from recovering below was an erroneous judgment, and that the same has been finally vacated and annulled? The trial court could have granted a new trial because of the reversal of the judgment, although its record disclosed no error, and it seems reasonable that this court should exercise a similar discretionary power so long as it retains control over the judgment, and a fact has been brought to its attention concerning which there can be no dispute. We cannot say that the existing complications are due to any fault or laches of the plaintiff in error. When he brought the present action he was doubtless advised by counsel that the judgment in the mandamus case could not be pleaded in bar, in view of the appeal therefrom and the provisions of the Dakota statute. The construction that had been placed on that statute by the courts of California gave great weight to this view, and, while we are constrained to hold that the view was erroneous, yet we are not prepared to decide that the plaintiff should be compelled to sustain a great loss because he has been guilty of no other fault than the bringing of an action based upon a mistaken view of the law. The trial court might have continued the case in hand of its own motion until the mandamus case was decided, and we think that such action ought to have been taken. That course, however, was not pursued, and it is the duty of this court, which still retains control of the judgment, to take such action as will shorten litigation, preserve the rights of both parties, and best subserve the ends of justice. In view of what has been said, we conclude that we have the power and that it is our duty to reverse the judgment below, and remand the cause for a new trial. The judgment in the mandamus case has been reversed, and the cause remanded for a new trial, and, if this court makes a similar order, it will be optional with the plaintiff to prosecute either one of the suits and dismiss the other, and by so doing avoid further complications growing out of the pendency of suits upon the same cause of action in two courts of co-ordinate jurisdiction. The judgment below is therefore reversed, and the cause remanded for a new trial.

SANBORN, Circuit Judge: I concur in the result in this case on the ground that under section 5343 of the Compiled Laws of Dakota of 1887, which declares that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied," the judgment in the mandamus suit which was pending upon appeal in the supreme court of the state of Dakota when this suit was tried was not then *res adjudicata*, and upon the merits the judgment below ought to be reversed. *Sharon v. Terry* (C. C.) 36 Fed. 346; *In re Blythe's Estate*, 99 Cal. 472, 475,

34 Pac. 108; Harris v. Barnhart, 97 Cal. 546, 34 Pac. 589; Naftzger v. Gregg, 99 Cal. 83, 33 Pac. 758; Story v. Commercial Co., 100 Cal. 41, 34 Pac. 675; Fresno Milling Co. v. Fresno Canal & Irrigation Co. (Cal.) 36 Pac. 412.

UNION CENT. LIFE INS. CO. v. BERLIN.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 755.

LIFE INSURANCE—ACTION ON POLICY—WAIVER OF FORFEITURE.

The holder of a life insurance policy had given notes for the first year's premium, the first maturing May 15th and the second July 15th. Both notes and policy provided that on failure to pay any note at maturity the policy should lapse. On the maturity of the first note the solicitor through whom the policy was procured agreed with the insured to pay it personally as an accommodation. A few days before the maturity of the second the solicitor called on the insured, and stated the necessity of meeting it at maturity, but offered, if payment of one-half the first note was made, to renew the second on behalf of the company, on being furnished a health certificate from one of the company's physicians. It was understood that this would be done, but the insured was then ill, and continued so until his death July 29th; nothing further having been done in regard to the premiums. *Held*, that there was nothing in the transactions between the solicitor and the insured which could have misled the latter by inducing the belief that his policy would remain in force after the second note became past due, or to warrant the submission to the jury, in an action on the policy in which such facts appeared without contradiction, of the question of the estoppel of the company to insist upon the forfeiture.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

This case was before this court on writ of error at a former term. Insurance Co. v. Berlin, 33 C. C. A. 274, 90 Fed. 779. The statement of the case as there made may for convenience be repeated here, correcting a single error as to the date when the first premium note became due, which was May 15, 1895, instead of February 15. The statement of the case was as follows:

"This suit was upon a policy of life insurance issued by appellant on the life of Charles L. Berlin, of Memphis, Tenn., payable to his wife, the appellee. The trial resulted in a judgment against appellant, and to review that judgment this writ of error is prosecuted. The policy was dated February 11, 1895, and the annual premium was \$129.75. As a substitute for cash payment of the first year's premium, four notes were executed by the assured, Berlin, payable to appellant. The first note was due May 15, 1895, and the second July 15, 1895. One of the conditions of the policy was as follows: 'The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes, given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance.' The notes contained the following provision: 'Said policy, including all conditions therein for surrender or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity, with interest at 6 per cent. per annum, payable annually.

In case this note is not paid at maturity, the full amount of premium shall be considered earned as premium during its currency, and the note payable, without reviving the policy or any of its provisions." Recovery in the court below was resisted upon the ground that the policy became forfeited by the non-payment of the second note, falling due July 15, 1895. Berlin died on the 29th of July, 1895. C. E. Tucker was the general agent of appellant at Memphis, and J. B. Marmon was a solicitor and collector employed by Tucker. Marmon was a personal friend of Berlin, and induced him to apply for and take the policy of insurance sued on. When the note representing the first installment of the annual premium became due, May 15, 1895, Berlin was unable to meet it, and Marmon agreed with him to take care of or pay the note for him, and the amount of the note was charged to Marmon against the sum then due him for work, and was paid as between Berlin and the company, and this became a debt due from Berlin to Marmon personally. On the 6th of July, before maturity of the second note, and on the 15th, Marmon called on Berlin, and agreed with him to renew the second note, provided Berlin would pay him one-half of the first note, which had been assumed and paid by Marmon; it being understood, as Marmon says, that Berlin would have to be in good health, or furnish a health certificate, indorsed by one of the company's medical examiners. Berlin was, at the time of this interview, sick, though the illness was not thought to be serious. Berlin was to be at his office the day following the 6th, at which time he expected to pay Marmon the amount required in order to secure a renewal of the second note, and it appears that he had procured the money necessary to make that payment, and came to the office the next day, but remained only a short time, returning home before Marmon saw him. Marmon says he impressed Berlin with the importance of paying the amount required in order to renew the second note. After failing to see Berlin on the 7th of July, according to appointment, Marmon says he inquired about Berlin from time to time, and, being informed that he was getting along very well, he did not care to be too exacting, and let the matter stand, expecting to see Berlin every day until the day of Berlin's death, on the 29th. On the 29th day of July, Heckle, Berlin's brother-in-law, having ascertained that the second note had not been paid, called to see Mr. Tucker, the general agent, and, finding him absent from the city, tendered the amount of the second note to Marmon, which Marmon declined to receive. This was about 11 o'clock, and about seven hours before the death of Berlin thereafter, on the same day."

The judgment was reversed and the cause remanded, with a direction to grant a new trial. A second trial of the case resulted in a verdict against the defendant for \$5,528.55, on which judgment was duly entered, and to review that judgment this writ of error was sued out. On the second trial the evidence contained in the record of the first trial was again introduced, with only the addition of a single letter from Marmon to Tucker, which in no wise materially affects or changes the case. At the close of the whole evidence the court refused, on defendant's motion, to direct a verdict in its favor, and submitted the case to the jury on issues defined by the court as follows:

"There are now just two issues for you to determine in the case, gentlemen of the jury: (1) Did Marmon, by such conduct in the premises as would mislead a reasonably prudent man under the given circumstances, induce Berlin to believe that he had extended or would extend payment of the note falling due July 15, 1895, so that he did not pay it? Was that the real cause of the nonpayment? (2) Had the defendant company, by its course of dealings with Berlin and other policy holders, through Tucker and Marmon, its Memphis agents, induced Berlin to believe that Marmon had the authority to extend payment of the note falling due July 15, 1895? If you answer both these questions in the affirmative, your verdict should be for the plaintiff for the amount of the policy and interest."

The entire evidence in relation to these issues, and on which the verdict and judgment rest, is contained in certain letters of the insurance solicitor, Marmon, which we set out just as found in the record:

"Exhibit J.

"No. 270 Front St., Memphis, Tenn. July 26, 1895.

"Mr. John M. Pattison, Pres. Union Central Life Ins. Co., Cincinnati, Ohio—
Dear Sir: Your telegram of yesterday to Mr. Tucker for several reasons did not reach me until this afternoon. I am glad to state, however, that the delay has done no damage. In regard to the past-due notes on parties not in good health, and of which Mr. Yowell, of Arkansas, so promptly advised you, will say that the person in question is Charles L. Berlin, who has been sick for some time with bilious fever. I called at Mr. Berlin's office some time since to collect his note, and found that he was sick. I went then to his house, and found that he had a bilious attack; nothing more. I insisted then that he pay his insurance promptly, telling him that if he should become dangerously sick that we could not keep his insurance in force with a past-due note, etc. He was confident that he would be able to go to his office the next morning, and would then pay it, and did come to the office, and was there a short while; but the exertion was too great for him, and he had to return home, a sicker man than he was at first. I had no idea, as I stated to Mr. Yowell, of taking a settlement on the policy, even in his present condition, without a certificate from either Dr. Saunders or Dr. Peete, stating that he was out of danger. I am glad to say, however, that he (Berlin) is convalescing, and will soon be all right, and will settle the note in the regular way. Assuring you that I shall always endeavor to guard the interest of the U. C., as well as do justice to policy holders who favor me with their business, I am, very resp.,

"J. B. Marmon."

"July 31, 1895.

"E. P. Marshall, Secretary Union Central Life Ins. Co., Cincinnati, Ohio—
Dear Sir: Inclosed you will please find particulars as nearly as I can get them of the death of Mr. Berlin. I hold two notes of Mr. Berlin's. When the first note fell due, I told Mr. Berlin that I would see it paid the company in order to keep his insurance in force, and he understood that the company was satisfied as to the first note. I also assured Mr. Tucker that the note would be paid. Before the second note fell due I called on Mr. Berlin, as I have before stated, and sought to impress him with the importance of paying the amount, and agreeing that if he would pay a part of the note that I would renew the other for him, which he said that he would be able to do the next day. I do not remember the date, but he did come to his office the next day, but remained only a short time, returning home before I got to see him. I inquired about him from time to time at his office, and was informed that he was getting along nicely and would be up in a short time, and, not wishing to be too exacting with him, I let the matter stand as it was, thinking each day that I would see him. I had a talk with his brother-in-law this morning, and, of course, he wants the insurance paid. I told him that I would inform him as fast as I was advised by you, and to do nothing until I received some instructions in the matter, which he agrees to do. Awaiting your reply and instructions, I am, very truly yours,

J. B. Marmon.

"(Dictated.)"

"Exhibit E.

"Memphis, Tenn., August 2, 1895.

"Mr. E. P. Marshall, Secretary Union Central Life Ins. Co., Cincinnati, Ohio—
Dear Sir: Yours of the 1st inst. just received. I am sorry that you misconstrued the meaning of my letter when I stated that 'I told Mr. Berlin that I would pay the company his first note.' I meant that I owed the company thirty-two and 45-100 dollars, and, when the report was made to the company that the check for that note would be remitted, I did nothing in the name of the company, and if Mr. Berlin had asked me for the company's note, and had given me his individual note, I would have surrendered it to him without a

word, for I understood that I was responsible for the amount of the note. As to the second note, I cannot see how you could possibly understand that I had made or offered to make an extension on it. I had been instructed by Mr. Tucker to renew the second note if he (Berlin) would pay the first note. Mr. Pattison says in his letter to me that it is proper for an agent to say to a policy holder that he can get his paper renewed if he can pay all of the note. I said this to Mr. Berlin, and even went further, and tried to impress him with the fact that if he did not fix the note in some way when due that I could not keep his insurance in force any longer. I told Mr. Yowell, the Arkansas watchdog of the treasury, the same when he was here."

"Exhibit J.

"Memphis, Tenn., Aug. 3, 1895.

"Mr. E. P. Marshall, Secretary Union Central Life Ins. Co., Cincinnati, Ohio—Dear Sir: Yours of the 1st inst. received late yesterday evening. I am sorry that you misconstrued the meaning of my letter in regard to the first note of Mr. Charles L. Berlin. I can but reiterate what I stated in my letter of the 31st ult., namely, 'that I told Mr. Berlin, when his first note was due, that I had settled with the company and his insurance was in force. I also assured Mr. Tucker that the note would be paid,'—and had Mr. Tucker made his report the note would have been reported paid. I called on Mr. Berlin some days before his second note was due, and agreed to renew it, provided he would pay me a part of the first note, which he assured me he would do as soon as he came to his office. It was not my purpose to disobey instructions in not sending the notes as instructed. I fully intended to come to Cincinnati at once, and bring the notes with me, but found it impossible to leave, so sent the notes as instructed as soon as I found that I could not leave. Hoping that this will be sufficiently explicit for you to understand my exact position in the matter, and again assuring you that I shall endeavor to protect the interest of the company, and at the same time be loyal to those who have kindly favored me with their business, I am, very truly yours,

J. B. Marmon.

"Mr. Tucker will return about the 8th, J. B. M."

"Received August 5, 1895. The Union Central Life Ins. Co."

"Exhibit J.

"No. 370 Front St., Memphis, Tenn., Aug. 14, 1895.

"Mr. Jno. M. Pattison, Pres. Union Central Life Ins. Co., Cincinnati, Ohio—Dear Sir: Mr. Tucker has just returned, and wishes me to write you now while the matter is fresh in my mind all the facts about the Berlin notes. I think my former letters cover the matter fully, but I will go over the whole transaction again as fully as possible. When the Berlin note, dated February 15, 1895, and due May 15, 1895, was due, Mr. Berlin stated to me that one Mr. Gilchrist, a real-estate agent, had sold some property that he was interested in and had not turned over to him (Berlin) his (Berlin's) part of the commissions, and though he had made repeated efforts to collect from Gilchrist, had failed, and had no other money he could pay the note with. He requested, as a personal favor of me, to protect his insurance, which I consented to do, and told Mr. Tucker at once that I would assume this note. I did not pay the money to Mr. Tucker, because I had money to my credit with him. Mr. Tucker considered the note paid as far as Berlin was concerned, and would have reported it paid to the company, as I have said before, if he could have gotten off his report before he left on his summer trip. I called to see Mr. Berlin on July 6th, and told him that I would renew the second note, provided that he would pay me one-half of the first note, understanding, of course, that he would have to be in good health, or furnish a health certificate, indorsed by one of our medical examiners. When I assumed the first note, I did not give it to Mr. Berlin, but held it instead of a personal obligation, as I have frequently done before, but would have exchanged it for his personal obligation if he had so desired. He, Mr. Tucker, and myself understood that the note was settled, so far as he (Berlin) and the company were concerned. When I received your telegram requesting me to send both notes, while I did not consider that the first note belonged to the company, I wished to comply strictly with instructions, so sent them both as instructed. Berlin had drawn

the money from his employer to pay the one-half of the first note, and, had I gone to his house, I would have gotten the money; but, as I have said before, I did not care to be too exacting of him, hence carelessly let the matter stand, expecting to see him every day. When I called to see Mr. Berlin on July 6th, he was not confined all the time to his bed, and, when I was shown in, he sat out in the hall and talked with me for some time. He was confident that he would be at his office the next day, and then we could arrange the insurance. I regret exceedingly that this should have occurred, but feel that I have done nothing to compromise the company. It is especially unfortunate, for the public are so suspicious about insurance companies, and competing agents are so prone to use anything of the kind against us,—in fact, it has already been intimated by some that the U. C. has a contested claim against them,—that, should the Berlin policy not be paid, I fear that it will very materially injure our business here. Hoping that this will be sufficiently explicit, I am, very respectfully,
J. B. Marmon."

Exception was duly taken to the court's refusal to give a peremptory instruction in favor of the defendant; also to the denial of a special instruction requested, and to certain parts of the charge; and error is assigned accordingly.

Robert Ramsey and F. M. Thompson, for plaintiff in error.

Wm. M. Randolph, for defendant in error.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case, delivered the opinion of the court.

The question presented by the motion to direct a verdict for defendant, and by the assignment of error to the ruling of the court on the motion, is whether, upon the evidence disclosed in the letters of Marmon, the assured, Berlin, as a man of ordinary intelligence and prudence, was or could have been misled or induced to believe that the premium note falling due July 15, 1895, had been or would be extended, by reason of what had occurred between him and Marmon, without anything further on Berlin's part. Having stated the evidence at length, it would seem to require no particular discussion to show that no reasonable or just view which could be taken of this evidence would justify the conclusion that the insured was misled, or misunderstood the effect of a failure to pay the July installment of premium according to the very plain terms of the contract. The parties having made certain terms conditions on which the contract was to continue or to terminate, the contract as thus made must be enforced, unless performance was waived by the insurer. *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Insurance Co. v. Rosenfield*, 37 C. C. A. 99, 95 Fed. 358. All dealings in relation to the policy after its delivery to Berlin are found in what occurred in regard to the premium notes maturing May 15th and July 15th. The assumption of the first note was not on behalf of the company, but the individual undertaking of Marmon, affecting the relation between him and Berlin only. Such negotiations as took place in respect of the second (or July) note could only impress upon a reasonably intelligent, prudent person the importance of prompt payment of this installment of premium, and the danger of nonpayment. The understood necessity for a medical certificate of good health or

freedom from dangerous illness in order to renew the second note, with continued sickness from July 7th, furnishes a probable explanation of the failure by Berlin to take any further action after that date. But, be this as it may, the suggestion that he was misled as to the effect of what had taken place is wholly without support in the evidence. We conclude, therefore, that the facts furnish no foundation for the claim that forfeiture of the policy for breach of the condition requiring prompt payment of the premium was waived, and that it could not be reasonably inferred from the facts that Berlin was misled in this respect. Under such circumstances there was error in the court's refusal, on motion, to withdraw the case from the jury.

This view, being conclusive of the case as presented by the record, renders it unnecessary to consider other assignments of error. Reversed and remanded, with a direction to set aside the verdict and grant a new trial.

GULF, C. & S. F. RY. CO. v. CLARK.

(Circuit Court of Appeals, Eighth Circuit. April 9, 1900.)

No. 1,294.

1. PUBLIC LANDS—RIGHTS OF OCCUPANT UNDER HOMESTEAD LAW—ACTION FOR TRESPASS.

A receiver's receipt, issued to one in possession of public land claiming it as a homestead, under the provisions of Rev. St. § 2290, constitutes title which will support an action to recover damages to the land inflicted by a wrongdoer who does not connect himself with any claim or interest in the land.

2. WATER COURSES—RIGHTS OF RIPARIAN OWNERS—RESTORING STREAM TO ORIGINAL CHANNEL.

A riparian owner upon a stream may construct necessary embankments, dikes, or other structures to maintain his bank of the stream in its original place and condition, or to restore it to that condition, and to bring the stream back to its natural course, when it has encroached upon his land; and, if he does no more, other riparian owners cannot recover damages for the injury his action causes them.

In Error to the United States Court of Appeals in the Indian Territory.

W. A. Ledbetter, S. T. Bledsoe, and J. W. Terry, for plaintiff in error.

A. Eddleman and J. F. Sharp, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ROGERS, District Judge.

SANBORN, Circuit Judge. This was an action by H. H. Clark, the defendant in error, against the Gulf, Colorado & Santa Fé Railway Company, the plaintiff in error, to recover damages for diverting the current of the Canadian river in the Indian Territory, so that it washed away 90 acres of the land of the defendant in error which was located on the east bank of that river. The railway company denied that it had diverted the channel of the river to the injury of the defendant in error, and upon a trial of the issues a verdict was rendered

against it, which has been affirmed by the court of appeals in the Indian Territory. The evidence tends to show that the defendant in error was, in 1894 and 1895, in possession of the 90 acres of land which was washed away, as a homesteader, under section 2290 of the Revised Statutes of the United States; that he held a receiver's receipt for it; that in 1870 the current of the Canadian river at this point ran some distance east of the channel which it occupied in 1890; that during this period between 1870 and 1890 the railroad company had constructed an embankment, and placed its railroad upon the solid land, some distance west of the westerly bank of the Canadian river; that the river gradually washed away the westerly bank until it encroached upon and swept away some portion of the railroad embankment; that in 1890 or 1891 the railway company constructed dikes, on what was originally solid land some distance back from the westerly bank of the river, for the purpose of restoring the current of the river to its original channel; and that these dikes encroached upon the channel of the river as it actually was at the time they were constructed, but did not encroach upon or extend into the channel of the river as it was originally located in 1870, before the river encroached upon its westerly bank. In 1894 and 1895 this river, during a period of high water, washed out about 90 acres of the land of the defendant in error. The testimony was contradictory upon the question whether or not the removal of this land was due to the construction of the dikes.

The right of the defendant in error to recover at all, and his right to recover all the damages which resulted to the land, are challenged by the plaintiff in error on the ground that he had no title to the land, except his possession and his receiver's receipt as a homesteader. But the receiver's receipt of one in possession claiming land under it in accordance with the provisions of section 2290 of the Revised Statutes of the United States constitutes ample title, as against a wrongdoer who does not connect himself with any claim or interest in the land, to warrant a recovery from him of all the damages which he causes to the property. *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 839; *Railroad Co. v. Lewis*, 7 U. S. App. 254, 2 C. C. A. 446, 51 Fed. 658; *Railway Co. v. Johnson*, 10 U. S. App. 629, 637, 4 C. C. A. 447, 452, 54 Fed. 474, 479; *Wilson v. Owens* (Ind. T.) 38 S. W. 976; *Mansf. Dig. Ark. § 2628*; *Brummett v. Pearle*, 36 Ark. 471; *Hill v. Plunkett*, 41 Ark. 465.

It is assigned as error that the trial court erred in refusing to instruct the jury, at the request of the railway company, that the company had no right to change the original current of the river from where it was located before the river encroached upon and washed away its roadbed, but that it had the right, after the river had encroached and washed away the roadbed in the manner described in the testimony, to restrain the current of the river to the position it was in before the defendant's roadbed was washed away, and that if the jury found, from the evidence, that the company did nothing more than to restrain the current of the river to its original position, then

they should find for the company; and that, on the other hand, it instructed the jury—

"That the defendant had no right, by the construction of a dike or dikes, to turn the current of the river from its natural and accustomed channel, so as to throw it over onto the plaintiff's land, and that in an ordinary water course, for its own protection, the defendant had no right to build anything which in times of ordinary flood will throw the water on the lands of the plaintiff, so as to wash them away and injure them, and, though the river threatens to change its channel and to encroach upon the land of the defendant, yet the defendant cannot protect itself to the prejudice of the opposite proprietor. Hence, gentlemen of the jury, if you believe, from the testimony, that the construction and maintenance of the dike or dikes by the defendant was the direct and proximate cause of the injury and damages done to the plaintiff, if any, you will find a verdict for the plaintiff."

In view of the evidence before the jury in this case, this action of the court below cannot be sustained. When the dikes were constructed, the channel of the river had been gradually changing towards the west, until it had encroached upon the west bank a long distance, and the construction of the dikes necessarily changed the channel from its later location back to the position in which it was originally found. That was the purpose of their construction. While it is well settled that a riparian owner has no right to obstruct the natural channel of the river, so as to divert the current of the stream from its natural course, the true rule is that, when the river encroaches upon his land, he may take the necessary steps and use the necessary means to restore it to its original channel, to maintain his bank in its original condition, and to that extent, at least, to protect his property from the incursions of the water. The charge of the court impinged upon this rule of law, because it instructed the jury that the railway company could not under any circumstances protect itself or its own bank to the prejudice of the opposite proprietor. The restoration of a river to its original channel, and the maintenance of one of its banks in its original and natural condition, may often be to the prejudice of the riparian owners upon the other side of the stream, both in times of high and low water. But a riparian owner on the westerly bank of a stream is not required to sit in silence until his property is swept away by an encroaching river, because his preservation of it may increase the depth of the water in the channel, and cause an injury to the owner of the opposite bank which he would not have suffered if the water had been permitted to carry away the westerly bank. He has the right to protect his property against such encroachments, and when they have occurred, and the current of the stream has turned over upon his land, he has the right to restore it to its original channel. Any injury sustained by the owner of the opposite bank through such action is *damnum absque injuria*, and can only be avoided by his exercise of the same right to protect his own bank. A riparian owner may construct the necessary embankments, dikes, or other structures to maintain his bank of the stream in its original condition, or to restore it to that condition, and to bring the stream back to its natural course; and, if he does no more, riparian owners upon the opposite or upon the same side of the stream can recover no damages for the injury,

his action causes them. *Farquharson v. Farquharson*, 3 Bligh, Pr. N. S.) 421, 422; *Rex v. Sewer Com'rs*, 8 Barn. & C. 355; *Lamb v. District* (Cal.) 14 Pac. 625; *Hoard v. City of Des Moines* (Iowa) 17 N. W. 527; *Ang. Water Courses*, § 333; *Barnes v. Marshall* (Cal.) 10 Pac. 115; *Taylor v. Fickas*, 64 Ind. 167; *Turnpike Co. v. Green*, 99 Ind. 205; *York Co. v. Ralls*, Can. Law T. Feb. 1900.

For the failure of the court below to try this case in accordance with this rule, the judgments of the court of appeals in the Indian Territory and of the United States court for the Southern district of the Indian Territory must be reversed, and the case must be remanded to the latter court for a new trial; and it is so ordered.

BRADLEY SALT CO. v. NORFOLK IMPORTING & EXPORTING CO. OF VIRGINIA.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 346.

1. LIMITATIONS—EXTENSION OF TIME FOR BRINGING SUIT—VIRGINIA STATUTE.

Code Va. § 2934, as amended by Acts 1893-94, provides, among other things, that if in any action commenced within due time the plaintiff shall bring the wrong form of action, and judgment shall be rendered against him solely on that ground, "in every such case, notwithstanding the expiration of the time within which a new action must otherwise have been brought, the same may be brought within one year after such * * * judgment against the plaintiff, but not after: provided, however, that the time that any such action or suit first brought shall be pending in any appellate court shall not be included in the computation of said year." *Held*, that such year does not run from the judgment of the appellate court, but from that of the lower court, excluding from the computation the time during which the action was pending in the appellate court.

2. SAME—ACTION AGAINST CORPORATION—EFFECT OF DISSOLUTION.

Code Va. § 1103, providing for the application and distribution of the property of corporations on dissolution, and for the continuance of the corporation for the purposes of suits, etc., contains nothing by reason of which the running of the statute of limitations in favor of a corporation is suspended on its dissolution and the distribution of its property as against an ordinary action at law brought to recover a judgment against it.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

This is an action in assumpsit instituted December 5, 1898, for the breach of a contract dated February 3, 1891, by which the defendant company agreed with the plaintiff company to receive from it during the year 1891, and pay for, a large quantity of salt, the plaintiff's cause of action having accrued on January 1, 1892. The defendant pleaded limitations. The Virginia statute of limitations requires such suits to be brought within five years after the cause of action accrues. This action was, therefore, clearly barred unless the plaintiff could bring itself within some exception to the running of the statute. The plaintiff sought to do this by its third replication, in which it averred that on April 24, 1895,—within five years next after the cause of action accrued,—it commenced in the court of law and chancery of the city of Norfolk, Va., an action of covenant against the defendant on said agreement to recover the same damages for the breach thereof for which this action was brought, and that on December 7, 1897, judgment was given against it in said action in the

supreme court of appeals of Virginia, solely upon the ground that it had proceeded in the wrong form of action, and that this present action was brought within one year after such judgment. To this, plaintiff's third replication, defendant demurred. For a further replication to the defendant's plea of the statute of limitations the plaintiff filed its fourth replication, averring that within five years next after the cause of action accrued, to wit, during the year 1896, the defendant corporation was dissolved, and its corporate rights and privileges ceased, and thereupon, pursuant to section 1103 of the Code of Virginia, all the property of the defendant and all debts due to it became subject to the payment of the said damages in the declaration mentioned. And the said plaintiff says that it thereupon became and was the duty of said defendant to apply its said property and debts due to it to the payment of the debts due by it, but the defendant did not so apply its property and assets, but distributed the same among the members prior to its dissolution. To this replication also the defendant demurred. To enable the court to dispose of the case upon the pleadings, the parties filed the following agreement of facts: "First. That it is true, as alleged in the declaration, that the contract declared on was to be performed during the year 1891. Second. That it is also true, as alleged in the declaration, that an action of covenant was brought on the 24th day of April, 1895, in the court of law and chancery for the city of Norfolk, on said contract, for the same damages as those claimed here; and that there was, on the 27th day of November, 1895, a judgment entered in said court against the plaintiff on the demurrer of the defendant upon the ground that he had brought the wrong form of action, to wit, an action of covenant instead of an action of assumpsit. Third. That on the 5th day of March, 1896, a writ of error to said judgment of the said court was allowed the plaintiff by one of the judges of the supreme court of appeals of Virginia. Fourth. That it is true, as alleged in the declaration, that on the 9th day of December, 1897, the said supreme court of appeals affirmed the said judgment of the said court of law and chancery for the city of Norfolk, rendered as aforesaid against the plaintiff on the said 27th day of November, 1895. And, fifth, that this action is for the same damages as aforesaid, and was brought on the 8th day of December, 1898." The trial court held that section 1103 of the Code of Virginia, relied upon in the plaintiff's fourth replication, and section 2934 of said Code as amended, relied upon in the third replication, did not take the case out of the operation of the general statute of limitations, and that the plea of the statute of limitations was good, and sustained the defendant's demurrer to the plaintiff's replications, and dismissed the suit. The plaintiff has brought the case here by writ of error.

James E. Heath, Jr. (Gilmor S. Kendall and James Heath, on the brief), for plaintiff in error.

William H. White, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge (after stating the facts as above). This case involves the construction of section 2934 of the Code of Virginia, as amended by Acts 1893-94, and as further amended in matters not affecting this case at the session of 1897-98, and which now reads as follows:

"Sec. 2934. Further Time Given; When Suit Abates, or is Defeated on Ground not Affecting the Right to Recover.—If an action, commenced within due time in the name of or against one or more plaintiffs or defendants, abate as to one of them by the return of no inhabitant, or by his or her death or marriage; or if, in an action commenced within due time, judgment for the plaintiff shall be arrested or reversed upon a ground which does not preclude a new action for the same cause; or if there be occasion to bring a new suit by reason of the loss or destruction of any of the papers or records in a

former suit which was in due time, or if in any pending cause, or in any action or suit hereafter commenced within due time in any of the courts of this commonwealth, the plaintiffs proceed or have proceeded in the wrong forum, or bring the wrong form of action, or against the wrong defendant, and judgment is rendered against the plaintiff solely upon such ground, in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, or arrest, or reversal of judgment, or loss or destruction, or judgment against the plaintiff, but not after: provided, however, that the time that any such action or suit first brought shall be pending in any appellate court shall not be included in the computation of said year."

We are not aware that the points involved in the present case have been determined by any court of Virginia. The case in hand is one in which the judgment of the court of law and chancery of Norfolk city was rendered against the plaintiff solely upon the ground that it had brought the wrong form of action, to wit, an action of covenant, instead of an action of assumpsit, and section 2934 is applicable. By omitting the parts not pertinent to this case, the section may be condensed to read as follows:

"Or if in any pending cause or in any action or suit hereafter commenced within due time * * * the plaintiff * * * bring the wrong form of action, * * * and judgment is rendered against the plaintiff solely upon such ground, in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such * * * judgment against the plaintiff, but not after: provided, however, that the time that any such action or suit first brought shall be pending in any appellate court shall not be included in the computation of said year."

The plaintiff's cause of action accrued January 1, 1892, and the five-years limitation expired January 1, 1897. The plaintiff began its action of covenant in the court of law and chancery of Norfolk April 24, 1895, and the judgment against the plaintiff was entered November 27, 1895. The plaintiff waited until March 6, 1896, before it, by writ of error, took the case to the supreme court of appeals of Virginia. That court, on December 9, 1897, affirmed the judgment of the lower court, and the plaintiff then waited until December 8, 1898, when it brought this suit. The plaintiff contends that the year allowed him by section 2934 in which to bring a new suit is one year from the date of the judgment against it in the appellate court, and that it brought this suit within one day of the expiration of the year. The defendant contends that the meaning of the section is that the plaintiff had one year after the judgment rendered against him in the lower court, not including in the computation of said year the time during which the action was pending in the court of appeals. The whole time from the date of the judgment against the plaintiff, November 27, 1895, to the date of entering the present suit, December 5, 1898, was three years and nine days, and the time the case first brought was pending in the appellate court was one year, nine months, and three days, so that, deducting that time, there remains one year, three months, and six days as the time which elapsed between the judgment against the plaintiff and the bringing of this suit. It seems to us that this method of computation precisely gratifies the words and meaning of the statutes. The statute provides as plainly as lan-

guage can express it that the plaintiff who loses his suit upon certain grounds not going to its merits can bring a new suit within one year, notwithstanding it would otherwise be barred by limitations; and it further provides that, if he chooses to test the judgment given against him by an appeal, the time during which the appeal may be pending in any appellate court shall not be included in the computation of the year. The language and intention of the statute is so plain that we can find no occasion for construction, and neither argument nor illustration can make it plainer.

The plaintiff's fourth replication averred that in 1896, which was within five years after the action accrued, the defendant corporation was dissolved, and that thereupon, under section 1103 of the Code of Virginia, it became the duty of the said corporation to apply its assets to the payment of its debts; but, instead of so doing, it distributed its assets among its shareholders. It is difficult to comprehend how, in an action at law against a corporation upon a contract, it can be a good reply to the statute of limitations to simply aver that the corporation had, during the running of the statute, been dissolved, and the assets distributed. The theory advanced by counsel for the plaintiff is that, upon the dissolution of the corporation, its assets became a trust fund for the payment of its liabilities, and the corporation a trustee for the purpose of distributing its assets and winding up its affairs. But this is not a suit based upon the plaintiff's right to participate in a trust fund. The plaintiff is not suing for the benefit of all the creditors. This is an ordinary common-law action against a corporation by which the plaintiff seeks to recover a judgment upon its own claim which accrued nearly seven years before the suit was brought. Section 1103 of the Virginia Code, as printed in plaintiff's brief, gives no new right of action or remedy. It simply provides that, when any corporation shall expire or be dissolved, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among its members, and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, enforcing its liabilities, and distributing the proceeds of its works, property, and debts among those entitled. It makes provision for serving process upon such a corporation by publication. No provision is made with regard to the statute of limitations. There is, therefore, nothing in section 1103 which creates an exception to the statute of limitations when pleaded in a common-law suit such as this. We find no ground upon which plaintiff's contentions can be sustained. Judgment affirmed.

WHEELER v. McNEIL et al.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1900.)

No. 1,269.

1. ESTOPPEL—SHOWING CONSIDERATION OF CONTRACT—EFFECT OF RECITALS.

Where by a contract one party agreed to execute his notes to the other for a lump sum,—the consideration being the satisfaction of a judgment against the maker for a much larger amount, and the rendition by the payee of services as a lawyer in certain pending litigation,—a subsequent agreement apportioning such notes between the two considerations does not estop the payee, in a suit by the maker for cancellation of the notes apportioned as a retainer on the ground, among others, that the amount was excessive and exorbitant, from showing that such notes were in fact based on both considerations.

2. CONTRACTS—RESCISSION FOR FRAUD—LACHES.

A party having the right to rescind a contract for fraud is required to disaffirm the same at once on discovering the fraud, to restore any consideration received, and place the other party as near as may be in statu quo; and a suit in equity to rescind cannot be maintained five years after the contract was made, during all or the most of which time the complainant had full knowledge of the facts constituting the alleged fraud, and with such knowledge held the defendant to full performance.

Appeal from the Circuit Court of the United States for the District of Colorado.

This suit arose in this way: On June 8, 1893, the appellee Atterson W. Rucker had a judgment against the appellant, Jerome B. Wheeler, for \$801,670.87, and an appeal from that judgment was pending in the supreme court of the state of Colorado. Thereupon they made an agreement that in consideration of the settlement of that judgment, and the retainer of Rucker in certain suits against Wheeler maintained by parties claiming under one Wood, Wheeler should pay to Rucker \$20,000 in money and \$280,000 in promissory notes, making in all \$300,000. Wheeler paid the money, made the notes, and made a written agreement with Rucker and the appellee John L. McNeil, dated on that day, which recites that Wheeler has retained Rucker in the actions pending against him by those claiming under Wood; that, as a retainer, he has executed and delivered to him his three promissory notes of \$25,000 each, due in 42, 48, and 54 months, respectively, from their date; and that he has deposited with McNeil, as security for the payment of these notes, 246,750 shares of stock in certain corporations. By the terms of this agreement, Wheeler authorized McNeil to sell the stock on default in the payment of any of the notes, and to apply the proceeds of the sale to the payment thereof. Default was made in the payment of the notes, and McNeil advertised a sale of the stock under the collateral agreement, to take place on March 19, 1898. Meanwhile one of the notes had passed to the appellees Thomas A. Rucker and the First National Bank of Aspen, and another to the appellee F. R. Dorr, while Atterson W. Rucker retained the third one. Thereupon, on March 15, 1898, Wheeler filed a bill in the court below to avoid the notes and the collateral agreement on the ground that they were obtained by extortion, fraud, and misrepresentation, and to enjoin the sale. The answers denied all the averments of fraud, misrepresentation, and oppression; alleged that the real consideration of the notes and the agreement was not only the retainer, but also the compromise and settlement of the judgment which Rucker had against Wheeler, and that the appellees Thomas A. Rucker, the bank, and F. R. Dorr were innocent purchasers, for value, of the notes which they held. Testimony was taken, and after final hearing the court dismissed the bill, and Wheeler appealed from that decree of dismissal.

James C. Starkweather and W. E. Hemingway, for appellant.

Tyson S. Dines and A. W. Rucker (Kyle Rucker, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The gravamen of the charge in this bill is that in June, 1893, while the appellant, Wheeler, was in financial difficulty, and while grave litigation was pending between him and claimants under Wood, the appellee Atterson W. Rucker, who was an attorney at law, falsely represented to him that he was familiar with the facts, and could and would render valuable services in the Wood litigation, if retained, and wickedly threatened that, if he was not so retained, he would disclose his knowledge and render his services to the claimants under Wood; that by means of these false representations and threats he induced and forced the appellant to give him as a retainer in the Wood litigation his promissory notes for \$75,000, and to secure them by the 246,750 shares of stock described in the collateral agreement. All the charges of fraud, deceit, threats, and extortion are denied by the answers. The record is voluminous. Upon some questions it is inconsistent, and upon others it is contradictory. It would serve no good purpose to review it in detail, and we content ourselves with a statement of the facts which in our opinion it establishes. Atterson W. Rucker was an attorney at law in June, 1893. He made no false representations of his familiarity with the facts in the Wood litigation, or of the services he would render if retained, which induced Wheeler to agree to pay him a retainer of \$75,000, or to make the three notes of \$25,000 each and the collateral agreement in suit. He made no threats to disclose his knowledge or render his services to the claimants under Wood which either forced or induced Wheeler to agree to pay him a retainer of \$75,000, or to make the notes and collateral agreement in suit. Rucker was not Wheeler's attorney or adviser prior to June 8, 1893. On the other hand, he had been and was prosecuting an action against Wheeler in his own behalf, in which he had obtained a judgment for \$801,670.87. Wheeler's appeal from this judgment was pending in the supreme court of Colorado. Wheeler was represented by, and in all he did in the negotiations and agreements of June 8, 1893, he acted under the advice of, his trusted attorneys at law, who had been acting for him in opposition to Rucker for years. Under these circumstances, Wheeler, his two attorneys, and Rucker met and negotiated for days to secure a compromise of the pending litigation over this judgment of Rucker against Wheeler. The result of that negotiation was that Rucker agreed to stand retained for Wheeler in his litigation with the claimants under Wood, and to render such services for him as he should request, and to satisfy his judgment for \$801,670.87, for \$20,000 in cash and \$280,000 in promissory notes. The three notes for \$25,000 each, here in suit, were part of the notes for \$280,000; and the real consideration for them and for the collateral agreement securing them was not the retainer of Rucker alone, but it was the compromise of the pending suit between Rucker and Wheeler and the retainer, and the chief consideration was the compromise. After this compromise and retainer for \$300,000 were agreed upon, Wheeler

and Rucker agreed to assign \$225,000 of the consideration to the compromise, and \$75,000 to the retainer, and the notes for the deferred payments and two collateral agreements which recited this appropriation were executed. Rucker never advised or acted as attorney for the claimants under Wood, but he remained faithful to his retainer, and rendered all the services for Wheeler that he was requested to render, but he was not called upon to render services of any substantial value. These facts furnish no ground for the granting of any relief to the appellant. He was not forced to execute the notes and agreement by any threats of Rucker. He was not induced to execute them by any false representations of Rucker. He was not deceived or persuaded into their execution by Rucker while he stood in a relation of trust or confidence with him. They dealt with each other at arm's length, and Wheeler made his notes and his collateral agreement, after full consideration, under the advice of his own attorneys who had been conducting his litigation against Rucker for years. There was no extortion of an unreasonable and exorbitant fee, because the chief consideration for the notes and agreement was the compromise of the judgment against Wheeler. The retainer of Rucker had little, if any, effect in increasing the amount agreed upon for the compromise and the retainer together, above the amount which would have been required to effect the compromise alone. The unavoidable conclusion is that the appellant failed to establish the essential facts which he pleaded in his bill, and for this reason his suit was rightly dismissed.

The contention of counsel for appellant that Atterson W. Rucker is estopped from taking advantage of the fact that the real consideration for the notes and the collateral agreement was the compromise of the judgment and the retainer, and not the retainer alone, has been considered. It is true that he signed the collateral agreement, which recites that the consideration for the three notes was the retainer; that at the same time he signed another agreement, that the remaining \$225,000 of the \$300,000 was to be paid for the compromise of the judgment; and that in his answer he admitted that it was agreed between him and Wheeler that \$75,000 of the \$300,000 should be designated and appropriated as his retainer. But it is axiomatic that the true consideration of an obligation or agreement may be proved, although it contains the recital of a false one; so that the agreements do not estop Rucker from proving and availing himself of the truth. Nor can his answer be permitted to have that effect; for while he admits in it that the agreement was made between himself and Wheeler to assign \$225,000 of the \$300,000 as the consideration for the compromise of the judgment, and \$75,000 as the consideration for the retainer, he also pleads that before this contract was made they had agreed that Wheeler should pay \$300,000 in solido for the compromise of the judgment and the retainer. Moreover, the evidence conclusively shows that the agreement to appropriate a part of the \$300,000 to the compromise of the judgment, and a part to the retainer, was a perfunctory contract, made without any actual consideration, after the negotiations for the compromise and the retainer had been practically concluded, and after the actual consideration for both had been fixed

at the lump sum of \$300,000. This is a suit in equity. The appellant has received the benefit of the compromise of the judgment and of the retainer. He agreed to pay \$300,000 for them. There is no equity in his claim to escape from a payment of any of the sums which he agreed to pay for two *considerata* which he has received, because he and Rucker assigned too large a share of that consideration to one, and too small a share of it to the other, of them.

There is another reason why this bill could not be maintained, even if the execution of the notes and the pledge of the stock were made to retain Rucker, and were induced by his alleged threats and misrepresentations. This is a bill to rescind a contract and to avoid a pledge, for fraud. Conceding the averments of the bill to be true, the contract and pledge were voidable, not void. They were valid until disaffirmed, not void until affirmed. *Stuart v. Hayden*, 36 U. S. App. 462, 475, 18 C. C. A. 618, 625, 72 Fed. 402, 409; *Oakes v. Turnquand*, L. R. 2 H. L. 325, 344; *Mining Co. v. Smith*, L. R. 4 H. L. 64; *Upton v. Englehart*, Fed. Cas. No. 16,800. Until they were disaffirmed, Rucker was bound by his retainer, and precluded from serving the claimants under Wood; and Wheeler was bound to pay the notes, or to apply the pledged stock to their payment. The contract and pledge were made on June 8, 1893. Wheeler's litigation with the claimants under Wood continued until December, 1895. He knew the character of the retaining fee he promised to pay, the threats and representations which he alleges induced the execution of the contract and the pledge, and whether or not these representations were true, immediately after June 8, 1893, for they related to the knowledge of Rucker, and the services he could render in the Wood litigation; and under the retainer he had a right to, and doubtless obtained from Rucker, a complete disclosure of Rucker's information, and the nature of the assistance he could render. In any event, he knew all the facts relative to the alleged fraud of which he complained as early as December, 1895, for then the Wood litigation practically ceased; and he knew what information Rucker had given, and what services he had rendered. Nevertheless he held Rucker fast under his retainer, repeatedly asked forbearance in the collection of the notes, and promised to pay them, and never attempted to rescind or avoid his contract and pledge until he commenced this suit, on March 15, 1898, about five years after the contract and pledge were made,—many years after he knew all the facts constituting the alleged fraud of which he complains, and more than two years after he had realized all the benefits of the agreement. These facts conclusively estop the appellant from rescinding or avoiding his contract and pledge.

For just and wise reasons, the law gives to one who is induced by fraud to make a contract the option, upon discovery of the facts constituting the fraud, to rescind the contract and restore the consideration, or to affirm it and recover the damages he has sustained. But it imposes upon him the imperative duty to exercise his option, to release the party with whom he has contracted, to restore any consideration he has received which may be restored, and to place the parties as near as may be in statu quo immediately upon the discovery of the fraud, if he would rescind or avoid his contract. Nor does it permit

him to speculate upon his option, to lie in ambush for years, until changes in the conditions or markets make his interest plain, before he makes his choice. Silence, delay, acquiescence, or the use or retention of any of the fruits of the contract for any considerable length of time after a discovery of the fraud is in itself an exercise of the option, and constitutes a complete and irrevocable ratification of the transaction. *Rugan v. Sabin*, 10 U. S. App. 519, 531, 3 C. C. A. 578, 580, 53 Fed. 415, 418; *Kinne v. Webb*, 12 U. S. App. 137, 144, 4 C. C. A. 170, 174, 54 Fed. 34, 38; *Stuart v. Hayden*, 36 U. S. App. 462, 478, 18 C. C. A. 618, 627, 72 Fed. 402, 411; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. Ed. 804; *Grymes v. Sanders*, 93 U. S. 55, 62, 23 L. Ed. 798. This rule is peculiarly applicable to cases of the character here in question, where the property in controversy is stocks of mining and other like corporations, which are speculative in character. *Grymes v. Sanders*, 93 U. S. 55, 62, 23 L. Ed. 798; *Kinne v. Webb*, 12 U. S. App. 137, 144, 4 C. C. A. 170, 174, 54 Fed. 34, 38. The appellant retained all the fruits of the contract and pledge he seeks to avoid. He held Rucker bound by his retainer for more than two years, until the Wood litigation had ended and he had derived all the benefits of the contract. He repeatedly promised to pay the notes, and obtained forbearance in the enforcement of the notes and the pledge, after he knew all the facts which constituted the alleged fraud, and he was thereby irrevocably estopped from rescinding or avoiding them long before he presented his bill. Equity will not relieve from the burdens of a contract induced by fraud, at the suit of a complainant who has acquiesced in it and accepted its benefits for years after he had full knowledge of the facts which constituted the fraud. The decree below is affirmed.

In re KEMP.

(District Court, D. Colorado. March 21, 1900.)

BANKRUPTCY—DISSOLUTION OF LIENS—ATTACHMENT.

The lien of an attachment levied upon property of an insolvent debtor within four months prior to the filing of his voluntary petition in bankruptcy will be dissolved by his adjudication as a bankrupt. If Bankr. Act, § 67, cl. "f," applies only to involuntary proceedings in bankruptcy, the case is covered by clause "c" of the same section, which relates to voluntary proceedings.

In Bankruptcy. On motion for the dissolution of an injunction and for the delivery of property of the bankrupt to petitioner.

H. S. Silverstein, for sheriff.

O. P. Grimes, for trustee.

HALLETT, District Judge (orally). A petition was filed January 15th and the adjudication was on the 20th of January last. In November prior to that, certain of the creditors, Adolph Hirsch and Simon Hirsch, took out a writ of attachment and levied it upon the goods of the bankrupt. This suit was pending at the time when the petition was filed and the adjudication made, and is still pending.

On the 20th of March, upon petition of the trustee, this court enjoined the sheriff of Teller county from selling the goods levied upon in the attachment suit; and, when the matter came on for hearing in the county court recently, it is said that the county court ordered the goods to be turned over to the trustee. The sheriff of Teller county has now moved the court to dissolve the injunction, which was issued on the 20th of March, and to require the trustee to turn over the goods to him; that is, to return the goods to him which he has delivered to the trustee under the order of the county court of Teller county. This motion must rest upon the ground that the attachment proceeding was not affected by the bankruptcy of the defendant in that suit. Upon that matter counsel for the sheriff contends that the question turns upon clause "f" of section 67 of the bankruptcy act. That clause declares that:

All "levies, judgments and attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of the petition in bankruptcy against him should be deemed null and void in case he is adjudged a bankrupt."

Counsel contends that this clause of section 67 relates only to a case in which there may be an involuntary petition filed upon which adjudication shall be made, and not to a case in which a voluntary petition shall be filed by the bankrupt. Some courts have apparently so decided; but those courts appear to be of the opinion that the cases of adjudication upon a voluntary petition fall under clause "c" of the same section, and that clause "c" relates to voluntary cases, and clause "f" of section 67 to involuntary cases. The court of appeals of the Seventh circuit held that this clause "c" was in conflict with clause "f" of section 67, and that clause "f" was the only one that could be enforced; also, that clause "f" related to voluntary as well as involuntary bankrupts. In *re Richards*, 37 C. C. A. 634, 96 Fed. 935. As stated before, other courts, circuit and district courts of the United States, have held that the two clauses, "c" and "f," may stand together, and that clause "c" may relate to voluntary cases. It is not necessary to decide in this case whether the view taken by the circuit court of appeals of the Seventh circuit be the correct one or not; but whether the case fall within clause "c," or within clause "f," the attachment must fall, as being one taken out within four months before the bankruptcy of Kemp. The adjudication of bankruptcy established the fact of insolvency, and under clause "c," the attachment having been taken out within four months before the bankruptcy, the bankrupt was insolvent at the time the proceeding in attachment was begun; and under that clause, if that be the one which is applicable to the case, the attachment fails as much as under clause "f" of the bankruptcy act. So that it must be said that the attachment taken out within four months of Kemp's bankruptcy was vacated and set aside by that proceeding on the part of Kemp,—by his becoming a bankrupt. And the plaintiffs in that attachment suit must stand upon the same footing as other creditors of the bankrupt. If the plaintiffs in that suit are entitled to anything for the care of the property pending the attachment, or if they are entitled to any part of the costs of that suit, they must apply before the

referee for the allowance of that claim as a preferred claim. There are decisions of the courts which show to what extent creditors in the position of the plaintiffs in the attachment suit may be reimbursed for the care of the property and the costs in the suit. Upon this, the motion of the sheriff of Teller county to have the property returned to him must be overruled.

In re KLINGAMAN.

(District Court, S. D. Iowa, E. D. May 22, 1900.)

BANKRUPTCY—PREFERENCES—TRANSFER OF PROPERTY.

Goods were sold on credit, with an agreement that the property was "pledged and hypothecated" to the vendors as collateral security for the payment of the price, and with authority to them to take possession and dispose of the goods, at their discretion, for security or reimbursement. It was not shown that the vendee was insolvent at this time; but afterwards the vendors, learning that he had become insolvent, procured the return to them of a portion of the goods, for the value of which they gave the vendee credit on the notes he had made for the purchase money. Within four months thereafter he became bankrupt. *Held*, that the vendors had received a preference, within the meaning of the bankruptcy act, by a transfer of property from the bankrupt, which was made at the time of the actual return of the goods to them, and not at the time of the contract of pledge and hypothecation; and, since its enforcement would enable them to obtain a larger proportion of their debt than other creditors, they could not prove a claim against the estate for the balance of the purchase money without surrendering the preference so received.

In Bankruptcy. On review of decision of referee in bankruptcy.

M. A. McCoid, for creditors.

SHIRAS, District Judge. From the certificate of the referee the facts in this case are shown to be as follows: On the 17th day of June, 1898, the firm of Luthy & Co., of Peoria, Ill., upon the order of Charles S. Klingaman, shipped to him some 4,000 pounds of binder twine; it being provided in the order that notes for the purchase price were to be given by Klingaman, payable on September 1, 1898, and it being also stipulated in the order that:

"All property delivered under this order, and the proceeds thereof, and the policies of insurance thereon, are hereby pledged and hypothecated to Luthy & Co. as collateral security for the payment as herein promised, and shall be held subject to their order, on demand, with authority to take possession and dispose of the same, at their discretion, for security or reimbursement."

On the 1st day of August, 1898, Luthy & Co., having learned that Klingaman was then insolvent, sent an agent to his place of business, who secured the return of \$100 worth of the binder twine bought of Luthy & Co., for which credit was given Klingaman on the notes he had given for the purchase price of the twine. Within a few days thereafter Klingaman filed his petition in bankruptcy, and on the 12th of August, 1898, he was adjudged a bankrupt, and in due season a trustee of his estate was appointed. Luthy & Co. thereupon filed for allowance against the bankrupt estate a claim consisting of the

balance due them after giving credit for the \$100 worth of goods received by them as above stated. To this claim objection was made on part of other creditors, on the ground that Luthy & Co. had in fact received a preference to the amount of \$100, and should not be permitted to prove up a claim for the balance due unless they should surrender the preference received by them, as provided for in section 57 of the bankrupt act. The referee held that the provisions of the contract of purchase gave to Luthy & Co. an equitable lien upon the goods sold for the purchase price; that the trustee took the estate subject to all just liens or claims enforceable against the bankrupt; that the ordinary creditors were not protected by the provisions of the Code of Iowa regulating the recording of instruments affecting the title to personal property; and that the delivery to and reception by Luthy & Co. of the twine, under the facts shown in the evidence, did not constitute a preference under the bankrupt act, and therefore Luthy & Co. were entitled to prove up their claim without surrendering the property received by them. To this ruling the opposing creditors excepted, and now seek a review of the question by the court.

As I understand the facts of the case, at the time the twine was delivered back to Luthy & Co. Klingaman was then insolvent, and Luthy & Co. knew such to be the fact. By section 60 of the act it is declared that:

"A person shall be deemed to have given a preference, if, being insolvent, he had * * * made a transfer of any of his property, and the effect of * * * such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

It cannot be questioned that if Luthy & Co. are permitted to retain the property delivered to them on August 1, 1898, and to prove up the balance of the debt due them, they will be enabled to secure a greater percentage of their debt than the general creditors; and therefore it is clear that the pivotal question is whether, as between Luthy & Co. and the contesting creditors, the transfer of the property in fact took place on the 1st day of August, 1898, or on the 17th day of June, 1898, the date of the contract of purchase,—it not being shown that on that date Klingaman was insolvent. It will be kept in mind that Luthy & Co., by their own act, in seeking to prove up their claim, have invoked the aid of the court in bankruptcy for the enforcement of the provisions of the act; and they cannot insist upon their right to share in the dividends payable from the estate unless they meet the obligations imposed upon them by the provisions of the act, which are intended to enforce the equitable rule, established by the act, that among the creditors equality is equity.

On behalf of the contesting creditors it is claimed that, as against them, the transfer of the property must be deemed to have taken place on the 1st of August, 1898, whereas on behalf of Luthy & Co. it is claimed that the actual delivery then made to them of the property in question was in pursuance of the terms of the contract of purchase; that this contract gave them an equitable lien upon the goods then sold to the bankrupt, which they could enforce at any

time; that, as it is not shown that Klingaman was insolvent when the contract of purchase was executed, giving the lien cannot be deemed to be a preference; and, therefore, they are not required to surrender the goods received by them, or account for the proceeds, as a condition precedent to the allowance of their claim. Under the provisions of the bankrupt act of 1867 it was held that a preference given by means of a chattel mortgage dated from the time of the delivery of the instrument, and not from the time when the same was recorded or possession thereunder was taken. *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235. In the act now in force it is enacted (in section 3) that a petition for adjudication may be filed against an insolvent debtor within four months after the commission of an act of bankruptcy, and that, when the act charged consists in having made a transfer of property with intent to defraud creditors, or for the purpose of giving a preference, the four-months period is to date from the recording or registering of the transfer, when that is done, or, if not, then from the time the beneficiary takes notorious, exclusive, and continuing possession of the property. Under this section it is clear that if the creditors of Klingaman had filed a petition for adjudication against him, on the ground that, being insolvent, he had given a preference to Luthy & Co., by transferring to them the goods received on August 1, 1898, the act of preference would have been held to have been committed on the day the goods were delivered, and not upon the day the lien was contracted for. In other words, the commission of an act of bankruptcy, by transferring property while insolvent to one or more creditors with intent to prefer them, is declared to be committed when the instrument of transfer is recorded or registered, or, if not recorded or registered, then when the beneficiary takes open possession of the property, or when the creditors have received actual notice of the transfer.

Under the prior act of 1867, the preference was held to have been given when a lien, valid between the parties thereto, was created, although no notice thereof was given to the other creditors. Under the present act a preference is not created until notice thereof is given to the other creditors, either by recording or registering the instrument of transfer, or by taking actual or open possession of the property by the creditor, or by giving actual notice of the transfer to the creditors. It does not seem possible that congress did not intend this change in the rule to apply to questions arising between a creditor claiming the benefit of a preference and the other creditors. This would require the holding that upon a petition filed by creditors, based upon an act of bankruptcy in giving a preference when insolvent, the act of bankruptcy must be held to have been committed when the creditor recorded the instrument of transfer or took open possession of the property; but if the trustee or creditors, after the adjudication has been had, should seek to avoid the same transfer, it would be held that the transfer constituting the preference took place when the mortgage or contract was delivered to the creditor, although the same was not recorded, nor was possession then taken of the property intended to be transferred. In my judgment, it was the purpose of

this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held to have been committed when the transfer is made effectual as against other creditors by recording or registering the instrument of transfer, or by the beneficiary taking actual and open possession of the property, or by otherwise giving actual notice of the transfer to creditors. In other words, the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice of the transfer to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt.

The referee in this case correctly held that under the provisions of the Code of Iowa the failure to record the contract of purchase did not affect the validity of the equitable lien secured thereby as between the parties thereto, and that, as no subsequent lien had been obtained against the same up to the date when possession was taken on August 1, 1898, the lien was made effectual as against third parties by the act of taking possession; but the pivotal question under the bankrupt act is, when did this transfer take effect as against creditors, in the sense that thereby a preference was given to Luthy & Co.? If, as against creditors, it took effect on August 1, 1898, then it constituted a preference, as on that day Klingaman was insolvent, and Luthy & Co. knew it. If, however, the transfer, as against creditors, dates back to June 17, 1898, then it cannot be held to be a preference, as it is not shown that at that date Klingaman was insolvent. Under the provisions of the bankrupt act, it must be held, for the reasons already stated, that the transfer of the property to Luthy & Co. took effect on August 1st, and therefore this transfer constituted a preference to Luthy & Co.; and it follows that, under the provisions of section 57 of the bankrupt act, the claim of Luthy & Co. cannot be allowed, unless they surrender the preference they have received.

The ruling of the referee is therefore set aside, and the proceedings are remanded to him, with instructions to enter an order conforming to this opinion, and fixing some proper time within which Luthy & Co. may surrender the preference received, in case they so elect to do. The same order will be entered with respect to other claims of the same character, and to which this ruling is applicable.

In re MAYER.

(District Court, E. D. Wisconsin. May 14, 1900.)

1. BANKRUPTCY—FEES AND COSTS—ATTORNEY'S FEE.

The fact that a bankrupt has disobeyed an order of the court requiring the payment of money to his trustee, and has fled the jurisdiction, and is in contempt, will not prevent the allowance out of the estate of a proper fee to his attorneys for professional services rendered to the bankrupt in the course of the proceedings before the occurrence of the contempt; such misconduct on the part of the bankrupt being without their privity or complicity.

2. SAME—WHAT SERVICES INCLUDED.

Under Bankr. Act 1898, § 64b, subd. 3, providing for the allowance out of an estate in bankruptcy of a "reasonable attorney's fee, for professional services actually rendered * * * to the bankrupt in involuntary cases while performing the duties herein prescribed," the allowance must be restricted to compensation for services rendered to the bankrupt in the preparation of schedules, attendance at examinations, and other duties in aid of the estate and its administration. It should not include a fee for defending the bankrupt against charges of fraud or concealment of assets, or other matters involving his personal liability, civil or criminal, whether such charges grow out of the examination or otherwise, nor a general retainer in behalf of the bankrupt.

3. SAME—PREPARATION OF SCHEDULES.

In cases of involuntary bankruptcy, the services of the bankrupt's attorney in preparing the schedules required by the act may be compensated by a fee, payable out of the estate, varying in amount from \$25 to \$50, according to the extent of the work involved.

4. SAME—ATTENDING EXAMINATIONS.

For services rendered to an involuntary bankrupt while undergoing his examination before the referee, his attorney may be allowed a fee of \$25 for each day actually occupied in such examination, provided there are no unnecessary delays or adjournments caused by the conduct of the bankrupt himself in the examination.

In Bankruptcy. On an application by attorneys for the bankrupt for allowance of a bill of fees for services rendered on behalf of the bankrupt in the course of the proceedings, amounting to \$1,635, as itemized for retainer and per diem charges.

The referee certifies that the bankrupt has disobeyed the order of the court requiring payment of certain funds withheld from the trustee, has absconded, and stands adjudged in contempt. The questions certified thereupon are: (1) Can the claim for attorney's fees be considered while the bankrupt so remains in contempt? (2) If open to consideration, what services may be included in an allowance? (3) For what amount, under the circumstances stated? See (D. C.) 97 Fed. 328; (D. C.) 98 Fed. 839.

Timlin & Glicksman and Charles F. A. Groth, for bankrupt.
Bloodgood, Kemper & Bloodgood, for trustee.

SEAMAN, District Judge. This inquiry, which calls for an interpretation of the act in reference to allowances for attorney fees, is of special importance in its bearings upon other cases in this district, and I have given careful consideration to the matters submitted by the referee. The following conclusions are certified thereupon:

1. The bankrupt is in contempt, and clearly cannot move the court for any matter of indulgence until he has cleared his contempt. *Hov-
ev v. Elliott*, 167 U. S. 409, 436, 17 Sup. Ct. 841, 42 L. Ed. 215.

Whether this general rule would exclude him from invoking subsequently the benefits secured by statute of an allowance for his attorney is a question not presented on this record, for the reason that the application was made and the attorney's services were rendered before the occurrence of the contempt; and it is undoubted, both from the circumstances of the case and the reputation of his attorneys at this bar, that they were in no manner privy to the disobedience of the final order of the court. To the extent that such services were rendered within the intent of the statute, the subsequent misconduct of the bankrupt, without fault on the part of the attorneys, cannot serve to preclude the allowance of a fee.

2. The question of the extent of services for which such allowance is contemplated by the statute arises out of the provision in section 64b, under the head of "Debts Which Have Priority," that "costs of administration shall be paid," including "one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, * * * to the bankrupt in involuntary cases while performing the duties herein prescribed." The guarded language of this allowance and of the cognate provisions must be interpreted in the light of the intent manifested throughout the act to secure rigid economy in administering the estate in bankruptcy, and save to the creditors a considerable portion which was otherwise liable to be swallowed up in expenses,—a feature in which the former acts were found defective. The claimants urge that the grant of attorney's fees out of the estate is exclusively for the benefit and protection of the bankrupt, without regard to any benefit to the creditors; that it is made a matter of right, founded on the presumption of his surrender of all his possessions as demanded by the act, and on the equity of having any necessary services of an attorney in the course of the proceedings borne by the estate thus surrendered. If such interpretation is adopted, it would seem that no inquiry need be made in this case beyond that of the reasonableness of the claims presented, all being charged for one attorney. Both the fact and the need of able counsel to defend the bankrupt on serious charges of fraudulent conduct and concealment of property appear in this record and have otherwise come to the knowledge of the court. Even the disclosure in such proceedings of property, largely in excess of the claims in question, withheld and concealed by the bankrupt, and under his control, cannot serve to defeat the allowance, if it rests on statutory right and not in judicial discretion, aside from the measure of allowance.

I am of opinion, however, that the terms of the provision for the services of an attorney "to the bankrupt in involuntary cases while performing the duties herein prescribed" are thus limited in strict accord with the general tenor and spirit of the enactment, and neither express nor intend an allowance for the defense of the bankrupt through the course of the proceedings in matters involving his personal liability, civil or criminal. The duties to be performed by the bankrupt in the proceedings are prescribed in section 7, and all relate to attendance and services of presumptive benefit to the estate, with the possible exception of attending at "the hearing upon his applica-

tion for a discharge." The preparation of schedules by the bankrupt in involuntary cases, and his attendance on compulsory examinations before the referee, are matters in discharge of his duty, for the benefit of the estate, and each may require the services of an attorney, for which the estate thus receiving the benefit is chargeable for reasonable compensation; but, in conformity with the purposes of the act, the allowance must be made "sparingly and with great caution." In *re Kross* (D. C.) 96 Fed. 816, 819. When the examination involves the prior transactions and conduct of the bankrupt, he is entitled to allowance for the services of counsel therein to the extent only of saving and protecting his rights on the inquiries so made, and not for subsequent services in his defense, whether they arise out of such examination or otherwise. The test for compensation out of the estate is whether the service is rendered in the performance of the bankrupt's duty in aid of the estate and its administration, and not whether the bankrupt stands in need of the service of counsel for his personal benefit and protection in any of the proceedings. No sanction appears in any of the provisions for an allowance in the last-mentioned view, and its adoption would violate the general consistency of the act for securing economy in administration. Indeed, the policy of compensating counsel assigned by the courts to aid needy defendants in criminal prosecutions has never been adopted by congress, and it would seem anomalous to impose the burden of such defense of a bankrupt on the creditors. The opinion recently handed down in the circuit court of appeals for this circuit (*In re Curtis*, 100 Fed. 784) is well in point, both for a general rule of construction to be applied to the act in reference to expenses and for its interpretation of the analogous allowance in the same connection of an attorney's fee to the petitioning creditors in involuntary cases. It is held to be limited strictly "to the service rendered in procuring the adjudication." On the construction indicated, the services rendered in preparing the schedules, and in attendance on the examination of the bankrupt before the referee pursuant to the order, are entitled to an allowance. All other claims are rejected, including that for "retainer."

3. The inquiry as to the amount to be allowed for items of service so approved cannot be definitely answered, for want of specific information of the extent and circumstances of the service; but the statement of a general rule for measuring the allowance will serve for an adjustment by the referee. (1) It is certified by the referee that his customary allowance for service in drafting schedules is from \$25 to \$50, according to the extent. This work is mainly clerical, and the practice in that regard is approved. (2) As indicated above, I am of opinion that the bankrupt is entitled to counsel while undergoing his examination before the referee in respect of his affairs and conduct. Ordinarily this should not require attendance on more than one or two days. If extended, however, at the instance of the creditors or trustee, without delay needlessly caused by the conduct of the bankrupt in the examination, the time so occupied must be computed in making the allowance. The examinations should be conducted with reasonable dispatch, and without unnecessary adjournments; and if, in any case, there is procrastination or prolixity on

the part of the moving parties, the increased expense must be borne by the estate represented. The number of days of actual service within this view will be determined by the referee, and thereupon a per diem allowance of \$25, as charged in the statement filed herein, is deemed reasonable, and in accord with the views expressed in *Re Curtis*, *supra*.

In re ANSON.

(District Court, N. D. California. November 24, 1899.)

BANKRUPTCY—PRIORITY OF CLAIMS—WAGES OF LABORER.

An employe of a bankrupt, having a claim against him for wages earned within three months before the commencement of the proceedings in bankruptcy, does not lose the right of priority accorded to him by Bankr. Act, § 64b, subd. 4, by reason of the fact that, within four months before the bankruptcy, and while the debtor was insolvent, he recovered a judgment against him for such wages and other claims; but the original claim for wages may be proved as an unsecured debt, and will be entitled to priority of payment.

In Bankruptcy. On review of decision of referee in bankruptcy.

Within four months prior to the filing of the petition in bankruptcy in this case, one Brady recovered a judgment against the bankrupt, on a claim for wages earned by him as a clerk in the bankrupt's store, amounting to \$108.33, and a claim for money loaned, and for costs. In the bankruptcy proceedings, Brady proved his debt against the bankrupt for the wages so earned as an unsecured debt, not relying upon the judgment, and surrendered to the trustee in bankruptcy certain property which he had caused to be attached under the judgment. On a re-examination of the claim, the trustee in bankruptcy opposed the allowance of the claim as a debt entitled to priority of payment under the provisions of the bankruptcy act.

The opinion of Referee E. P. FOLTZ was as follows:

"The question presented upon the re-examination of the claim of John E. Brady against the estate of M. F. Anson, bankrupt, is as follows: Where a creditor has earned wages within three months before the commencement of proceedings in bankruptcy, and within four months before the commencement of proceedings in bankruptcy obtains a judgment for said wages and for another claim while the bankrupt is insolvent, has such creditor lost his priority as to the original claim for wages earned within three months before commencement of proceedings? Counsel for the trustee maintains that the original cause of action is merged in the judgment, so that it loses its character as a claim for wages, and is not entitled to priority as wages. As a general rule, the original cause of action is merged in the judgment. According to the later and better authorities, the reason of the rule is that a new suit would be superfluous, and against the interests of both parties. It is to prevent needless and endless litigation. Therefore the judgment is regarded as a new debt, and the only exception is where so regarding it would work a manifest hardship. *Freem. Judgm. § 215*. The question is, does the present case come under the rule or under the exception? The reason of the doctrine of merger does not apply to the present case. The plaintiff here does not seek to litigate his claim again, for the purpose of securing a more satisfactory judgment; but, as the law has destroyed his judgment lien (section 67f of the act), he claims the right to be put in the same position as he would have been in had he not obtained a judgment. In many cases the judgment has been held not to be an absolute merger of the original debt,—not a new debt, but a new security for an old debt. *Freem. Judgm. § 245; 53 Am. Dec. p. 296, note*. Therefore, by the great weight of authority, a judgment obtained after the petition for adjudication in bankruptcy was filed, on a cause of action which accrued before, does not merge the original debt, but the discharge in bankruptcy discharges

such judgment, as well as the costs of the action in which the judgment was obtained. Note in 53 Am. Dec. p. 296, and numerous cases cited; also, *Imlay v. Carpentier*, 14 Cal. 173. And some of the cases cited in 53 Am. Dec. p. 296, hold that the creditor may prove his claim on the original debt, or on the judgment, as he may elect. It would seem that the present case is much stronger in favor of the creditor than the cases above cited. Other cases hold that the merger of the original debt in the judgment is not so complete that the courts cannot look behind the judgment to the original cause of action for the purpose of protecting the rights of the parties. *Conklin v. Field*, 37 How. Prac. 456. The purpose of section 67f is to prevent preferences, and to put all creditors on an equal footing, except as affected by the section on priorities. It could not have been the intention of congress that a judgment on a claim for wages earned within three months should be treated as invalid for the purpose of destroying the judgment lien, yet as of sufficient validity to merge the original debt so as to destroy the priority. Such a construction would put a penalty on vigilance, and would place creditors for wages earned within three months in a less favorable position than other creditors, instead of a more favorable position, as the act seems to contemplate. It is therefore my opinion that Brady has not lost his priority by obtaining a judgment."

H. R. McNoble, for claimant.

O. B. Parkinson, for trustee in bankruptcy.

DE HAVEN, District Judge. In this matter, the ruling of Referee E. P. FOLTZ, allowing priority of claim of John E. Brady for \$108.33 as wages earned within three months before the date of the filing of the petition in bankruptcy, having been heretofore submitted to the court for decision, now, after due consideration had thereon, it is by the court ordered that said ruling be, and the same is hereby, affirmed.

COURIER-JOURNAL JOB-PRINTING CO. v. SCHAEFER-MEYER
BREWING CO.

In re FIRST NAT. BANK OF LOUISVILLE.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 791.

1. BANKRUPTCY—JURISDICTION OF CIRCUIT COURT OF APPEALS—PETITION FOR REVIEW.

Bankr. Act 1898, § 24b, which authorizes the circuit courts of appeals to "superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction," is intended to provide a summary mode of reviewing the orders and decisions of the bankruptcy courts upon questions of law, and does not contemplate any review of the facts. The jurisdiction is to be exercised upon an original petition filed in the appellate court by any person aggrieved.

2. SAME—APPEAL.

Section 25a, providing that "appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals," in certain specified cases, intends that the appellate court, on such an appeal, may review both questions of fact and of law.

3. SAME—REVIEW OF ORDER ALLOWING OR REJECTING LIEN.

Under the provision of the bankruptcy act that an appeal may be taken from a judgment of the court of bankruptcy "allowing or rejecting a debt or claim of \$500 or over," when a creditor proving his debt in bankruptcy claims a lien on property of the bankrupt the question of the lien asserted is an incident to the allowance or rejection of the debt, and may therefore

be reviewed on an appeal from an order allowing or rejecting the debt; and such an appeal brings up both questions of law and fact. An order allowing or rejecting the lien claimed may also be reviewed on a petition for review, but only as to matter of law.

4. SAME—REQUISITES OF PETITION FOR REVIEW.

A petition to the circuit court of appeals for a review of a decision of the district court sitting in bankruptcy should state specifically the question of law which was involved and ruled upon by the district court, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination; and the question of law so presented is the only question which will be decided by the appellate court.

5. INDEMNITY MORTGAGE—CONTINUING SECURITY.

Where a debtor, whose notes were indorsed or otherwise secured by several persons as sureties, gave them a mortgage on his property, conditioned to indemnify such sureties against all loss or damage on the debts on which they "may be bound as sureties as aforesaid, or may become hereafter bound as sureties, to the amount of \$25,000, within four years from the date hereof," *held*, that the mortgage was not to be construed as confining the indemnity to the liability of the mortgagees, as sureties, then existing, or to mere renewals of paper on which they were already bound, but that, the original debt being paid off and new debts contracted within the four years, on which the mortgagees became sureties, they were protected by the mortgage, to the extent of \$25,000, against such new indebtedness.

6. SAME.

A mortgage to secure future advances, or future liability of the mortgagee as surety for the mortgagor, constitutes a continuing security for the time and to the amount fixed. When a particular advance or liability is incurred and paid off, wholly or in part, the mortgage, if so intended by the parties, will continue as a security for new advances or new liabilities made within the limit fixed.

7. SAME—AMOUNT SECURED—BANKRUPT MORTGAGOR.

Where sureties receive an indemnity mortgage from their principal, to secure them against liabilities incurred in his behalf during a fixed period and to a limited amount, and thereafter, during the time stipulated, become responsible for the mortgagor in a sum greater than that limited, they cannot enforce the mortgage for a larger amount than the indemnity contracted for, as against the trustee in bankruptcy of the mortgagor, whatever might be their equities as against the mortgagor himself, for the estate of a bankrupt passes to his trustee subject only to actually existing liens and charges, and creditors of the bankrupt, seeking to be subrogated to the rights of the sureties, have no other or higher rights than the latter have.

8. SAME—SUBROGATION OF CREDITORS.

A debtor, whose commercial paper was indorsed and otherwise secured by several sureties, executed a mortgage on his property to indemnify such sureties against liability on the debts for which they were already bound, or debts for which they might become responsible during the ensuing four years, to the amount of \$25,000 in all. After the debtor had given notes to a bank, on which the mortgagees were sureties, for amounts exceeding the sum named in the mortgage, he contracted a debt to another creditor, likewise secured, and became bankrupt, all within the four years. The latter creditor claimed to be subrogated to the rights of the mortgagees to the extent of his debt, but was opposed by the former creditor, which claimed the entire benefit of the mortgage for itself. *Held*, that both creditors were entitled to share ratably in the benefit of the mortgage.

On Petition for Review of a Decision of the District Court of the United States for the District of Kentucky, in Bankruptcy.

The petitioner is a creditor of the Schaefer Brewing Company, a corporation of the state of Kentucky, which was declared a bankrupt upon the petition of

creditors in the district court of the United States for the district of Kentucky. Its debt has been allowed as a general and unsecured claim, but it has been denied the benefit of a mortgage made by the bankrupt, and the object of the petition is to revise the order excluding it from participating in the benefit thereof. The petitioner's claim against the bankrupt's estate is evidenced by a note made April 10, 1895, with one Charles A. Schaefer as surety thereon. This note was originally for \$3,000, but by payments had been reduced to \$1,700. Petitioner sought to be subrogated to the rights and lien of the said surety, Charles A. Schaefer, under a mortgage made by the principal debtor for the purpose of indemnifying and protecting said Schaefer and others as sureties. This mortgage, so far as material, is as follows: "That whereas, the said parties of the second part, with one Adolph Meyer, have already become liable as sureties in various attitudes on commercial paper for the said party of the first part in the sum of twenty-four thousand seven hundred dollars upon an agreement, made at the time of the undertaking of such suretyship between the said party of the first part and the said parties of the second part, that said parties of the second part, with the said Meyer, should be secured from all loss or damage in their said suretyship by a proper mortgage upon the property of said party of the first part, hereinafter set forth and described, and are secured, and the signature of the said Meyer cannot be had to the renewals of said commercial paper, and the said parties of the second part have undertaken and agreed to continue to be so bound as sureties as aforesaid in various attitudes upon commercial paper for the said party of the first part up to the amount of twenty-five thousand dollars, inclusive of the amount for which said parties of the second part are already bound as aforesaid during the period of four years from the date hereof: provided, they, the said parties of the second part, should be lawfully indemnified and secured from loss in their said suretyship by mortgage of indemnity upon the said property: Now, this instrument witnesseth that in consideration of the undertaking and agreement of the said parties of the second part, and in pursuance of the said agreement and undertaking between the said parties of the first and second parts, and in consideration of the premises and one dollar, said party of the first part, in order to protect, indemnify, and save and keep harmless from all loss and damage the said parties of the second part in the amount for which they have already become liable as sureties as aforesaid, and in the amount for which they are to become liable, or any one or more of them may become liable, as sureties as aforesaid, has, and by these presents does, grant, bargain, sell, and convey to the said parties of the second part the following described and enumerated realty and personalty, all in the city of Louisville, state of Kentucky: [Here follows description of land, etc.] The condition of this conveyance and transfer is such that should said party of the first part well and truly pay off and discharge all claims, debts, and liabilities on which said parties of the second part, or any or more of them, may be bound as sureties as aforesaid, or may become hereafter bound as sureties as aforesaid, to the amount of twenty-five thousand dollars, within four years from the date hereof, and save and keep harmless and from any and all loss by reason of their suretyship, then this conveyance is to be null and void; otherwise, remain of full force and effect." The Third National Bank likewise made proof of a claim against the bankrupt's estate, and set up a like claim to be subrogated to the lien of this and of two subsequent mortgages. This claim was evidenced by two notes, upon which all of the mortgagees of the mortgage of April 15, 1892, were sureties. These notes aggregated \$32,000. The district court held that the said Third National Bank was entitled to be subrogated to the lien of the said mortgage of April 15, 1892, to the extent of \$25,000, but was an unsecured creditor for the remainder of its debt. The First National Bank was excluded from any participation in the benefit of the said mortgage, because its debt was not made until after the limit of the mortgage had been reached, by the creation of more than \$25,000 of debt to the Third National Bank, upon which the said mortgagees were bound as sureties.

John J. McHenry, for petitioner.

Lewis N. Dembitz, for appellee.

Before TAFT, LURTON, and DAY, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

Two modes of reviewing the decisions and orders of the district court in bankrupt proceedings are provided by the bankrupt act. The first is that found in section 24b of the act, which provides that:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise, in matter of law, the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Section 25a of the same act provides:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

The superintending and revising authority granted by the twenty-fourth section was evidently intended to provide a summary way for reviewing the orders and decisions of the bankrupt courts upon questions of law, and does not contemplate any review of the facts. Under section 25, a review of both questions of fact and law is contemplated. Under section 24, the jurisdiction is not exercised under an appeal, but upon an original petition filed in this court by any person aggrieved by the decision or order complained of. This differentiation of the modes of redress provided by the two sections seems altogether conformable to the language employed, and is the interpretation announced by the circuit court of appeals for the Seventh circuit in *Re Rouse, Hazard & Co.*, 63 U. S. App. 570, 33 C. C. A. 356, 91 Fed. 96, and in *Re Richards*, 37 C. C. A. 634, 96 Fed. 935. The same interpretation is announced in the Fifth circuit court of appeals. In *re Abraham*, 35 C. C. A. 592, 93 Fed. 767, and in *re Purvine*, 37 C. C. A. 446, 96 Fed. 192. It was also the view taken by this court in *Cunningham v. Bank* (decided at this term) 101 Fed. 977. If the petitioner had desired a review of the question of the allowance of his claim upon both law and fact, he should have appealed. In *Cunningham v. Bank*, cited above, we held that the question of the rank or lien of a claim was an incident to the allowance or rejection of the debt for which a lien was allowed or denied, and might therefore be reviewed under an appeal from an order allowing or rejecting the debt, and that under such an appeal questions of both law and fact might be reviewed. Nevertheless an order allowing or denying a lien claimed may be reviewed upon petition, as to any matter of law. In *re Rouse, Hazard & Co.*, 33 C. C. A. 356, 91 Fed. 96; In *re Richards*, 37 C. C. A. 634, 96 Fed. 935. No rule or order has been made by the supreme court regulating the practice under the twenty-fourth section, and none has been prescribed by this court. In *Re Richards*, cited above, the court of appeals for the Seventh circuit, speaking of the mode in which the jurisdiction of the court might be invoked under that section, said:

"In the case of an appeal, the facts as well as the law are before this court for review. In the case of original petition, this court has authority to review merely a matter of law arising in the course of the proceeding below. The latter is intended as a summary mode of reviewing any supposed erroneous holding upon a question of law, and does not contemplate a review of the facts. A similar conclusion was reached by the court of appeals of the Fifth circuit in *Re Purvine*, 37 C. C. A. 446, 96 Fed. 192. The petition in such case should state specifically the question of law which was involved and was ruled upon by the court below, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose, and its determination. Such question of law so presented is the question, and the only question, that can be properly ruled upon by this court upon an original petition."

This meets with our approval, and properly indicates the character of question which may be thus reviewed, and a proper mode of presenting it. The facts as they appear from the order sought to be reviewed, or as stated in the opinion of the court, or in the summary of evidence certified by the referee, where it appears that the order of the referee was reviewed by the district judge only upon such summary certified to him, must be treated as settling the facts upon which the "matter of law" arises which is sought to be reviewed. We must therefore ignore the averment in the petition that only \$22,000 of the debt due to the Third National Bank was created within four years after the date of the mortgage of April 15, 1892. The referee and district judge seem to have proceeded upon the theory that as much as \$25,000 of the claim of the Third National Bank arose within four years from date of the mortgage, and we shall treat that assumption as a fact.

The summary of the evidence certified by the referee to the district judge, and upon which alone the latter affirmed the order excluding the First National Bank from any participation in the benefits of the mortgage of April 15, 1892, shows (1) that no part of the debts due to either the First or Third National Banks represents the debt of the mortgagor existing at date of the mortgage under which both claim; (2) that the debt of \$24,700 existing at date of the mortgage, upon which one or more of the mortgagees were bound in some attitude as a surety, has been paid off or in some way extinguished; (3) that the debt to the petitioner was made April 10, 1895, and that Charles A. Schaefer, one of the mortgagees, became, and still is, bound thereon as a surety; (4) that more than \$25,000 of the aggregate debt now due to the Third National Bank had been created before the debt to the First National Bank was made. It also appears that the mortgagor subsequently made two other mortgages covering the same property, both to the mortgagees in the mortgage of April 15, 1892, and intended to indemnify them as sureties. One of these later mortgages was made January 12, 1897, but is not included in the record before us. The other mortgage bears date February 19, 1894, and is for the purpose of indemnifying the mortgagees, jointly, up to the sum of \$5,000, against liability as sureties, "exclusive of and in addition to" the indemnity provided by the mortgage of April 15, 1892. The former mortgage is expressly recognized, and the only purpose of the later instrument seems to have been to increase the amount of indemnity by \$5,000,—limited, however, to paper jointly secured by those mort-

gages. The property of the brewing company at the date of these three indemnity mortgages was subject to two other mortgages aggregating \$50,000. The court below found that, under the charter of the corporation, it was prohibited from mortgaging its property to an amount in excess of \$75,000, and that any creditor affected by mortgages in excess of that sum could avoid any mortgage in excess of \$75,000. The court therefore held the indemnity mortgages of February 19, 1894, and January 12, 1897, void and unenforceable, upon the authority of *Bells & Coggeshall Co. v. Kentucky Glass Works (Ky.)* 48 S. W. 440. The petitioner, not being interested under either of the last indemnity mortgages,—his debt being secured by only one of the mortgages,—has not complained of this decision. The single error of which the petitioner complains is that the court erred in denying to it any benefits under the mortgage of 1892, and in adjudging that the Third National Bank was entitled to the full indemnity provided by that instrument. The referee seems to have based his order excluding petitioner from subrogation under that mortgage upon the ground that it had been satisfied and extinguished by the subsequent payment of the \$24,700 of liabilities there existing, upon which the mortgagees, or some of them, were bound as sureties, and that only \$300 of additional or new liability was protected thereunder. Upon this theory the referee ruled that the two later mortgages were valid to the extent of \$24,700, and gave to the Third National Bank the benefit of a lien to that extent by virtue of said mortgages, and to the extent of \$300 under the mortgage of April 15, 1892. The district judge construed the first indemnity mortgage as intended to protect the mortgagees to the extent of \$25,000 against liability as sureties upon either existing or new obligations incurred within four years, but that the protection of the mortgage was exhausted whenever the mortgagees had indorsed up to that amount. That the district judge regarded the mortgage as an indemnity upon new paper, as well as against liability upon old or renewed paper, is made evident from the fact that the order made by him adjudged that the said Third National Bank was entitled to and had a lien, "under and by virtue of the mortgage of April 15, 1892, upon the property therein described, for the sum of \$25,000." We quite agree with the district judge in construing that mortgage as not confining the indemnity thereby afforded to the then existing liability of the mortgagees as sureties, or to mere renewals of existing paper upon which they were already bound. The clear purpose of the parties was to not only indemnify the mortgagees as sureties upon debts already made, but to indemnify them against loss upon future indorsements made at any time within four years. In consideration of this indemnity the indemnitees agreed to continue to lend their names as sureties or indorsers up to the amount of \$25,000 at any time during four years. The mortgage was to be satisfied not alone by paying the claims on which the mortgagees were then bound, but by paying such liabilities upon which they might be "hereafter bound," "to the amount of \$25,000, within four years from the date hereof." Mortgages to secure future advances, or future liability as surety, are not unusual, and have been sustained in many cases. They constitute a continuing security for the time and to the amount fixed. When a particular ad-

vance or liability is incurred and paid off, wholly or in part, the mortgage, if so intended, will continue as a security for new advances or new liabilities made within the limit fixed. *U. S. v. Hooe*, 3 Cranch, 73, 2 L. Ed. 370; *Shirras v. Caig*, 7 Cranch, 34, 3 L. Ed. 260; *Lawrence v. Tucker*, 23 How. 14, 16 L. Ed. 474; *Hannum v. Wallace*, 4 Humph. 143; *In re York*, Fed. Cas. No. 18,138; *Kramer v. Trustees*, 15 Ohio, 253; *Robinson v. Williams*, 22 N. Y. 380.

The question which has given us the most concern arises out of the fact that the paper secured by the mortgagees, within the time limit of the mortgage, exceeds the amount which the mortgagees were bound to indorse, and the amount of the indemnity. The amount of indemnity contracted for was \$25,000. To this extent, and no more, the property was incumbered for the protection of the sureties. They bound themselves, during the limit of the mortgage, in the amount of about \$35,000. If they had paid this sum and then sought to enforce the mortgage, they could have enforced it only to the extent of \$25,000. Possibly, as between themselves and the mortgagors, the latter could not, in equity, compel a reconveyance of the legal title until the whole debt had been paid. *Williams v. Love*, 2 Head, 79. But that principle would not apply against subsequent incumbrances, and should not when bankruptcy has occurred. The estate passes to the trustee of the bankrupt, subject only to actually existing liens and charges. The creditors of the bankrupt have no other or higher right than the surety has. The right of the creditor is to have the benefit of all securities belonging to the debtor which he has given to his surety for his indemnity. *Hampton v. Phipps*, 108 U. S. 260, 2 Sup. Ct. 266, 27 L. Ed. 719; *Bank v. Stewart*, 4 Dana, 27; *Black v. Kaiser*, 91 Ky. 422, 16 S. W. 89; *Breedlove v. Stump*, 3 Yerg. 257; *Greenlaw v. Pettit*, 87 Tenn. 480, 11 S. W. 357. It is true that the sureties were not obliged to secure paper in excess of \$25,000 at one time. But they did. What is the result? The amount of the indemnity is not thereby increased. That remains fixed, and is as if \$25,000 in value, and no more, had been placed in the hands of the sureties to indemnify them. They could keep themselves safe by refusing to indorse beyond the amount of the indemnity. The mortgagor had no direct purpose to secure its creditors. Nor had it any purpose to indemnify its sureties as sureties upon any particular debts. The benefit of the indemnity is accorded to the creditor only through the right and lien of the surety. Equity proceeds upon the notion that the application of the debtor's property, in the hands of the debtor's surety, to the payment of the debt for which the surety is bound, is conformable to the justice of the matter and the purpose of all parties. Hence the creditors may compel, by a direct suit, the application of any collateral held by the surety for his indemnity which belongs to the debtor. But which creditor has this right? Here are two. One presents a debt made before the debt of the other, and says: "I am prior in time. If there is not enough for both, I must be paid first, because prior in origin of debt." Clearly, that is no ground. The indemnity was against any indorsement, up to \$25,000, made within four years. Every creditor coming within this restriction is entitled to share

equally, if the fund is not enough to pay all. But the first creditor adds: "The indorsement of my debt exhausted the amount which the sureties were bound to secure. Your debt originated after mine, and was indorsed in excess of the amount the sureties undertook to indorse." This raises an objection to the participation of the petitioner which is not without weight, and has given us serious consideration. We have, however, concluded that every debt indorsed by one or more of the mortgagees, within the time limit of the mortgage, is entitled to share equally in the distribution of the indemnity provided by the mortgage. The mortgagor did not intend to secure any particular indorsements. It is as if it had said: "I want you to indorse for me, and to continue my indorser from time to time for the next four years up to as much as \$25,000. Here is property worth \$25,000, which I will place in your hands to indemnify you against loss as my surety." Under this arrangement the surety becomes bound on paper in excess of \$25,000. When the creditors holding such paper come to secure the appropriation of the collateral deposited by the debtor with the surety, justice is best attained by equality of right. The limitation placed upon the amount of liability which the mortgagees agreed to assume was not for the benefit of the creditor. Neither was the mortgage itself intended for his benefit. The right of subrogation arises not out of contract, but is a pure equity, and allowed only where it does not conflict with the legal or equitable rights of other creditors of the common debtor. *Greenlaw v. Pettit*, 87 Tenn. 480, 11 S. W. 357; *Pom. Eq. Jur.* (1st Ed.) § 1419, note 1. Any creditor coming with a debt made within four years after the date of the mortgage, and secured by one or more of the mortgagees, is within the restrictions of the mortgage and within its equity.

We therefore conclude that the district court erred in the order made, and that the petitioner is entitled to share ratably with the Third National Bank in the benefits of the mortgage. The order will be set aside, and an order of distribution made in conformity with the view here expressed. The Third National Bank will pay the costs of this proceeding.

In re ARNSTEIN et al.

(District Court, S. D. New York. October 6, 1899.)

1. **BANKRUPTCY—PROVABLE CLAIMS—RENT.**

Where a tenant of realty, under a lease for a term of years, becomes bankrupt, the landlord is entitled to prove a claim against his estate only for rent due at the time of the filing of the petition in bankruptcy, not for rent which would have accrued during the remainder of the term. Such unaccrued rent is not a fixed liability absolutely owing at the time of the bankruptcy, but only an unmatured obligation to pay in the future a consideration for the future enjoyment and occupancy of the premises.

2. **SAME—UNLIQUIDATED CLAIM FOR LOSS OF RENT.**

Where a tenant, under a lease forbidding assignment without the landlord's consent, made a general assignment for the benefit of his creditors, and afterwards became bankrupt, and the landlord assumed control of the

property, and leased it to the trustee in bankruptcy, receiving compensation out of the estate for the time it was occupied by the latter, and then resumed possession, and moved for the liquidation of his claim against the bankrupt for damages for breach of the contract of lease, in order that it might be thereafter proved against the estate, *held*, that such claim was not provable in bankruptcy, and the motion should be denied.

3. SAME—COST OF RESTORING ALTERATIONS.

A lease of realty provided that the tenant might make alterations in the premises, he agreeing to restore the property, at the expiration of the lease, to its former condition. Before the end of the term the tenant became bankrupt, and the landlord resumed possession of the premises, and leased them to the trustee in bankruptcy, afterwards seeking to prove a claim against the estate in bankruptcy for the estimated cost of restoring the property. *Held*, that the claim was not provable, as the clause in the lease contemplated the expiration of the lease by its own terms, not by re-entry by the landlord.

In Bankruptcy. On review of decision of referee in bankruptcy. The report of the referee was as follows:

The proofs of claims objected to are for unaccrued rent under leases having yet by their terms several years to run, and the estimated cost of changing certain alterations made by the tenants, to restore the premises to the condition they were in at the time of the leases, the leases having provided that the tenants might make said alterations, they agreeing at the expiration of the lease to restore the premises to their former condition. The claimants filed also petitions asking to have their claims liquidated in such manner as the court might direct, under subdivision b, § 63, Bankr. Act. Section 63 of the bankruptcy act provides as to what are provable claims substantially as follows: (a) Debts of the bankrupt, which are (1) a fixed liability, as evidenced by a judgment or instrument in writing, absolutely owing at the time of the filing of the petition, whether then payable or not; * * * (4) founded upon an open account, or upon a contract, express or implied. (b) Unliquidated claims against the bankrupt may be liquidated in such manner as the court shall direct, and may thereafter be proved and allowed against the estate. Classes of three claims are above provided for: (1) Debts which are a fixed liability, and evidenced by instrument in writing, absolutely owing, but not necessarily then payable; (2) debts founded on contract, express or implied; (3) unliquidated claims after they are liquidated.

Section 1 of the bankruptcy act, defining the meaning of the words used, provides that "debt" shall include any debt, demand, or claim provable in bankruptcy. This definition does not assist much in determining what are debts, within the above provision. The question presented on this hearing is as to whether the above claimants have any debt or claim provable in bankruptcy, under the above provisions of the act.

A contract of lease is peculiar in its nature, and differs in many respects from other contracts. Rent, as such, is an incident to, and grows out of, the use and occupancy, and is the consideration therefor. Unaccrued rent cannot be said, therefore, to be a fixed liability then absolutely owing, payable in the future, or, indeed, a "debt" of any kind, as that word seems to be used in the act. It is only an unmaturing obligation to pay in the future a consideration for future enjoyment and occupancy. This cannot be said to be, properly speaking, a present debt, demand, or claim at all, as these words are apparently used in the foregoing provisions, due regard being had to the context, and cannot come within either the clause as to fixed liability then owing or a debt founded on contract. The authorities, both under the earlier act in 1841, the last act, and the present one, seem unanimous to this effect. *Ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6,725; *In re Breck*, 12 N. B. R. 215, Fed. Cas. No. 1,822; *Bailey v. Loeb*, 11 N. B. R. 271, Fed. Cas. No. 739; *In re May*, 9 N. B. R. 419, Fed. Cas. No. 9,325. The above are under the late act. *In re Jefferson*, 1 Nat. Bankr. N. 288, 93 Fed. 948, is under the present act. *Bosler v. Kuhn*, 8 Watts & S. 183, is under the act of 1841. It is equally clear, I think, that

the claim for the estimated cost of restoring the premises does not come under either of said clauses.

It is urged, however, that the claimants have a claim for unliquidated damages, and they have filed an application under subdivision "B" that the same be liquidated in order that it may be proved. The bankrupts in this case, prior to the proceedings in bankruptcy, became insolvent, and made an assignment for the benefit of creditors of all their property, including presumably the lease in question, and delivered possession to the assignee. By the provisions of the lease, an assignment was expressly prohibited, except with the consent of the landlord. The bankrupts, therefore, violated the lease, and have practically put it out of their power to comply with its terms. On the breach of the whole of a continuing contract, whereby the contract is repudiated or disavowed and abandoned, the other contracting party is entitled to treat it as at an end and destroyed by such act, and seek his remedy in an action for damages for the loss of the contract. *Amos v. Oakley*, 131 Mass. 413; *Marybury v. Land Co.*, 10 C. C. A. 393, 62 Fed. 335, 351; *Sedg. Meas. Dam.* § 90; *Tod v. Land Co. (C. C.)* 57 Fed. 47, 63.

It is urged that the claimants are entitled, on the above principle, to consider the contract and lease disavowed and destroyed, and assert a claim for damages for the value of their contracts; that such a claim is unliquidated, but when liquidated can be proven as a claim against the estate. It seems manifest that such a claim is capable in law of being liquidated, and the measure of damages would be the difference between the fair rental value of the premises and the amounts reserved and provided for in the lease.

One, at least, of the claimants has alleged, in his proof filed against the trustee asking for the payment of rent during the time the premises were occupied by the trustee, that the rent reserved was the fair value for the use and occupancy of the premises. On this statement there would seem to be no claim for damages, as the landlord has possession of the premises, although probably the question as to the amount of the damages is not properly involved in this hearing. Whether a claim of the nature above suggested is provable in bankruptcy was discussed, but not necessarily decided, in *Ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6,725,—a case under the old act. In *Re Jefferson*, above mentioned, a case under the new act, the learned justice evidently considered that such a claim could not be proven, but his opinion on that point is unfortunately very meager. In the case of *People v. St. Nicholas Bank*, 151 N. Y. 592, 45 N. E. 1129, it was held a claim of similar nature was provable against the receiver of a defunct corporation. See page 598, 151 N. Y., and page 1130, 45 N. E. It is true there had been there a subsequent reletting at a lower rent, and the claim was for the deficiency on an actual reletting, while here it would be for the difference between the rent reserved and the fair value of the premises; but this is not a difference in principle, but only goes to the method of ascertaining the damages. In *re Hevenor*, 144 N. Y. 271, 39 N. E. 393, involved the question as to provable claims under an assignment for the benefit of creditors, and it was held that the claim in that case was not provable; but there the claim was not for damages for the loss of contract, but under a provision in the lease allowing the landlord to relet as agent for the tenant, who agreed to pay the difference as it should accrue. In such case it was held there was no present debt, but only an obligation to mature in the future, not within the terms of the assignment. There the claim was based on the contract and covenant to pay the deficiency thereafter occurring, if any, and not a present claim for damages for loss of the contract. The distinction is, in substance, pointed out in the *St. Nicholas Bank Case*, 151 N. Y. 596-598, 45 N. E. 1129.

In many of the decisions under the old act (see cases ante) it is stated that the bankruptcy itself abrogated the lease. The old act, however, differed on this point from the present one in a very important particular, in that it contained a specific clause in regard to claims for rent, omitted from the present act, providing that the rent up to the adjudication, whether due or not, might be proved, and nothing more (see section 19); thus specifically forbidding any further claim by reason of the lease. Congress undoubtedly had the power to provide that bankruptcy should dissolve a contract of lease and it apparently,

by the above provision of the old act, intended to do so after giving the landlord the right to prove the amount accrued, up to the time of the adjudication, which he could not otherwise have had. That clause was omitted from the present act. I do not think, therefore, the decisions under the old act have much bearing on the present question.

Whatever, however, may be the true rule as to claims of the nature above alluded to, I think it unnecessary to decide in this case, as the landlords have re-entered and resumed possession of the property. It appears by the proofs of claims filed herein against the trustee and allowed that the landlords assumed control of the property, and made substantially a new lease to the trustee, under which the landlords claim, and have been paid rent as part of the expenses of administering the estate.

The claim of Emily Smith and Frederick Henry Smith against the trustee states that the possession of the trustee was had under an agreement made by him with the landlords; that, during the time of his continuing in possession of the said premises, he should pay as rent therefor a per diem at the rate mentioned in the said lease; and that, by reason of the premises, there is justly due and owing from the said trustee, etc. The proof of claim further states substantially that on the 21st day of April, 1899, the said trustee surrendered possession of the premises to the said landlords. The claim of Ann Reilly states that the said trustee rented from the said landlords the premises in question from January 1, 1899, to April 18, 1899, at so much per diem, that being the proportionate daily rental of the premises paid by said bankrupts prior to January 1, 1899, which sum is the reasonable value of the use and occupation of the said building and premises. The landlords virtually assumed, as owners, control of their property, and are now in possession of the same. Such acts constituted an entry which terminated the tenant's term, and it is well settled that, where a landlord re-enters for forfeiture of the lease, he elects to treat the tenant as a trespasser, and cannot sue for rent afterwards accruing or for breach of covenant subsequently to be performed. By such entry the landlord put an end, by operation of the law, to the tenant's term and all claims for the future. *Ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6,725.

It is urged on behalf of the claimants that it was the duty of the landlords to lease the premises, and secure thereby as much rent as possible in mitigation of damages, under the well-known rule that a person must do what he can to keep down damages. But in this case the landlord made no pretense of acting on behalf of the tenant to mitigate damages. He made the new contract in his own name with the trustee, and, having entered and exercised his right as owner, he cannot now claim that his entry was to prevent waste or mitigate damages. *Ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6,725. He might have rented for more, and would have had the benefit; by entry he assumed the risk.

A landlord reletting premises to another is presumptively deemed, unless rebutted, to have accepted surrender. *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576. In *People v. St. Nicholas Bank*, 151 N. Y. 596, 45 N. E. 1129, the landlord relet under a provision in the lease giving him the right so to do. He did not enter as of his previous estate. If the reletting here was not to enforce forfeiture, but save damages for tenant's benefit, the landlord should have acted avowedly at the time in that capacity. *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576.

This disposes of all claim, including that for restoration of alterations. The lease allowed the alterations to be made, and provided only that on the expiration of the lease the premises should be restored. I think this, under the cases, meant expiration by the lease, not entry by landlord. There was no obligation to restore until the termination of the lease, and there was therefore no breach and no cause of action. This case differs widely from the case of *Ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6,725, where the damages claimed were for originally making the alterations, and there was a breach and consequent cause of action at the commencement of the lease, and prior to the re-entry, while here the making of the changes was legal. The claim, if any, is for failure to restore, and this was not to be done until the expiration of the term fixed by the lease. I think, therefore, that the claimants have no claim prov-

able in bankruptcy, in any aspect of the case, and that the proofs of claim as filed should be disallowed, and the application to liquidate should be denied.

"F. K. Pendleton, Referee."

Blumensteil & Hirsch, for trustee.

H. R. Pool, for claimants Emily Smith et al.

Mitchel Levy, for claimant Ann Reilly.

BROWN, District Judge. The ruling of the referee, excluding the claims of Emily Smith and Ann Reilly except for rent accrued up to the time of the filing of the petition, is hereby affirmed.

STONE, Collector, v. LAWDER et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 329.

CUSTOMS DUTIES—APPRAISAL—ALLOWANCE FOR DAMAGE.

Under Customs Administrative Act 1890, § 23, providing that "no allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon," but that the importer may abandon to the United States all or any portion of the goods included in any invoice, not less than 10 per cent. of the total value or quantity of the invoice, and be relieved from the payment of duties on the portion so abandoned, an importation of pineapples in bulk included in a single invoice must be considered as a whole, and the importer is entitled to no allowance on account of damage to or deterioration of the same, but must pay duty on the entire invoice, unless a portion equal to 10 per cent. thereof is abandoned.

Appeal from the Circuit Court of the United States for the District of Maryland.

John C. Rose, U. S. Atty., for appellant.

Robert H. Smith and John E. Semmes, for appellees.

Before GOFF and SIMONTON, Circuit Judges.

GOFF, Circuit Judge. S. M. Lawder & Sons, fruit importers, during the year 1897 imported a number of cargoes of pineapples in bulk from Governor's Harbor, B. W. I., to the port of Baltimore. On the discharge of the cargoes it was found that a number of the pineapples were decayed, and that they had gone into what the customs officers called "slush," having thereby entirely lost their commercial value. The collector assessed duty on the entire amount of the pineapples, no matter as to the condition they were in when they were brought into the port. The importers protested, claiming that they were not liable for the duty on the pineapples that had gone into slush before the cargo was landed. The board of general appraisers reversed the action of the collector, and held that the importers were not required to pay duty on such decayed and worthless pineapples. The collector then appealed from such decision of the board of general appraisers to the United States circuit court for the district of Maryland, which af-

firmed said decision, and from the decree of that court so affirming such decision this appeal is prosecuted.

At the time of such importations the duty on pineapples was 25 per cent. ad valorem. The number of pineapples destroyed by decay in the importations in controversy was less in each cargo than 10 per cent. of the whole amount of the invoice. The appellant insists that, as the importers could not abandon all or any portion of the said importations to the United States, and could not claim an allowance for damages because of the decay of said pineapples, the duty as first assessed by the collector was proper. The contention of the appellant is that section 23, c. 407, Acts 1890, approved June 10, 1890 (Supp. Rev. St. p. 754), applies to the importations in question. That section is as follows:

"That no allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of the goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned: provided, that the portion so abandoned shall amount to ten per centum or over of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction or otherwise disposed of for the account and credit of the United States under such regulations as the secretary of the treasury may prescribe."

Is it not beyond question that the claim of the appellees in this case is a claim for an allowance for damage to the merchandise imported by them? Is it not equally clear that, under the section of the act of congress we have quoted, all such allowances as to importations like this are prohibited? Under former tariff acts and the decisions of the courts relating thereto, such allowances were proper, and were frequently made. *Marriott v. Brune*, 9 How. 619, 13 L. Ed. 282; *U. S. v. Southmayd*, 9 How. 637, 13 L. Ed. 290; *Weaver v. Saltonstall* (C. C.) 38 Fed. 493. It is the natural inference that it was because of the many claims for damages so presented, and the persistent efforts so continuously being made for an abatement of duties, that the necessity for the change in the legislation referring thereto which was made in the tariff administration act of 1890 (the said section 23 we have mentioned) was suggested to congress. By that section a radical change was made, and all allowances for damages to goods, wares, and merchandise imported into the United States were absolutely prohibited; but, in lieu of the damages theretofore allowed, the importer was himself to determine what goods were damaged, by abandoning all or any portion of the same, thereby relieving himself of the duties on the portion so abandoned, provided that portion amounted to 10 per centum or over of the total value or quantity of the invoice. The word "damage," as used in said section, has its ordinary signification, and covers, we think, all claims founded on injurious changes in the condition of the articles imported, occurring after they leave the place of shipment and before they reach the port of discharge. It will be noted that the portion abandoned must amount to 10 per centum or over of the total value or quantity of the invoice, and not of the goods, wares, and merchandise as discharged at the port of entry. The words of the section we are considering seem to have been used for the pur-

pose of meeting the language of the courts in construing former acts relating to the same matter, and were clearly intended to compel the importer to pay the duties on his importation, unless a portion of the same amounting to 10 per centum or over of the total value or quantity of the invoice shall be abandoned to the United States, in which event he was to be relieved of the duty on the part so abandoned, which might be all of, a greater portion of, or a comparatively small part of, the total importation.

This question was before the circuit court of appeals for the Second circuit, and that court, in disposing of it, used this language:

"This section prohibited allowance for damage, unless, within a specified time, the importer should abandon to the United States his damaged goods, in which event he would be relieved from payment of the duties on the portion so abandoned, provided it amounted to 10 per centum or over of the total amount or quantity of the invoice. This provision is also general. It prescribes the prerequisites for damage allowance, and is applicable to all articles except those which are or may be specially excepted, as is now the case with respect to damage upon imported wines and liquors. It is not to be supposed that it was the intention of the legislature to take one article out of the general system, unless such intention is clearly manifest. The mere statutory provision by which imported broken glass is duty free does not, in our opinion, modify the system in respect to the article of damaged glass. The cases of *Marriott v. Brune*, 9 How. 619, 13 L. Ed. 282, *Lawrence v. Caswell*, 13 How. 488, 14 L. Ed. 235, and *U. S. v. Nash*, 4 Cliff. 107, Fed. Cas. No. 15,856, in which it was held that, if the quantity or the weight stated in the invoice had been diminished by leakage or by loss on the voyage, the duty is chargeable on the quantity or the weight actually imported, are not conclusive with respect to the duties to be imposed upon the damaged goods where the allowance for damage is specially regulated by statute." *U. S. v. Bache*, 8 C. C. A. 258, 59 Fed. 762.

We do not find it necessary to consider in detail the testimony relating to the method resorted to by the customs officers for the purpose of ascertaining whether or not the quantity of decayed pineapples amounted to 10 per centum of the invoice, as the insistence of the appellees is in fact based on their right to exclude entirely the whole quantity of "slush," on the theory that the same was not in fact imported into the United States. This contention cannot, in our opinion, be sustained, as under existing law an importation in bulk of pineapples included in a single invoice must be considered as a whole, and the importer thereof is entitled to no allowance for damage or deterioration to or concerning the same, and must pay duty on the entire invoice, unless a portion of the same is abandoned by him under the provisions of section 23 of the act of June 10, 1890.

We find that there is error in the decree complained of, and therefore the same will be reversed, and this cause will be remanded, with instructions that such further proceedings be had therein as are indicated by this opinion. Reversed.

UNITED STATES v. STONE et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1900.)

No. 85.

CUSTOMS DUTIES—CLASSIFICATION—PARCHMENT PAPER.

Paper made from wood pulp subjected to the single process of immersion in an alkaline solution, while sometimes included, in commercial language, in the general class of parchment paper, is usually designated commercially as "imitation parchment," "parchment No. 2," or "grease-proof wrapping paper," and is not dutiable as parchment paper, under paragraph 308 of the tariff act of 1894.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal to the circuit court by Stone and others, importers, from a decision of the board of general appraisers affirming a classification for duty by the collector of certain imported merchandise. On such appeal the following opinion was delivered by TOWNSEND, District Judge:

Ordinary unsized paper, produced from rags, and treated with sulphuric acid, after being subjected to two separate processes presents the appearance of parchment, is in fact parchment paper, and is commercially known either as "parchment paper," "parchment No. 1," or "vegetable parchment." Paper made from wood pulp, subjected to only the single process of immersion in an alkaline solution, is commercially known either as "imitation parchment paper," "parchment No. 2," or "grease-proof wrapping paper," and is sometimes included, in commercial language, in the general class of parchment papers. The article in question belongs to this second class. It was classified for duty under paragraph 308, Schedule M, of the act of 1894, at 30 per cent., as parchment paper. The importers protested, claiming that it was dutiable under paragraph 313 or under paragraph 310 of said act, as paper, or manufactures of paper not specifically provided for. It is agreed that the single question in the case is whether this imitation paper has acquired the commercial designation of "parchment paper." The utmost that can be claimed from the testimony is that it may be so included in a general class of parchment paper, but even this claim is doubtful. The great preponderance of the most trustworthy evidence shows that the commercial designation of said imitation parchment is not "parchment paper." The decision of the board of general appraisers is therefore reversed.

Harry P. Disbecker, for the United States.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed on opinion below.

UNITED STATES v. HAMPTON.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 321.

PENSIONS—MATERIALITY OF FALSE STATEMENT BY APPLICANT—DEPENDENT PENSION ACT.

Rev. St. § 4716, providing that "no money on account of pensions shall be paid to any person * * * who in any manner voluntarily engaged in or aided or abetted the late Rebellion," was not repealed by implication by Act June 27, 1890 (26 Stat. c. 634), known as the "Dependent Pension Act," but applies to pensions granted or applied for under said act; and a false statement in that regard, made under oath by an applicant under that act, is upon a matter material to the inquiry, and renders him subject to prosecution for perjury.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

The defendant in error, William Hampton, was indicted in the district court of the United States for the Western district of North Carolina, in proper form, for perjury in making a false oath before a special examiner of the pension bureau in a matter material to an inquiry then pending before the commissioner of pensions touching a claim of said William Hampton for pension, by stating under oath in an affidavit, to wit, "I was not in the Confederate army," which statement was material to said inquiry and was not true; the said William Hampton having theretofore served as a soldier in the Confederate army. The jury found the defendant guilty, and he, through his counsel, moved in arrest of judgment, upon the ground that the statement was not material to the inquiry, for the reason that the application for a pension by said William Hampton was under the dependent pension act of June 27, 1890, and that section 4716 of the Revised Statutes of the United States was, by implication, repealed by the said act of June 27, 1890 (26 Stat. c. 634). The district court so held, and the motion was sustained, and the judgment arrested. The United States, through its attorney, prayed a writ of error, and has brought the case here.

Spencer Blackburn, Asst. U. S. Atty.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge (after stating the facts as above). Section 4716 of the Revised Statutes enacts that "no money on account of pension shall be paid to any person, or to the widow, children or heirs of any person, who in any manner voluntarily engaged in or aided or abetted the late Rebellion against the authority of the United States." This section was codified from the act of March 3, 1873, § 23. This act was entitled "An act to revise, consolidate and amend the laws relative to pensions," and was a general pension act, granting pensions to the officers and enlisted men, and their widows, children, and dependent relatives, who had served in the military and naval service of the United States, and who had been wounded, injured, or contracted disease in the line of duty. The act was an elaborate general law, of many sections, with provisions for the practical working of the pension department, and providing in detail who were to be benefited, how application for pension was to be made, how granted, and how paid, and general provisions for the punish-

ment of frauds, which were afterwards codified as part of title 57 ("Pensions") of the Revised Statutes of the United States. By act of June 27, 1890, congress determined to grant pensions not only to those who had been wounded, injured, or had contracted disease in actual service in the line of duty, but also to all soldiers and sailors of the United States who had served during the war of the Rebellion, and who were, or might thereafter be, suffering from a mental or physical disability of a permanent character, not the result of their own vicious conduct, which incapacitated them from manual labor, so as to render them unable to earn a support, and gave to them a pension of not less than \$6 and not more than \$12 a month, proportioned to the inability to earn a support, and without regard to rank. The act provided that persons receiving pensions under other existing laws, or whose claims were pending in the pension office, might receive the benefit of the act, and that nothing should be so construed as to prevent any pensioner thereunder from prosecuting his claim for pension under any other general or special act, provided that no person should receive more than one pension for the same period. It is stated in the record that it was under this act of 1890 that the defendant was applying for a pension.

This act of June 27, 1890, was a short act, of four sections, the purpose of which was to enlarge the existing acts so as to give a pension to United States soldiers and sailors of the war of the Rebellion who were incapacitated to such a degree as to be unable to earn a support, and also to provide pensions for their widows, children, and dependent parents. It does not in express terms repeal any existing acts,—not even those inconsistent with it. It simply enlarges the class of persons who may obtain pensions, and guardedly refrains from affecting any existing laws with regard to pensions. It is not possible to argue that it covers the whole subject of the prior existing laws, and was intended as a substitute for them. To contend that the pensions under this act of 1890 were unaffected by the general provisions of the Revised Statutes, providing that pensions could not be attached or assigned or pledged, or that persons presenting false affidavits concerning claims for pensions under that act could not be punished under the sections of the general act, would be a proposition that could not be maintained. It is familiar law that repeals by implication are not favored (*McCool v. Smith*, 1 Black, 459-470, 17 L. Ed. 218), and that such an implication arises only where there is positive repugnance between the new law and the old, and then only to the extent of the repugnancy (*In re Henderson's Tobacco*, 11 Wall. 652-656, 20 L. Ed. 235; *Chew Heong v. U. S.*, 112 U. S. 536-549, 5 Sup. Ct. 255, 28 L. Ed. 770; *U. S. v. Matthews*, 173 U. S. 381-388, 19 Sup. Ct. 413, 43 L. Ed. 738; *Red Rock v. Henry*, 106 U. S. 596-601, 1 Sup. Ct. 434, 27 L. Ed. 251; *Appeal Tax Court v. Western Maryland R. Co.*, 50 Md. 274-296). We can find no repugnancy whatever in the present case. We are without the benefit of any argument or brief on behalf of the defendant in error, and without an opinion of the trial judge giving the grounds of his decisions, except the statement in the order signed by him that the false statement was not material to the inquiry, "in that, by implication, section 4716 of the

Revised Statutes of the United States was repealed by chapter 634, 26 Stat., which is the act of June 27, 1890. The only implication which could arise would be from the language of the act of June 27, 1890, "that all persons who served ninety days or more in the military or naval service of the United States during the late war of the Rebellion," and were unable to earn a support, should be entitled to receive a pension, and from the contention that "all persons" meant all persons, whether they had served in the Confederate army or not, without reference to the qualification of section 4716, forbidding the payment of pension money to such persons. That is not a necessary implication, nor even a probable one. All the previous acts as to which section 4716 is plainly applicable use similar language—such as "all persons," "all soldiers and sailors," "all soldiers, sailors and marines"—to express the class to whom pensions are granted. And in several acts passed before the act of June 27, 1890, and in two passed afterwards, in which congress saw fit, for very apparent reasons, to exempt the beneficiaries from the restriction of section 4716, congress did so by express language,—as, for example, in the act of March 9, 1878, granting pensions to the survivors of the War of 1812, it was provided that section 4716 should not apply; and in the act of January 29, 1887, granting pensions to the survivors of the Mexican War, it was provided that section 4716 was repealed so far as pensioners under that act were concerned. And by the act of August 1, 1897, it was provided that the prohibition contained in section 4716 should not apply to persons who afterwards enlisted in either the navy or army of the United States, and who while in such service incurred disability from wound or injury received or disease contracted in the line of duty; and in the act of July 27, 1892, it was provided that persons who had served in certain Indian wars should not be affected by section 4716. From the fact that no such provision was inserted in the act of June 27, 1890, and that there is no apparent reason why it should be, we think it cannot be successfully maintained that there is any ground for holding that the act is not subject to the general regulation of section 4716, prohibiting the payment of any money on account of pensions to a pensioner who had been engaged in the Rebellion. For these reasons, we think that the inquiry as to the previous service of the defendant in the Confederate army was material, and that the granting of the motion in arrest of judgment was error, and should be reversed, and it is so ordered.

McSHERRY MFG. CO. v. DOWAGIAC MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 772.

L. PATENTS—INFRINGEMENT—EQUIVALENTS.

A patentee, although not a pioneer inventor, but an improver only, is entitled to a reasonable range of equivalents, measured by the advance he has made over older machines, and is not limited to the specific form claimed and described, unless he has expressly so limited himself, or unless such limitation is necessary in order to save his patent from anticipation.

2. SAME—GRAIN-DRILLS.

The Hoyt patent, No. 446,230, for an improvement in grain-drills, covers improvements of merit over prior machines, and is entitled to a reasonable range of equivalents. As so construed, *held* infringed as to claims 1, 2, 3, 4, and 5.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a bill in equity to restrain the infringement of patent No. 446,230, granted February 10, 1891, to W. F. Hoyt for an improvement in grain-drills. The court below held the patent valid, and that the defendant had infringed the first three claims, but that the evidence failed to show the sale of any drills embodying the elements of claims 4 and 5. The sixth claim of the patent was not involved. From this decree both parties have appealed,—the complainant from so much of the decree as failed to find infringement of the fourth and fifth claims, and the defendant from the decree finding infringement of claims 1, 2, and 3. The object of the invention, as stated in the specifications, "is to provide an independent spring-pressure for each of the shoes and covering-wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering-wheels may be raised from the ground when the implement is not in use, or when transporting it from one field to another." The claims of the patent in issue are as follows: "(1) In combination with the transporting-wheels and frame, the hopper, shoe, and draft-rods, the latter having a pivotal connection with the frame, the clamping-plates having a pivotal connection with the draft-rods, the spring-metal pressure-rods attached to said plates, said rods extending rearwardly of the hopper, the forked arm coupled to said rods, and means for raising and lowering said arm, substantially as specified. (2) In combination with a frame of a grain-drill, the hopper having a flange at the upper end, the shoe attached to the hopper, the curved draft-rods leading from the shoe and having a pivotal connection with the frame of the machine, a swinging head located between the upper ends of the draft-rods, spring-metal rods attached to the swinging head, said rods extending back of the hopper and below the flange thereof, said spring-metal rods being coupled to an arm, said arm having means for raising and lowering it, and means for locking the parts, for the purposes set forth. (3) In combination with the frame, hopper, shoe, and draft-rods, the plates pivotally attached between the upper portions of said draft-rods, said plates having the horizontal shoulders, said shoulders bearing upon the draft-rods, the spring-metal rods attached to said plates and passing rearward of and on opposite faces of the hopper, and means for applying pressure to the rear ends of said spring-metal rods, for the purpose specified. (4) In a grain-drill, the combination of the wheels and main frame, of a hopper, shoe, and draft-rods having a pivotal connection with the frame, means for applying spring-pressure to the shoe, comprising the pressure-rods having their forward ends coupled to the draft-rods and a lever at the rear ends, a wheel traveling in the path of the shoe, and spring-metal rods coupling said wheel and its journal-bearing with the spring-pressure rods, substantially as indicated. (5) In a seed-drill having a hopper, shoe, and draft-rods, the hopper having a projection on its periphery at the top, plates pivoted between the upper end portions of the draft-rods, spring-metal rods clamped between said plates, means for raising and lowering the rear ends of said rods, and a wheel traveling in the rear of the shoe, said wheel having a spring-pressure connection with the spring-metal rods leading from the draft-rods." The first three claims are for the drill without the press-wheel attachment. The next two are for the drill with the press or covering wheel attachment. Fig. 1 of the patent is an end elevation of the drill, with one of the transporting wheels removed, and showing the frame broken away. Fig. 2 is a perspective view of a portion of the drill embodying the improvements of the patent. Fig. 4 is an enlarged perspective of the clamping-plates detached, between which the spring-pressure rods of the shoe and covering-wheel are adapted to be secured. Fig. 5 is a perspective view of the scraper-plate and cap, adapted to be secured to the rear ends of the spring-pressure rods of the covering-wheel. These figures are set out on the following page for purposes of illustration.

Fig. 1

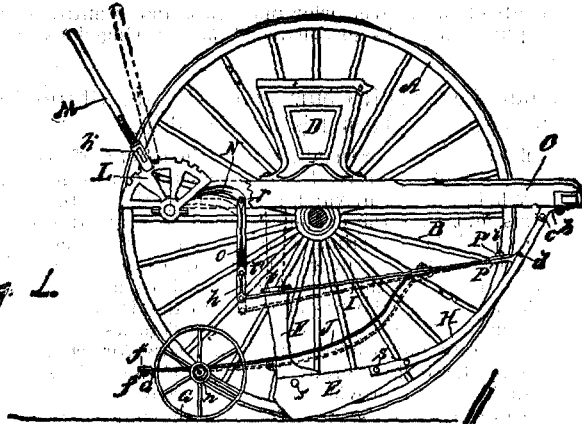


Fig. 2

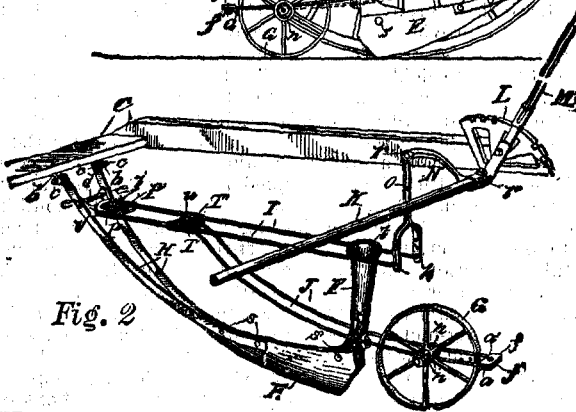
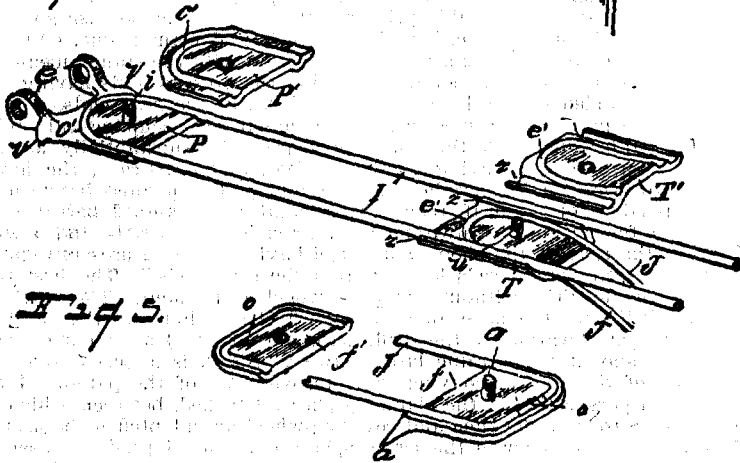


Fig. 3



Charles M. Peck, for appellant and cross appellee.
Fred L. Chappell, for appellee and cross appellant.
Before TAFT, LURTON, and DAY, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The patent to Hoyt was for improvements in that class of grain-drills generally known as a "shoe drill." Such drills are used for sowing small grain in rows; the grain being dropped from a hopper into a furrow cut in the ground by a knife or point, called the "shoe," and then covered by a heavy chain dragged behind, or, as in the case of the structure covered by the fourth and fifth claims of Hoyt's patent, by a press or covering-wheel following the shoe. The answer put in issue the novelty and patentability of the invention of the patent. That issue was found against the defendants. No error has been assigned upon that portion of the decree, and the only questions for our consideration arise upon the defense of noninfringement.

The McSherry Manufacturing Company make and sell a drill which closely imitates the structure of the first three claims of the patent in suit. The defense is that the drill made by the McSherry Company does not include the "clamping-plates" of the first claim, nor any equivalent therefor. That claim calls for "clamping-plates having a pivotal connection with the draft-rods, and spring-metal pressure-rods attached to said plates." The draft-rods mentioned are the rods, H, of the figure above. They are the rods connecting the shoe, E, with the frame of the drill, and curve upwardly, and are slightly diverging, their upper ends being pivotally attached on the trunnions of plates secured to the under face of the front edge of the frame, C. The draft-rods of the defendants' structure have same construction and pivotal attachment. The spring-pressure rods of the shoe are the rods, I, of Figs. 1 and 2, shown on page 718. These spring-pressure rods, and a means for connecting them with the draft-rods, are thus described in the specifications:

"I indicates the spring-pressure rods of the shoe. Said rods are formed of one piece bent to a loop at their forward ends, as shown in Fig. 4, and extending rearwardly on each side of the hopper, F. The rear ends thereof are pivotally attached to the bifurcated end, h, of the arm, O, as shown in Fig. 2, the upper end of said arm being pivoted at r to the free or outer end of the swinging arm, N, the opposite end of the arm, N, being permanently secured at r¹ to the rock-shaft, K, which extends along the rear edge of the machine-frame, and which is actuated by the lever, M, attached thereto. The forward looped end of the rods, I, is secured between the clamping-plates, P, P¹, which are provided with the grooves, c¹ (see Fig. 4), in their adjacent faces, that receive said rods, and in which they are firmly held by the bolt, i, passing through said plates, which draws them tightly together upon said rods. The under plate, P, of said clamping-plates is provided with the lugs, e, having eyes therein that are adapted to receive the bolt, d, which passes loosely there-through. The ends of said bolt pass through the adjacent faces of the draft-rods, H, and are firmly secured therein, as shown in Figs. 2 and 3, by which means the forward ends of the pressure-rods, I, are pivotally coupled to the draft-rods. The lugs, e, of the plate, P, extending between the draft-rods, H, keep the upper ends of said rods spread and in contact with the trunnions, c, of the supporting-plates, b. The plate, P, is also provided with the horizon-

tal shoulders, v, on each side thereof, that are adapted to engage the upper edge of the rods, H, for purposes hereinafter described."

In the McSherry structure there are found the same two spring-pressure rods, I, one lying on each side of the hopper, F. The mode in which these rods are pivotally attached to the draft-rods differs in detail from that of the patent. The appellants' spring-rods, instead of being looped and held between "clamping-plates" pivotally attached to the drag-bars, are divided and directly attached to the draft-rods by means of an eye formed on the forward end of each rod, which is adapted to receive a bolt which passes through the draft-rods near their upper ends; the bolt forming the pivotal connection between the spring-rods, I, and the draft-rods, H. Pivoted on the same bolt is a plate, which defendants' expert calls a "wedge-plate," having lugs formed upon it which lie between the spring-rods and the draft-rods, and engage the latter, thereby transmitting the pressure of the spring-rods to the shoe through the draft-rods. It is true that the defendants' structure has no clamping-plates, either rigidly or pivotally attached to its draft-rods. But clamping is but one way of attaching one thing to another. Attachment may be made in many ways without clamping. But what are the functions of Hoyt's clamping-plates? The thing he wanted to do, and the thing essential to the proper transmission of pressure to his shoes and covering-wheels, was to make a pivotal connection between his spring-pressure rods and his draft-rods, so that pressure might be transmitted or withdrawn through the engagement of the pressure-rods with the draft-rods. Whether this connection should be made by clamping the rear ends of his spring-pressure rods between clamping plates bolted together, the clamping-plates being pivotally attached to a bolt rigidly connecting the upper ends of the diverging draft-bars, or by attaching the rear ends thereof by means of eyes to a bolt attached pivotally to the upper ends of the draft-bars, was a matter of form. Whether the connection was made in one way or the other, it was essential that the pressure-bars should engage the draft-bars in order that they might transmit pressure through the latter to the shoes. Hoyt provided for such engagement by lugs on each side of his clamping-plates. The defendant did the same thing by lugs on a plate which they attached to the bolt passing through the eyes at rear ends of their pressure-bars. The essential thing in both cases was a means for transmitting the lever-regulated pressure of the spring-pressure bars to each shoe and covering-wheel independently of each other and of every other shoe and wheel. Each has used substantially the same means. The mode in which the connection should be made between the pressure and drag bars was a matter of form. The clamping-plates of Hoyt's patent are not of the essence or substance of his invention. It was one way, and a convenient way, for making such a pivotal connection as was desired. The defendants' pivoted-bolt and wedge-plate, having lugs, the pressure-bars being attached by eyes to the bolt, is mechanically an equivalent for the pivoted clamping-plates, having lugs; the pressure-bars being attached by clamping-plates between said plates of

the patent. The parts accomplish the same function in the same way, and constitute what in the second claim is called a "swinging head." But it is insisted that the patentee, by the language of his claims, and by the history of the art, must be limited to the precise mode of connecting his pressure-bars and draft-bars described in his specifications and called for in his claims,—in other words, that the patent is not infringed unless clamping-plates form an element in the infringing structure. The case turns here. Grain-drills were old. Shoes and press-wheels are elements found in other structures. The combination was regarded as sufficiently novel to justify a patent, and defendants do not deny its validity. None of the older patents which have been introduced show a mechanism which seems to combine the advantages and effectiveness of the structure of the patent. The same may be said of drills not covered by any patent, so far as the proof in this case goes. It is not always easy to point out with precision just what marks the difference between a new and successful structure and an old and less satisfactory mechanism. That Hoyt's drill is a marked improvement over older structures is most clear, on the evidence. Its lightness, durability, simplicity of construction and operation, seem established. Its long, elastic springs give it a wide range of action over uneven surfaces. It needs few repairs. These qualities have contributed to its popularity, and brought it into extensive use. The novelty of the combination is not disputed. Its utility and success are proven facts. There is nothing in the history of the art, as developed in this record, which would make it necessary that Hoyt should be limited to clamping-plates pivotally attached to the draft-bars, as a means of pivotally connecting his pressure and draft bars. It is true that he calls for clamping-plates in his claims, and that he does not claim any other method of making his connection. But he has not shown any intention to confine himself to that specific mode of connection. The form he describes and claims is not of the essence of his invention, and the law allows a patentee any form which is the equivalent of that claimed, unless he has expressly limited himself to the one claimed and described, or unless it is necessary to limit him to the specific form in order to save his patent from anticipation. Hoyt was not a pioneer. But his invention is clearly a meritorious one. In such case he is not cut off from a reasonable range of equivalents measured by the advance he has made over older machines. In *Bundy Mfg. Co. v. Detroit Time-Register Co.*, 36 C. C. A. 375, 94 Fed. 524, we said:

"To be entitled to the benefit of the doctrine of equivalents, it is not essential that the patent shall be for a 'pioneer invention,' in the broad sense of that term. If his invention is one which has marked a decided step in the art, and has proven of value to the public, he will be entitled to the benefit of the rule of equivalents, though not in so liberal a degree as if his invention was of primary character. Mr. Justice Jackson, in *Miller v. Manufacturing Co.*, 151 U. S. 186, 207, 14 Sup. Ct. 310, 318, 38 L. Ed. 131, said, 'The range of equivalents depends upon the extent and nature of the invention.' The meritoriousness of an improvement depends—First, upon the extent to which the former art taught or suggested the step taken; and, second, upon the advance made in the usefulness of the machine as improved."

In discussing the seventh claim of the Chambers patent, in *Penfield v. Chambers Bros. Co.*, 34 C. C. A. 579, 587, 92 Fed. 639, Judge Severens stated the rule of equivalents very clearly, by saying:

"This invention, although an improvement, was one of great merit, and a large advance upon anything which had gone before. The doctrine of *Miller v. Manufacturing Co.*, 151 U. S. 206, 14 Sup. Ct. 310, 38 L. Ed. 121, is invoked to prove that where an invention relates to an improvement, merely, the inventor is restricted to the precise construction which he has detailed. But I take it that that doctrine is not absolute, and, when rightly construed and expounded, means this: That the rule applicable to the determination of equivalency depends upon the importance and the breadth of the original invention, and does not depend upon the question whether it was the first in the field relating to that subject, but upon the degree of advancement which the invention has made in newness of discovery and utility; for there may be as much merit in bringing on a large illumination from a feeble start, as in the conception of the first beclouded idea which may have originated the course of study and discovery along that line. The rule is not a hard and fast one, but measures equivalents by looking to see what has been accomplished before; and finding whether the combination, read broadly, had been anticipated, or whether, having reference to what had already been shown, the claim must be limited to the precise construction in order to save it as being new; for the constant rule is to give to the inventor the benefit of all that he has invented. If he has improved only a little, he has only a correspondingly narrow standing ground. If he has improved much and widely, the area of the field in which he is to be protected is enlarged to the limits of what his invention has made its own."

To the same effect are *McCormick Harvesting Mach. Co. v. Aultman, Miller & Co.*, 16 C. C. A. 259, 69 Fed. 371; and *Muller v. Tool Co.*, 23 C. C. A. 357, 366, 77 Fed. 621. The second and third claims of the patent are substantially identical with the first. The swinging head of the second claim is the pivoted clamping-plates of the first claim. If the first claim is infringed, the second is, also.

As to the fourth and fifth claims of the patent: These include the structure of the first three claims, with the press or covering-wheel added. By a stipulation, defendants admitted that prior to this suit they have made and sold grain-drills, with press-wheel attached, such as shown on page 16 of an illustrated catalogue issued by them. Their superintendent, Horace G. Swope, testified that they had in stock some 300 press-wheels and spring attachments such as shown by the drawing in the catalogue above referred to, but that none had been made or sold since his connection with the business, which began in December, 1895. This suit was begun in March, 1897. There is no other evidence as to the actual sale of such press-wheel attachments than that contained in the stipulation referred to, though it is shown that since December, 1895, such attachments have not been advertised in catalogues issued since that date. In this condition of the evidence, the learned circuit judge held that complainant had failed to establish infringement by failure to show sales of drills including the press-wheel attachment of the fourth and fifth claims. In this we think he erred. The stipulation shows that sales of drills including the press-wheel attachment had been made at some time prior to the filing of the suit, and, although Swope's evidence shows that no sales had been made since his connection with the McSherry Company, there were on hand some 300 of the infrin-

ging parts. An injunction should go against any sale of the drill with such parts attached, and for an accounting by reason of sales heretofore made. That the press-wheel attachment infringes, we have no doubt. The only difference between the structure of the Hoyt patent, under its fourth and fifth claims, not heretofore dealt with, is that defendants have united the draft and spring-pressure rods of the covering-wheel, G, about halfway back of the hopper, H, into one part, and doubled it back on itself, and then attached the upper end thereof to the shoe spring-pressure rods, I, of the patent, in substantially the method of the patent. This is a mere change of form. The function is the same. Pressure is transmitted to the covering-wheel from the shoe spring-pressure rods through the partly-united covering-wheel pressure-rods in substantially the same way as in the method of the patent. The decree must be modified so as to find the fourth and fifth claims infringed, and in all other respects affirmed. The McSherry Manufacturing Company will pay costs of both appeals.

FRY v. ROOKWOOD POTTERY et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 746.

1. PATENTS—INVENTION—TRANSFERRING APPLIANCE TO ANOTHER SIMILAR ART.
The art of painting on canvas or paper is so nearly allied to that of painting or decorating clay ware that no patentable invention is involved in transferring the use of an atomizer for applying pigments from one art to the other.
2. SAME—DECORATING POTTERY WARE.
The Fry patent, No. 399,029, for an improvement in the art of decorating pottery ware, is void for want of patentable invention and for anticipation, particularly by the "air brush" or atomizer for applying pigments to all surfaces, patented by Peeler and improved by Walkup.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

L. M. Hosea, for appellant.

R. H. Parkinson and G. B. Parkinson, for appellees.

Before LURTON and DAY, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. This is a bill to restrain infringement of patent No. 399,029, of March 5, 1889, granted to Laura A. Fry for an "improvement in the art of decorating pottery ware." The answer denied novelty, and averred that the improvement had been described in printed publications prior to the alleged invention of the complainant, in a patent to L. Walkup, of May 6, 1884, a patent to A. Peeler, of April 25, 1882, in the life of Josiah Wedgwood, in the "History of the Ceramic Art," and in other publications; and that the process had been known and in public use prior to complainant's invention by Peeler, Walkup, Whipple, Ligowsky Clay Pigeon Company, the Matt Morgan Art Pottery Company, Carter, Cincinnati

School of Design; and that the patent was void for want of novelty. The specifications of the Fry patent thus state the invention and method of application:

"My invention consists in the application to the surface of the ware after the article has received its final shape, and before it is finally glazed or fired, suitable coloring matter in the form of a cloud or spray, as hereinafter described, whereby a particularly soft, delicate background or shading is produced upon the ware, which may be made to gradually fade or vanish in one or more directions, and to blend from one color to another without any perceptible line of demarkation. It consists, furthermore, in heating the ware when hard or glazed upon the surface, and thereafter applying the coloring matter, in manner as hereinafter described, to the hot surface, and finally firing or glazing the decorated article. To carry my invention into effect, the coloring-matter is blown upon the surface of the ware—either in its soft state, in the 'bisque' state, or on the glaze, before firing—in the form of a cloud or atomized spray or mist, produced by means of any of the usual forms of atomizers which are operated by an air blast, or a steam blast, or by the lungs of the operator, and which, being well known, need not be herein described. After the ware has thus been decorated, the color is fixed by firing the ware in the customary manner. I employ the coloring matter either in a liquid or semiliquid form, or in the form of a very dry, almost impalpable, powder, as desired. As the coloring matter is blown from the tube of the atomizer, and carried therefrom in a cloud of fine, almost imperceptible, particles, it may be readily directed upon the article in such manner as may be found best adapted to produce the desired effect, the application being freely made where the color is to be intense, and more delicately made in proportion as the color effect is to be delicate, or otherwise varied as the taste, skill, or ingenuity of the operator may dictate. A single color may thus be applied to a color ground, or different colors may be applied separately, or by means of separate atomizing-jets several colors may be applied simultaneously. By this process delicate clouding—if 'clouding' it may be called—is produced entirely free from outline and possessing a peculiarly delicate 'vanish'; and where two colors merge a peculiar softness of blending is secured, which may not otherwise be obtained. A variety of new and beautiful effects may also be obtained which it is not necessary herein to describe. The coloring-matter and the glazing material for the clay ware may be mixed together, and applied to the article by my process, or the coloring matter may be applied as above described, and the glaze thereafter applied by the usual process of dipping and firing. Where the clay ware to be colored and decorated has been once fired, and is not, therefore, sufficiently absorbent, I heat the same before blowing the color thereon, the effect of the heat of the article being to cause the liquid coloring matter to quickly dry without marring the effects which are sought in its application. I am aware that coloring matter in a liquid state has heretofore been applied to the glazed surfaces of china ware by sprinkling or spattering the same thereon with the aid of a comb and brush, the comb being passed over the brush dipped in the coloring matter in such manner as to cause the latter to fly off in fine, independent drops or particles, this process being technically known as 'spatter work,' and I make no claim thereto. My improved process differs from spatter work in that, instead of being spattered in small, independent drops, the color is laid upon the ware in a cloud or sheet of almost imperceptible spray or mist, producing very different effects, and such as have hitherto been unknown.

"I claim as my invention: (1) The improvement in the art of decorating articles of clay ware which consists in blowing an atomized spray or cloud of coloring matter upon the surface thereof, and thereafter fixing the same by firing, substantially in manner as described. (2) The improvement in the art of decorating clay ware which consists in heating the surface and blowing upon the heated surface an atomized spray or cloud of coloring matter, and thereafter fixing the same by firing, substantially in manner as described."

The discussion of this case by the learned circuit judge (90 Fed. 494) is so full and satisfactory that we are content to affirm the de-

cree of the circuit court upon the opinion of that court, which, so far as it relates to the question of patentability, was as follows:

"It is conceded that the defendants only infringe the first claim of the patent covering the application of color to the clay in its green state before it is fired at all. Color is applied to pottery by the use of mineral pigments carried in a solution of clay. These are technically called 'slips.' The gist of Miss Fry's improvement was the spraying of these slips by the use of an atomizer upon the green clay molded into the desired form. Every other step in the process which she describes was old. The application of the color to the green clay before any firing was confessedly old in the making and decorating of the pottery. The only change claimed to have been effected was in the means by which the color was applied, to wit, by atomizing, rather than by a brush. The only question for the court to decide is whether, in what had been done before, there was a palpable suggestion of atomizing and spraying color upon pottery as a means of getting better effects in the decoration. It is to be borne in mind in determining such a question that the function of the court is not to consider what Miss Fry's actual knowledge of the prior art was, and then to decide whether, with such knowledge, what she did involved real invention; but the court is bound to assume that she knew everything about the art of applying color to pottery or kindred surfaces which was contained in printed publications or in the public history of the art, and upon that assumption say whether the step she took in the art required the exercise of the inventive faculty. Approaching the question thus limited, we find that in the Chinese method of decorating pottery it had been common to blow upon the articles to be decorated in the green clay the color through a bambo pipe having stretched across the end of it a piece of gauze or other material for dividing the pigment into fine particles, and thereby produce a spraying effect. Two pieces of pottery thus decorated have been exhibited to the court. It was old to use a mouth atomizer in blowing upon paintings shellac or other fixative necessary to preserve them. It was old to use the same process with charcoal sketches. In this condition of the art, Abner Peeler, on October 1, 1881,—three years before Miss Fry claims to have conceived her invention,—applied for a patent for a paint distributor, and the patent was issued to him on April 25, 1882. He says in his specifications: 'My invention relates to an improvement in devices for distributing pigments, the object being to apply to surfaces of any character all kinds of liquid coloring matter in a state of extreme attenuation. With this end in view, my invention consists in the combination with a reciprocating needle arranged and adapted to feed a quantity of liquid pigment to its point at every stroke of devices for projecting a jet of air against the needle and atomizing the liquid pigment.'"

It is unnecessary further to describe the mechanism of the invention than to say that it consisted of an ordinary atomizer with devices for holding the pigment and increasing the atomization by the assistance of a reciprocating needle, which presented the pigment in fine drops at the mouth of the atomizer. It was merely an improvement on an ordinary atomizer. The patentee, in describing the operation, said:

"In the reciprocating movement of the needle its point is drawn within and immersed in the pigment in the receptacle, a small quantity of which will adhere to it. When now the needle is thrown forward, its point will divide the air jet issuing from the pipe, D, and the adhering color will be blown from its opposite sides thereby, and carried to any object within convenient range of the jet. The quantity of color adhering to the needle is so small, and its atomization so perfect, that the individual particles of color are hardly discernible upon the object on which they are blown. It will therefore follow that with my distributor, and with one pigment, colored effects may be produced which will descend from the palest tints capable of being produced by the extreme attenuation of the color through all of the intermediate tints down to the depth of color formed by the paint in mass. As the tone of the different effects

will depend upon the length of time that the jet is directed to any one point, exquisitely graded shading may be produced by its careful manipulation. In polychromatic painting, in the prosecution of which it is often necessary, in order to obtain the desired tints, to apply one pigment upon the surface of another color, my distributor will be of great value, as, after it has been used to apply one color, the pigment receptacle may be cleansed, and another color introduced into it, and distributed upon the color first applied. In this way a blending of color may be produced almost unattainable in brush painting. In painting portraits either in color or in sepia, and in finishing solar prints, the device may also be used to excellent purpose on account of its adaption to produce those soft and delicate tints which this class of work demands. In fact, in all situations requiring delicate coloring my device will be found a great aid in the application thereof."

This patent was assigned to Liberty Walkup, to whom was issued another patent for a device which is merely an improvement upon Peeler's paint distributor. Like Peeler's, it is a device for distribution by atomization of pigments in the art of painting. He says, in his patent: "This invention relates to machines employed in the distribution of pigments in the art of painting, but more especially in the fine arts." Walkup, since 1883 and 1884, down to the present time, has been engaged in the manufacture of a device that he called an "air brush," to be used for the distribution of color over surfaces of all kinds. In his advertisement issued in 1883,—a year before Miss Fry conceived her improvement,—Walkup said that the air brush would handle liquid pigments on any surface known to the art, and that it would handle any liquid pigment in a satisfactory manner; that it could be applied to "India ink work, water colors, crayon work, photography, pastel work, architecture, lithographing, civil engineering, monumental drawing, designing or house decorations, drapery and costume designing, china decorating, colored photographs, artotypes, photogravures," etc. There is uncontradicted evidence that in 1883 Mrs. Walkup, the wife of the inventor, used the air brush to decorate china, which was subsequently fired, and that three pieces of china were thus decorated to show that the brush was adapted to the work. It is contended that the Peeler and Walkup patents cannot be successfully used with the heavy slip coloring matter that is used to decorate pottery. That is contradicted. It is not material, however, whether the particular form of atomizer used by Peeler and Walkup would distribute with sufficient ease the heavier coloring material used in pottery decoration, because the change from Walkup's invention to the common form of atomizer was palpable. Walkup's atomizer was merely an improvement on the common form, and was invented only to make the spray finer than the ordinary atomizer would make it. Walkup's patented device necessarily contained the obvious suggestion that an ordinary atomizer would accomplish the same result in a less degree. It is to be noted that Miss Fry does not mention in the specifications of her patent any particular form of atomizer. It appears that she herself used the ordinary mouth atomizer when she began this method of coloring at the Rookwood Pottery, but that afterwards, because the use of this form of atomizer was disagreeable and harmful to the throats of the designers and artists of the Rookwood Pottery, air pumps and other mechanical devices were applied to the working of atomizers under

direction of Mr. Taylor, the manager of the pottery. The advantages to be derived from atomization and spraying of coloring-matter on surfaces to be decorated were fully set forth in Peeler and Walkup's patents, and in the advertisement of Walkup, long before Miss Fry attempted the use of an atomizer. The particular form of atomizer to be used with the heavier pigments was a matter of detail and mechanical skill for which no patent can be supported.

It appears that the mouth atomizer for distributing and spraying color on clay was adopted by a number of persons, who were entirely ignorant of Miss Fry's use of an atomizer for such a purpose, at or about the same time that she began its use. It is clearly established that Matt Daly used the atomizer for the distribution of coloring matter upon pottery about the same time as Miss Fry; that Ligowsky, an inventor of many patents, also used the same method of distributing coloring matter; and that W. A. Long, a witness for Miss Fry in this case, after having experimented with the Walkup brush, and finding it hardly adapted for the distribution of such heavy coloring matter as the slips, began at once to use the mouth atomizer. It is not a matter of importance whether these uses of the atomizer were anterior to or after Miss Fry's use of the same device. They are not referred to as prior uses, but they are material because they tend to show that, after Walkup's device became known, the use of an ordinary atomizer for color slips was merely a plain and obvious step which involved no patentable invention. A well-authenticated instance of the use of atomizers in applying slip colors to terra-cotta work at the Northwestern Terra-Cotta Works in Chicago some time prior to Miss Fry's conception of the method appears in the evidence, and a plaque of Sarah Bernhardt, thus colored some time before July, 1884,—the earliest date fixed by Miss Fry of her conception of her improvement,—has been produced in court. On the whole case, I have no doubt that Miss Fry's patent is void for want of invention. Even if Walkup's patent had been limited—as it was not—to the application of pigments to canvas and paper, the art of painting on those surfaces is so nearly allied to painting or decorating clay that it would have involved no invention to transfer the use of the atomizer from one art to the other. This principle was applied in *Stearns v. Russell*, 54 U. S. App. 591, 29 C. C. A. 121, 85 Fed. 218, and *Steiner Fire-Extinguisher Co. v. City of Adrian*, 16 U. S. App. 409, 8 C. C. A. 44, 59 Fed. 132, decisions by the circuit court of appeals of this circuit, and in the cases cited in those decisions. It is hardly correct to say that painting on clay is an art distinct from painting on other surfaces, so far as the mechanical method of applying the color is concerned. Walkup's patent, as for the means of applying pigments to all kinds of surfaces, and the use of the atomizer to apply pigments to clay only, is a case "of applying what was on its face expressly intended for all arts to a special art for which it was peculiarly adapted." *Palmer v. Manufacturing Co.* (C. C.) 84 Fed. 454, 457. The decree of the circuit court will be affirmed, with costs.

THE STYRIA (four cases).

(Circuit Court of Appeals, Second Circuit. April 3, 1900.)

Nos. 137-144.

1. SHIPPING—EFFECT OF DECLARATION OF WAR—RIGHT TO DISCHARGE CONTRABAND CARGO.

The Austrian steamship *Styria* loaded at an Italian port as a part of her cargo a quantity of sulphur for delivery at New York. The master issued bills of lading therefor, and on April 24, 1898, cleared; but, before sailing, war was declared between the United States and Spain. Held, that such fact constituted a "restraint of princes," within an exception in his bills of lading, which justified the master in refusing to proceed to a port of one of the belligerent powers with a cargo of sulphur, generally recognized and treated as contraband of war, and that he had the right to land such cargo, with all proper precautions for safe-keeping, at the expense of the shippers, without waiting for further action of the hostile powers, thus leaving his vessel free to proceed with the remainder of her cargo; but, having learned, before he left the port, through official proclamation made by the Italian government, that the Spanish government had agreed not to treat sulphur as contraband of war until further notice, it became the duty of the master to reload the cargo so discharged, and the vessel was liable to the shippers for the damages sustained by reason of his failure to do so.

2. SAME—LOSS BY DELAY IN DELIVERY OF CARGO—MEASURE OF DAMAGES.

The measure of damages for delay in delivering a cargo of merchandise, for which the vessel is liable, is the difference between the price the goods actually brought when they arrived, and the price they would have brought at the time they should have been delivered; and this measure of damages is not changed by a stipulation in the bill of lading that the shipowner is not to be liable in any case for more than the invoiced or declared value of the goods, the purpose of which is only to fix the outside limit of liability.

Appeal from the District Court of the United States for the District of New York.

These causes come here upon appeals from decrees of the district court, Southern district of New York. There are four libels and cross libels, arising out of the same transaction. The libelants are all owners of different lots of brimstone, shipped by the steamship *Styria* at Porto Empedocle, Sicily, in the month of April, 1898, and, the vessel not having brought over the brimstone, libeled her upon her arrival for damages resulting from her failure to bring it in accordance with the contract. Subsequently, by stipulation between the parties, the brimstone was brought over by the *Abbazia*, another steamer belonging to the Austro-Americana Steamship Company, which is the owner of the *Styria*, and, upon its arrival here, was libeled by that company for expenses incurred in landing and storing in Sicily the brimstone in question. Decrees were entered in the district court in favor of the libelants and cross claimants (93 Fed. 474), from which decrees the claimants and cross libelants appealed. The libelants, being dissatisfied with the amount of damages awarded by the district court, appeal from so much of the decrees in their favor as limits their recovery to the amount actually awarded. The facts sufficiently appear in the opinion.

J. Parker Kirlin, for the *Styria*.

E. B. Hill, for appellants Malcolmson and Munroe.

Latham G. Reed, for appellant Parsons.

Charles C. Burlingham, for appellant Morgan.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The Styria is an Austrian steamer, owned by the Austro-Americana Steamship Company. She was bound on a voyage from Trieste, via Sicilian ports, to New York. She sailed from Trieste with some general cargo for New York on April 16, 1898, reached Cape Empedocle (Girgenti), her second port, early on April 21st, and began taking on brimstone on the afternoon of the same day. Five shippers at that place furnished for shipment about 2,200 tons, the cargo here involved, which was laden on the vessel by April 24th, on which day the vessel was cleared at the custom house and was ready to proceed on her voyage. The captain was under instructions to proceed to Messina and Palermo to fill up with fruits. Fruit cargo at these ports had been engaged. About this time war broke out between this country and Spain. There is no dispute as to the sequence of historical events, which is as follows: On April 20th congress passed and the president approved the joint resolution recognizing the freedom and independence of the people of Cuba, and demanding that the government of Spain relinquish its authority in the island and withdraw its land and naval forces. On the same day the Spanish minister at Washington demanded and received his passports. On the morning of April 21st our minister at Madrid was informed by the Spanish minister of foreign affairs that the diplomatic relations between the two governments were broken off. On the same day he left Madrid. On April 23d the queen regent of Spain issued a decree announcing the existence of war with the United States, which was published in the official papers at Madrid on April 24th, and communicated to the other powers and made public on or about April 25th. On that day it was published in the newspapers of this country, and presumably in Sicily and England. The declaration of war was made by the United States under an act passed April 25th, declaring the existence of war since April 21st. There is no evidence in the case which will warrant a finding that the captain knew that war had been declared before he shipped libelants' sulphur and signed bills of lading therefor. On April 25th the queen regent of Spain issued a proclamation, which contained the following provisions:

"Art. 5. In order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag, the royal navy, auxiliary cruisers, and privateers, if and when the latter are authorized, will exercise the right of visit on the high seas and in the territorial waters of the enemy, in accordance with international law and any regulations which may be published for the purpose.

"Art. 6. Under the denomination 'contraband of war' the following articles are included: Cannons, machine guns, * * * powder, sulphur, saltpeter," etc.

Thereafter, and while the state of war continued unmodified, under the rules of international law, sulphur or brimstone, shipped and owned as this was, was subject to seizure by war vessels of Spain on the high seas, a process which would involve the arrest of the neutral vessel carrying it wherever she might be,—off the coast of Sicily, in the straits of Gibraltar, or on the banks of Newfoundland,—her enforced deviation from her voyage to a Spanish

port, and her detention there until a Spanish prize court should have determined the questions arising upon confiscation of the cargo. It appears from the record that on April 27th the captain knew that Spain and the United States were at war. On that day he began to discharge and warehouse the sulphur, notifying the shippers that he did so "on finding risky my passage to New York, with the actual sulphur cargo, for facts of war." The unloading of the sulphur was completed on May 7th, and shippers again notified. On the same day she cleared, and on the next morning, May 8th, proceeded on her voyage with the cargo laden at Trieste, picked up her fruit at Messina and Palermo, and sailed from Italian waters May 9th, reaching New York on June 3d.

It seems manifest that, upon the outbreak of war, a voyage with contraband on board to the port of one of the belligerents might fairly be regarded as a risky piece of business. The suggestion made upon the argument that the naval power of Spain was not such as would induce a "man of ordinary courage, judgment, and experience" to hesitate to proceed is of no weight. We may not attribute to the captain of the *Styria* knowledge gained after the event; and, indeed, this court is not advised of any historical facts which would warrant the conclusion that it was not entirely within the power of Spain during the first few months of the war to arrest and search every vessel westward bound through the straits of Gibraltar, and picking her way along by the lighthouses on the Spanish coast. The first question to be determined is whether, with such a risk involved in the event of the vessel's proceeding with the sulphur on board, the captain was justified in relanding and warehousing it. Three clauses of the bill of lading are relied upon:

- (a) "Restraints of princes and rulers of people * * * excepted."
- (b) "In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe for any reason to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and, on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the post office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."
- (c) "With liberty (in event of steamer putting back to this or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer."

The second clause above quoted was made most prominent upon the argument,—question being raised whether it was applicable to a condition of affairs existing elsewhere than at the port of discharge, and also whether, as matter of fact, the master exercised the option provided for, and whether he did himself consider the voyage unsafe; there being evidence tending to show that he landed the sulphur because of telegraphic orders from the steamer's managers in Glasgow. We do not find it necessary to discuss this branch of the case because we find in clause (a) abundant authority for a refusal to carry forward the sulphur while such a condition of affairs existed as that already described as being generally known to

exist when the discharge began on April 27th. There is no logical difference between a restraint of princes and rulers exercised by a cruiser with power to visit, search, and seize lying two leagues off Cape Empedocle, and that exercised by a half-dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances the owner of contraband cargo (loaded, as this was, before war broke out) could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. Moreover, it would certainly be unreasonable to require the ship to remain in port with the contraband cargo on board until the war should cease,—a period of months, possibly years. The owners of other cargo not contraband have rights as much, if not more, entitled to consideration than those of the owners who have been unfortunate enough to ship the cargo which has produced the risk.

That a blockade is within the term "restraints of rulers and princes" has been settled for the federal courts by the decision in *Olivera v. Insurance Co.*, 3 Wheat. 183, 4 L. Ed. 365. That a well-founded apprehension of capture by the cruisers of a belligerent is the equivalent of an actual restraint is the doctrine of the later authorities. The case of *Atkinson v. Ritchie*, 10 East, 530, mainly relied on by libelants, is not in point. The only excuse there offered was that the captain apprehended an embargo would be laid, but in the case at bar he knew that war had been declared.

In *Geipel v. Smith*, L. R. 7 Q. B. 410, Cockburn, C. J., says:

"Is a blockade a restraint of princes? I think it is, * * * provided the blockade is effective; and in the eye of the law a blockade is effective if the enemy's ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. * * * It would be monstrous to say that in such a case the parties must wait, for the obligation must be mutual, till the restraint be taken off,—the shipper with cargo which might be perishable, or its market value destroyed; the shipowner with his ship lying idle, possibly rotting."

In *Rodoconachi v. Elliott*, L. R. 9 C. P. 518, the exchequer chamber held to the same effect where goods in transit from China to England had reached Paris just at the beginning of its siege by the Germans, and it appeared that an effort to remove them would probably have resulted in their seizure.

In *Explosives Co. v. Jenkins* [1896] 2 Q. B. 326, goods, contraband in the event of war, were shipped from England to Yokohama. While on the high seas war broke out between China and Japan, of which the master heard when he put into Hong Kong, whereupon he discharged the goods, and placed them in safe custody, and continued his voyage to Yokohama. The court sustained the ship, saying:

"The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese government that contraband of war should be landed."

Inasmuch as the master, where the contract was made in time of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband, we fail to

see why he should not have the right to land such contraband cargo, with all proper precautions as to safe-keeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk or delay by reason of an actual arrest which would be caused only by the presence of such contraband cargo. The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered. We understand that the district court reached this same conclusion, but found the ship in fault because she did not wait a reasonable period to see if there might not be some reasonable assurance of safety, and held that "the commencement of the discharge on the 27th was too hasty and precipitate."

This brings us to the next branch of the case. When two nations formally proclaim the existence of a state of war between themselves with all the solemnity observed in this instance, it would seem to be going too far to say that parties whose contracts are affected thereby should wait some indefinite time, which a court shall find reasonable, in a vague expectation that the belligerents may think better of it, and make peace. A situation is quite conceivable where delay might fairly be required. Thus the minister of one power or the other might demand his passports; or the day named in an ultimatum might pass without compliance with its requirements; or a squadron of the war vessels of one power might impress seamen from the deck of the war vessel of another power, as the *Carnatic* and her consorts did with the *Baltimore* in 1798; or the war vessel of one power, encountering the war vessel of another upon the high seas, might pour broadside after broadside into her, as the *Leopard* did with the *Chesapeake* in 1807,—any one of which acts would seem to import the imminence, if not the actual existence, of war, and yet might fall short of being such authoritative evidence of a state of belligerency as would justify a master in treating any part of his cargo as being thereby made contraband. But the situation shown here was a very different one. Both nations had united in proclaiming to the whole world that they were at war, and we know of no reason why the master of any vessel of a neutral nation was bound to wait 24 hours, or 24 days, or 24 weeks, to see if the two belligerents would not settle their differences. As soon as he learned that war was declared, the master knew that the cargo he had taken on board at Port Empedocle was contraband. "I knew," says he, "that sulphur is to make gunpowder. Everybody knows that. * * * I thought it must be contraband." We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war. It certainly should be a safe assumption for the master of a neutral vessel to make that he cannot carry such cargo to the ports of one belligerent without risking its seizure by the other; and, in the absence of special circumstances, there would seem to be no necessity to wait for further assurance in that regard.

In the case at bar, however, there were special circumstances which will be next considered. The exportation of sulphur is one of the greatest industries of the island of Sicily, and the Italian gov-

ernment was naturally solicitous that the trade in sulphur with the United States should not be interfered with. It now appears in the record, by reports obtained from diplomatic sources, that shortly after the proclamation of the queen regent negotiations were opened by the Italian government to secure a modification of its provisions, so that sulphur should not be considered contraband of war. The Spanish government declined to alter the decree, but on April 29th, at Madrid, the Spanish minister for foreign affairs "verbally" [sic, orally?] stated to the Italian ambassador that orders would be given to the naval departments, as a temporary measure, not to treat sulphur as contraband of war. The same statement was made by the Spanish minister for foreign affairs to the British ambassador on May 6th. On May 31st the same minister stated in an official note to both the Italian and the British ambassadors that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice. Not being in telephonic communication with the chancellery of the embassy at Madrid, the master of the Styria was not advised of these transactions at the moment they occurred; and his conduct is to be judged, not in the light of exact knowledge acquired after the event, but by such information as may have been available for him at the time and place.

As we have seen, he knew certainly on April 27th, and probably on April 26th, that war had been declared, and that his sulphur cargo was contraband; that he was therefore entitled to land and store it, thus leaving his ship free to carry out her obligations to the rest of the cargo. On May 25th the *Giornale di Sicilia*, a newspaper published at Palermo, and which the captain saw from day to day, stated that Messina merchants had asked their parliamentary deputy to urge the government to co-operate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filled with reports and rumors as to the progress of this movement to secure exemption; but down to the 6th of May not one of these reports bore the stamp of authority, and no one vouched for their accuracy. The statements in the clippings from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents, in Rome or elsewhere, furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted. It is a variety of merchandise such as always has been contraband. Its exportation to the United States might well be considered an "aid" to Spain's enemy. No one appears to have suggested that the United States concede the same exemption. On the one hand it might be urged that it would please the government and people of Italy to grant the request; but, on the other hand, in the case of merchandise so highly contraband, neither the Italian government nor people could justly take offense if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can

see that the hopeful prognostications of the writers for the Journal of Sicily were well founded; but there was nothing to give any such assurance at the time they appeared. We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken. By May 6th, however, the situation changed. The Journal of Sicily published an official declaration from the Italian minister of agriculture, industry, and commerce, as follows:

"Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23d of the Spanish government are considered as contraband of war arms, projectiles, fuses, powder, sulphur, niter. * * * I would also state that, in consequence of our request, the Spanish government has given notice to the commanders of its vessels to let sulphur pass free.

"[Signed]

The Minister, Coeco-Ortu."

Here was an official declaration which the master should have accepted as sufficient. The Italian government, through a cabinet minister, announces that official action has been taken by the Spanish government the practical result of which was to make sulphur free from capture. It matters not that the Spanish government might thereafter reconsider this decision, and direct its cruisers to seize sulphur, because it was to be assumed that cargoes taken out in reliance upon the proclamation of the Italian government would be respected. If they were not, the Italian government would have good ground for claiming indemnity from Spain, and a *casus belli* in case of its refusal.

It is not quite clear on what day this proclamation was published in the Journal of Sicily. Each issue of that newspaper has a double date, and the issue containing it is dated "Thursday-Friday, 5th-6th May, 1898." The sulphur was not wholly discharged until May 7th. Even if it had been discharged earlier, however, this proclamation appearing before the steamer sailed upon her voyage, we are clearly of the opinion that it was the master's duty to reship it, since the condition of affairs which made it contraband had ceased to exist. The loss sustained by reason of the expense of discharging and reloading so much of the sulphur as had been discharged before the changed condition was officially made known should be borne by the cargo owner. It was his misfortune that, after he had put it aboard, a war broke out which made his cargo contraband, and relieved the ship from the obligation to carry it while it remained in that condition. The ship, however, is liable for any loss sustained in consequence of her failure to carry and deliver when she could do so safely. There was no loss or deterioration of the sulphur, but there was a loss of market. The value of sulphur on the day it would have reached this market, had it been reshipped and brought forward when the Italian proclamation was published, was greatly in excess of its value when it finally reached here. The measure of damages in such cases is well settled.

The loss is the difference between the price the goods actually brought and the price they would have brought had they been sold on the day when they should have arrived.

The only remaining question in the case is whether this method of calculation is modified by the express terms of the contract. The bill of lading contains the following clause:

"The shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance, nor for any claim notice of which is not given before the removal of the goods, nor for claim for damage or detention of goods under through bill of lading, where the damage is done or detention occurs while the goods are not in possession of the shipowner, nor in any case for more than the invoice or declared value of the goods, whichever shall be the least."

The district judge construed this as providing that, in any settlement of loss or damage, the invoice value, and not the actual value, of the goods, should be taken as a basis, and therefore found the damage from loss of market to be the difference between such invoice value and the price the sulphur actually brought. A similar clause has been so interpreted in the same district in *The Hadji* (D. C.) 18 Fed. 459, and *Pearse v. Steamship Co.* (D. C.) 24 Fed. 285, and in the district of New Jersey in *The Lydian Monarch* (D. C.) 23 Fed. 298. *The Hadji* was appealed (C. C.; 20 Fed. 875), but the point was not passed upon in the circuit court. In the brief of counsel for claimant there is cited *The Aline*, 23 Blatchf. 335, Fed. Cas. No. 6,991; but it does not sustain the proposition. We are unable to concur in the interpretation put upon this clause, for the reason that the language used does not seem to import any such idea. The statement that the shipowner shall not be liable in any case for more than the invoice value of the goods is a simple and straightforward one. Grammatically construed, it fixes a final limit of liability beyond which he shall not be required to respond. It does not profess to regulate the calculation by which a loss is to be ascertained, if such loss is less than the limit. To give them such a meaning would seem to be to substitute for the contract the parties have made another and different one, which they might easily have made for themselves had they wished to do so. Of a precisely similar clause the supreme court of Massachusetts said:

"The words 'the liability shall not exceed,' etc., are apt words to express the outside limit of the sum to be recovered; but both the particular words and the whole structure of the sentence are most inapt to express a stipulation that, if the goods are still equal to the invoice value, there shall be no recovery at all." *Brown v. Steamship Co.*, 147 Mass. 60, 16 N. E. 717.

The decree of the district court is therefore reversed, and the cause remanded, with instructions to decree in favor of libelants for the difference between the proceeds of the sale (less charges of sale) and what would have been the proceeds (less charges of sale) of a similar sale on the day on which the sulphur could have been sold, had it been promptly reshipped and brought to this market, less the freight, against which sum there is to be credited the proper expenses of discharging and reshipping at Cape Empedocle as above indicated, and claimed in the cross libels. Interest will go with the balance; and, since both libelants and cross libelants have prevailed, there should

be no costs. In this court, each side having prevailed in part, there will be no costs.

On Reargument.

(May 10, 1900.)

Reargument of this cause was had upon the single question as to the effect of the stipulation under which the sulphur was brought forward. In the former opinion we held the ship in fault, and bound to respond for the damages caused by loss of market; and that loss was declared to be the difference between the price the goods actually brought when they reached here, in another steamer of claimant's line, and the price they would have brought had they been sold on the day when they should have arrived. That difference is concededly less than the invoice value. The reargument has induced no change of opinion on these propositions. We fail to see that it makes any difference how the sulphur was brought forward. If the claimant failed to bring it, the owner could have withdrawn it from the Sicilian warehouse, paying the Styria's lien for expenses of discharge and the freight, and brought it forward himself; or he might, if he chose, have sold it in Sicily. It is certainly clear that, at the time the stipulation was signed, claimant could not have seized the sulphur and sold it for its own use,—a deliberate act of conversion,—and in the face of such willful tort have still insisted on the limitation of liability clause contained in the bill of lading. Such being the situation, and the libelants being in a position where by application of the rule as to measure of damage above set forth they would be made whole—and only be made whole—for the loss they suffered by the ship's negligence, the claimant being at the same time protected against any liability in excess of the stipulated limit, it is contended that the effect of the stipulation is practically to destroy the libelants' right to relief; so that, although concededly they have lost over \$20,000 through the ship's misconduct, they cannot recover anything, while by the same stipulation the ship gives up nothing. When the circumstances under which the stipulation was signed are taken into consideration, it appears that its language does not import such a one-sided agreement. The libels had been filed, all claiming damages for nondelivered sulphur at its full market value on the day it should have reached here. No answers had yet been interposed, nor claim made that the damages must be scaled down to the invoice value. When, therefore, the stipulation provided that the proceeds of the sulphur to be brought forward under its terms should be credited on account of the damages, it certainly was not intended that it should be credited twice,—once by the application of the rule for determining difference of market values, and again by deducting the amount of such proceeds from the balance found upon applying the rule for ascertaining damages which the transactions and documents required. The petition to modify the mandate is denied.

CLINE v. JAMES et al.

(Circuit Court, D. Oregon. May 12, 1900.)

No. 2,548.

CONTRACTS—PERSONS BOUND.

A part owner of mining claims, whose interest was not of record, but who assented to the bonding of the same by the record owner, has no standing in equity to repudiate a conveyance of his interest by his co-owner in accordance with the terms of the bond, on the ground of a private agreement between them that such conveyance would not be made unless the purchaser also took certain other claims bonded separately; nor is it material that the purchaser had knowledge of complainant's interest, the latter being bound by the terms of the bond to which he assented.

In Equity. Suit to recover an interest in mining claims.

L. B. Cox, C. J. Schnabel, and Smith & Hough, for plaintiff.

W. E. F. Deal, John M. Gearin, and Coshow & Sheridan, for defendants.

BELLINGER, District Judge. The plaintiff claims to be the owner of an undivided three-eighths interest in the Gold Bug mining claim, and of an undivided one-half interest in the Oversight Lode mining claim, in the Wolf Creek district, in this state, and he brings this suit to compel a conveyance of such interests by the defendant James. James acquired the property from the defendant R. A. Jones. The plaintiff and the defendant R. A. Jones were jointly interested in several mining properties in the district referred to, and it is claimed by the plaintiff, but denied by the defendants, that the two mining claims in question were a part of their joint property. Among the property held in common were some mines known as the "Albany Group." In 1897 this group of mines was bonded to James by the parties, and at the same time Jones bonded, by a separate writing, the Oversight and Gold Bug to James for \$7,000. These bonds were afterwards extended to September 19, 1898. Before the expiration of the bonds, Jones sold the Gold Bug and Oversight mines to James; the former for \$6,999, and the latter for \$1. The plaintiff, claiming, as stated, to be a joint owner with Jones in these properties, testifies that these bonds were given with his knowledge and approval, but that it was understood between Jones and himself that Jones would not let one group go without the other, the relation of the mines to each other being such that the Albany group would be greatly depreciated in value by the sale of the other group; and this alleged understanding between Jones and the plaintiff is relied on to invalidate the title taken by James under his bond on the Oversight and Gold Bug mines. It was clear to me when the cause was submitted that the plaintiff had no standing in equity, and I so stated, but in deference to the wishes of his counsel I withheld a formal decision in the cause, and gave them leave to file written arguments, which they have done. Nothing is presented to change the opinion formed at the hearing. It is claimed, among other things, that the sale made was not in compliance with the bond; the bond on the two mines being for \$7,000, and the sale as made being \$6,999 for one mine and \$1 for the other. The

sale was during the life of the bond, and satisfies it, and there is nothing more to be said as to that. I regard it as very questionable whether the plaintiff had any interest in the two mines in question. Assuming that he had an interest, and that James knew of it, his acquiescence in the bond under which the sale was made is conclusive upon him. The bond made with his authority was his bond, and it does not admit of argument that the obligors in an instrument cannot vary the terms of their obligation by a private understanding between themselves, nor is the case any wise different where one acts for both with the knowledge and acquiescence of his co-owner. The bond is the thing, and where that is as the parties intended it no understanding aliunde can avail to defeat or change it. It is said that the plaintiff assented to the bond upon a condition, and that the obligee in the bond, taking notice of the plaintiff's assent, must take notice of the condition upon which the assent was given; but this is merely another way of saying that the owners of property may enter into an obligatory writing of sale with an antecedent understanding between themselves not to abide by their obligation, and that the obligee, so far from taking anything under the writing, is bound by the agreement of the parties to violate it. Much has been said to the effect that James was not a bona fide purchaser, etc., and that there is no estoppel upon the plaintiff, and that, in any event, these defenses must be pleaded. There is no question of estoppel nor of bona fide purchase in the case. Those are cases where innocent persons have been misled by appearances into dealing with or acquiring rights or interests in property under circumstances that would make it unconscionable to permit the owner to assert his title. This is a case, as already stated, where the alleged owners covenant to sell upon certain conditions, with an alleged understanding between themselves not to be bound by such conditions. Moreover, I am convinced that there was no such agreement or understanding between the parties to this bond not to sell one group of mines without both, as is claimed. Cline, the plaintiff, testifies that when the defendant Jones sent the bond "down here" for him to sign (this was the bond for the sale of the Albany group, in which the plaintiff's interest was of record), he, the plaintiff, "noticed the Oversight was not in it," and that he wrote to Jones regarding it; that Jones answered, "I put the Oversight along with the Gold Bug for \$7,000, and I won't let them take one group without taking the two, to make a lump sale of it;" that this understanding was contained in the correspondence of the parties, as is, of course, implied under the circumstances. A large number of letters written by Jones to Cline are in evidence. These letters cover a period of time from the 1st of January, 1896, to October 26, 1898. The frequency of this correspondence is shown by the fact that a large number of letters were sent by Jones to the plaintiff almost every month during this period. To illustrate, the defendant Jones wrote during the month of June, 1897, to the plaintiff, on the 3d, 5th, 6th, 9th, 16th, 22d, and 29th of the month. During the other months these letters were less frequent, but still they were quite as numerous, considering the nature of the business to which they relate, as could have been expected from the most painstaking business associate to his partner. It is a suggestive

fact that in all this volume of correspondence the particular letter or letters in which the plaintiff avers that Jones told him he would not let the purchaser take one group without taking the two are not to be found. In these letters the same subjects are referred to over and over again, with reference to all these properties. The different mining properties—those which are admitted to have been the joint property of the parties as well as those which are claimed by Jones to have been his separate property—are constantly mentioned. It is incredible that this volume of letters, filled with details of the business in which these parties were concerned, should nowhere make mention of such an agreement as the plaintiff now bases his right upon. It is likely that there would have been more than one letter containing some reference to such an agreement if it had existed. There is nowhere any discernible break in the correspondence, no place that indicates a missing letter; nor is any explanation offered of the fact that in all this book of letters the only one bearing upon the point in issue should be missing. The plaintiff has evidently preserved this correspondence with great care. Towards the latter part of the correspondence there are indications of impending disagreement between the parties, and the correspondence shows that Jones regarded the Gold Bug mine as his individual property. This occurred long before the expiration of the bond and the sale to James. Under these circumstances, it is hardly possible that the plaintiff, who has preserved so many of these letters, would have neglected such correspondence as contained the agreement which he now testifies to, especially in view of the fact that such an agreement would have been conclusive of his title to an interest in the Gold Bug mine. As I have already stated, I think it doubtful whether the plaintiff had any interest in this particular property; but, if he had, I am of the opinion that he was content to have the property sold in accordance with the terms of the bond, of which he had knowledge, and to which he assented, and that the claim now made of a contrary understanding is a pretense due to the fact that Jones has refused to account to him for any part of the proceeds of the sale made to James, and that the plaintiff, because of the fact that he sees no chance to recover what he claims as his share of the proceeds of that sale from Jones, seeks by this suit to reinstate himself in his alleged title to the property which has been sold, and the proceeds of which have passed beyond his reach.

OSBORNE v. ALTSCHUL.

(Circuit Court, D. Oregon. May 12, 1900.)

No. 2,570.

1. PUBLIC LANDS—PRE-EMPTION—PREFERENCE OBTAINED BY SETTLEMENT.

The preference which a settler on unsurveyed public lands gives under the pre-emption law is effective against subsequent claimants only when the settler files his declaratory statement within the prescribed three months after the receipt at the land office of the plat of survey.

2. SAME—SUIT BY SETTLER FOR EQUITABLE RELIEF—LACHES.

A settler on public lands, intending to enter the same under the pre-emption laws, who does not appeal from the decision of the local land

office rejecting his application, and who delays 17 years after the land has been patented to another before bringing suit therefor, is barred by laches from the right to equitable relief.

In Equity. On demurrer to bill.

King & Saxton and S. T. Jeffreys, for plaintiff.

Williams, Wood & Linthicum, for defendant.

BELLINGER, District Judge. This is a suit to declare the legal title to certain lands, for which the defendant has a patent, to be held in trust for the plaintiff's benefit. The suit was originally brought in the circuit court of the state of Oregon, for Malheur county, and has been removed to this court. In the original complaint the plaintiff claimed under the homestead laws of the United States. He alleged that during the year 1870 he entered upon the lands in question (the same being vacant and unoccupied public lands) with the bona fide intention of entering the same under the homestead laws of the United States, and that in 1891 he attempted to file a homestead upon said premises, but that his application therefor was rejected by the land department for the reason that the lands applied for had in the meantime, and in the year 1882, been patented to the defendant's predecessor in interest, the Willamette Valley & Cascade Mountain Wagon-Road Company. The plaintiff alleged that he had occupied said lands continuously since 1870, in good faith, and with the intention of entering them under the homestead laws of the United States. After the case was removed to this court the plaintiff had leave to file an amended complaint, which he did. In this amended complaint, plaintiff undertook to claim under the pre-emption or homestead laws of the United States, with a view, as it would seem, of relying upon whichever law should best serve his purposes. In this amended complaint it was alleged that the plaintiff entered upon the lands in question in 1870, with the bona fide intention of entering and holding the same under the pre-emption or homestead laws of the United States; that he built a dwelling house and made other valuable improvements thereon, and resided upon and cultivated said premises, with such intention, from 1870 until the filing of such amended complaint, "with the intention of obtaining title thereto under the pre-emption or homestead laws of the United States." And he alleged that in 1890 he attempted to file a homestead upon said premises, but that his application was rejected by the land department for the reason as stated in the original complaint. Thereafter the plaintiff had leave to file a second amended complaint, which he did, and in which he undertook to set up an equitable title under the pre-emption laws of the United States, alleging a settlement in 1870, with a bona fide intention of entering and holding the land settled upon under the pre-emption laws of the United States, and that he resided upon said premises, with said intention, and continuously cultivated and improved the same, until the present time, with the intention of obtaining title thereto under the pre-emption laws of the United States, and that he still so holds said land. From this last complaint it appears that the lands so settled upon were surveyed in 1874, and that in the same

year the map of their withdrawal from public settlement was filed in the local land office for the district in which the lands were situated; that these lands were selected by the road company in 1879, as inuring to it under its grant, and were patented to said company, through mistake, by the government on the 30th day of October, 1882; that the plaintiff made tender of his pre-emption filing in 1879, but that the local land office refused to receive the same, for the reasons stated in the two preceding complaints. So that the case, as now presented, is one where settlement was made in 1870 upon lands within the limits of a wagon-road grant, and subject, upon selection thereunder, to be taken as a part of such grant, which lands were surveyed and withdrawn from settlement in 1874, and where the attempted pre-emption filing was not made until five years thereafter. It further appears that patent issued to the wagon-road company in 1882,—17 years before the commencement of this suit.

The law requires, in cases where pre-emption settlements are made, as in this case, upon unsurveyed land, that declaratory statements be filed within 3 months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlements. Rev. St. § 2266. I have no doubt but that a pre-emption settler upon unsurveyed lands may perfect his pre-emption right at any time after the expiration of 3 months from the date of the receipt of the approved township plat at the district land office, if other rights have not intervened in the meantime,—if, in other words, the lands in question are still open to pre-emption at the date of the filing of the declaratory statement. The preference or so-called inchoate right which settlement gives is effective against subsequent claimants only when the settler has made his filing within the prescribed time after the receipt at the land office of the township plat. This the plaintiff did not do, and the lands claimed were in the meantime withdrawn from settlement. The plaintiff's failure to make his filing, or offer of filing, left the lands liable to disposal by the United States, and their withdrawal under the wagon-road grant was a disposition of them, so far as the plaintiff was concerned.

But, aside from this, the plaintiff is precluded in his right to relief by his laches. His offer to file as a pre-emptioner was made in 1879, and was refused. He took no appeal or other action in the land department. In 1882 patents were issued to the wagon-road company. It was then open to him to have brought this suit. He waited, however, 17 years, and until after a judgment had been rendered against him in an action at law, before doing so. After such a delay, without explanation or excuse, it is too late for him to invoke the aid of a court of equity. The demurrer is sustained.

HANCHETT et al. v. CHIATOVICH.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 565.

1. LIBEL—PUBLICATION TENDING TO INJURE BUSINESS—HARMLESS ERROR.

In an action for publishing a notice wherein defendants requested their employes to refrain from associating with or trading with plaintiff, the action of the court in leaving it to the jury to determine whether or not the publication was defamatory, in connection with an instruction that the notice was capable of two constructions,—one harmless and the other defamatory,—and that the burden of showing it to be defamatory was on plaintiff, if erroneous, is in favor of defendants, since any false publication which tends to injure a person in his trade or profession, or which causes him to be shunned or avoided by his neighbors, will be presumed defamatory.

2. SAME—WORDS ACTIONABLE—COVERT MEANING.

Words used in a publication which are not actionable in themselves may become so, if from their connection they convey a covert or hidden meaning which is libelous, and are understood in their concealed or hidden sense by those who read them.

3. SAME—QUESTIONS FOR JURY.

In an action for publishing a notice wherein defendants stated that plaintiff entertained feelings of animosity towards defendants, and that his actions had tended to interfere with their business, and that his expressed intentions were to further interfere with and embarrass defendants in their business, and requesting their employes not to associate with him or disclose to him any facts concerning defendants' business, and suggesting that none of defendants' employes trade with plaintiff, it was not error for the court to leave it to the jury to determine from all the facts and circumstances of the case whether defendants meant to charge that plaintiff was not a fit or proper person for their employes to associate with, and whether it was so understood by the persons in the community who read the notice.

4. SAME—MALICE.

The publication by an employer, out of motives of malice, ill will, or revenge, of a notice to his employes requesting them not to trade with another, and intimating that those who do so will incur the displeasure of their employer, manifestly to the prejudice of their employment, is libelous.

In Error to the Circuit Court of the United States for the District of Nevada.

Action by John Chiatovich against L. J. Hanchett and another to recover for an alleged libelous publication. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

See 93 Fed. 727, and 96 Fed. 681.

Reddy, Campbell & Metson and Torreyson & Summerfield, for plaintiffs in error.

M. A. Murphy, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was brought by the defendant in error against the plaintiffs in error to recover damages alleged to have been sustained by him by reason of the posting and circulation in and about the town of Silverpeak, in Esmeralda county, Nev., of the following words of and concerning the plaintiff:

NOTICE TO OUR EMPLOYEES.

"As John Chiatovich entertains for us feelings of animosity, and as his actions have tended to interfere with our business, and his expressed intentions

are to hinder and embarrass us still further, we deem it advisable, in our own interest, to abstain from all communication with him. We especially request our employes to refrain from associating with him, either directly or indirectly, and to disclose to him nothing that might tend to indicate the present condition of our business. We caution all against so doing, and recommend a total absence of all communication. We trust that our employes will further our interests in this matter, which demand a total session [cessation] of communication between us and him. We respectfully enjoin our people silence concerning ourselves, our business, and our property, and suggest that no one of our agents, representatives, or employes trade or deal with Chiatovich in any manner whatsoever. His interests are so antagonistic to ours, his purpose is so manifestly hostile, that those who favor him cannot complain if we consider them as equally unfriendly to us.

"L. J. Hanchett.

"L. E. H."

In his amended complaint in the court below the plaintiff alleged that at the time of the posting and circulation of the above notice he was, and for more than 25 years then last past had been, engaged in business as a merchant at the town of Silverpeak, and had always done a good business and maintained a good reputation for fair dealing, and as such merchant, and as a citizen and neighbor, had always conducted himself with honesty and fidelity, and had never been guilty, or suspected of being guilty, of slandering or vilifying his neighbors for their methods of doing business; that, by the notice so posted and published of and concerning the plaintiff, the defendants meant that the plaintiff was circulating false and malicious reports of and concerning their business and their manner and methods of conducting the same, and that the plaintiff's conduct and manner of doing business were such that he was not a fit or proper person for his neighbors to associate, communicate, or trade with; that the words so published and circulated were false, scandalous, malicious, and defamatory; and that by their use the defendants conveyed the idea, and wished and intended to have it understood and believed by those who should read and did read the notice, that the plaintiff was dishonest, wanting in probity, untruthful, and wholly unfit and unworthy for his neighbors or friends to associate or communicate with, and that his place of business was not a fit or proper place for the citizens or residents of the town of Silverpeak and the neighboring valleys, towns, and mining camps to resort to or do business in,—by reason of all which the plaintiff alleged that he was damaged in his good name, reputation, and credit in the sum of \$10,000. In his amended complaint the plaintiff further alleged that, in addition to his business of merchandising, he was, at the time of the posting and circulating of the words complained of, and for a long time theretofore had been, engaged in mining, milling, and refining ores, and in keeping a saloon and boarding house at and near the town of Silverpeak, the profits of which aggregated \$500 a month, and that in consequence of the publication and circulation of the notice his said business was greatly injured and became unprofitable, and that about 50 persons in the employ of the defendants, whose names are set forth in the amended complaint, stopped trading and dealing with the plaintiff, to his loss in the sum of \$10,000. In their answer the defendants admitted the posting and publication of the notice; alleged that the statements therein contained were true; denied the

meaning of the words of the notice alleged in the *intuendoes* of the complaint; denied all the averments of damage, and also the allegations in respect to the withdrawing of patronage by the employés of the defendants; and further set up in defense of the action that the posting and publication of the notice complained of were provoked by threats and unfounded charges on the part of the plaintiff against the defendants, and it was published without malice on their part, and for the sole purpose of protecting and defending their rights and reputation in the community. The cause was tried by the court with a jury. In the course of the trial a number of witnesses were permitted, against the objections and exceptions of the defendants, to testify that they read the notice, and understood therefrom that the plaintiff was not a fit person for an associate, and that they would be discharged from the employ of the defendants if they should trade or associate with the plaintiff; and the plaintiff was, likewise against the objections and exceptions of the defendants, permitted to testify that certain men in the employ of the defendants stopped coming to his place of business or dealing with him, in consequence of the notice, and to the loss to his business occasioned thereby. These rulings, and the action of the court below in respect to instructions given and refused, constitute the principal grounds relied on for a reversal of the judgment. The plaintiff sought to recover on two grounds: First, for alleged damage to his reputation; and, next, for alleged damage to his business. The court below very properly told the jury that the defendants had the legal right to give notice to their employés that the plaintiff entertained feelings of animosity towards them, and that they deemed it advisable to abstain from all communication with him, and to make the request that their employés should not disclose to him anything concerning the condition of their business, and to keep silent concerning themselves, their business, and their property. But in respect to the alleged damage to the good name and reputation of the plaintiff the court called the attention of the jury to those clauses of the notice in which the defendants said:

"We especially request our employés to refrain from associating with him [the plaintiff], either directly or indirectly, and suggest that no one of our agents, representatives, or employés trade or deal with Chlatovich in any manner whatsoever."

The court told the jury that this language was susceptible of two different meanings,—one harmless, and the other defamatory,—and left it to the jury to determine from the evidence in the case "in which sense, within the meaning of the words, the persons to whom the notice was addressed, or persons who read the same, may have understood them"; at the same time saying that the burden was upon the plaintiff to show that the language was defamatory. If there was error in this, it was error in favor of the defendants. "Any words," says Odgers on Libel and Slander (page 21), "will be presumed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbors, * * * and * * * all words * * * which, by thus engendering an evil

opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society." See, also, *Newell, Defam.* 67, 77; *Townsh. Sland. & L.* 21, and notes; 13 *Am. & Eng. Enc. Law*, 299; *Fitzgerald v. Robinson*, 112 *Mass.* 371; *Morassee v. Brochu*, 151 *Mass.* 568, 25 *N. E.* 74, 8 *L. R. A.* 524; *Morey v. Association*, 123 *N. Y.* 207, 25 *N. E.* 161, 9 *L. R. A.* 621; *Byram v. Aikin (Minn.)* 67 *N. W.* 807. The publication in question is to be considered in its entirety. So considered, there is in it, to say the least, a clear insinuation that the plaintiff was not a fit or proper person for the employes of the defendants to associate with, and, further, that if any of such employes should associate, trade, or deal with the plaintiff, they would be discharged from the defendants' employment. The complaint charges that the notice was so understood by the community in which it was published, and there was testimony given on the part of the plaintiff to the effect that persons who read the publication so understood it. Words used in a publication, even if not actionable in and of themselves, may become so if they convey a covert or hidden meaning, and are understood in their concealed sense by those who read them. Authorities *supra*. The court below left it to the jury to determine from all the facts and circumstances of the case whether the defendants meant to charge that the plaintiff was not a fit or proper person for their employes to associate with, and whether it was so understood by those who read it, and who, the evidence showed, resided in the little community in which the publication was made, and who knew the respective parties, and their circumstances and relations to each other. In this there was no error of which the plaintiffs in error can justly complain. The same observations equally apply to the alleged damage to the business of the plaintiff, unless it be true, as is contended on the part of the plaintiffs in error, that one man has the legal right to maliciously interfere with the business of another. We deny the soundness of any such proposition. No one can properly deny any man the absolute right to cease dealing, and to refuse to have business or other relations, with any particular person or persons; but no man, in our opinion, has the legal or moral right, from malice, ill will, or revenge, to command other persons to do so. Counsel for the plaintiffs in error have cited a number of cases to the effect that an employer has the right to interpose for the protection of those in his employ. We do not question that right. Nor do we dispute the proposition that an act legal in itself, and violating no right of another, cannot be made actionable on account of the motive which superinduced it. But every person in this country has the constitutional right of life, liberty, and the pursuit of happiness, so long as he keeps within the pale of the law. With many men,—perhaps in the case of a large majority,—the pursuit of happiness involves the pursuit of business enterprises of one kind or another. With what show of reason or justice can it be said that this right to lawfully pursue his own business—in the case at bar, that of buying and selling goods—can be legally interfered with by third parties, except by competition? As a matter of course, every business is legally subject to competition, which is not only right and proper in and of itself, but is also for the public

good. But it is, in our judgment, a clear violation of the right pertaining to every person engaged in an industrial enterprise for any other person, through malice, ill will, or revenge, to command or induce other persons to withdraw or withhold their custom from him, or otherwise maliciously interfere with his business. Motive does not count where one merely exercises his own right without violating any right of another, but when he does violate the right of another the motive of the act enters largely into the problem. The judgment is affirmed.

DORSEY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1900.)

No. 1,270.

1. NATIONAL BANKS—OFFENSES BY OFFICERS—EVIDENCE.

Evidence to the effect that when a bank rediscounts notes it indorses them, and that a bank held certain notes which it rediscounted, is sufficient to establish the fact, when such notes have become lost or destroyed, that they were indorsed by the bank, and to render admissible testimony of false entries in the books of the bank respecting such notes, made by direction of a defendant charged with having, as cashier, caused such entries to be made for the purpose of concealing the liability of the bank on account of such indorsement.

2. SAME—TRIAL—INSTRUCTIONS.

Where an indictment contained a number of counts charging the defendant, as an officer of a national bank, with having caused false entries to be made in the books, a general instruction that there was not sufficient evidence to show that such entries were made by defendant, and directing a verdict of acquittal on such counts, was properly refused, where there was evidence sufficient to go to the jury upon any one of the counts.

3. SAME—SUFFICIENCY OF INDICTMENT.

An indictment charging a defendant, as an officer of a national bank, with having made a false statement in a report made to the comptroller, is not required to set out such report in full, but is sufficient if it identifies the report by its date, and sets out the particular statement claimed to be false, the only requisite being that it shall clearly advise the accused of the exact charge he is required to meet.

4. SAME—TRIAL—QUESTIONS FOR JURY.

Where a defendant was charged with having, as an officer of a national bank, made false statements in reports to the comptroller, by understating the amount of overdrafts on the bank, and the government proved that the overdrafts existing at the time of the reports in fact largely exceeded the amounts reported, which evidence was met by the defendant by evidence tending to show that a large part of such overdrafts bore interest, and by the claim that he did not consider it his duty to report as overdrafts accounts on which interest was being paid, the sufficiency of such defense, both as to the facts and the question of good faith, was a matter for determination by the jury.

5. SAME—INSTRUCTIONS.

Upon an issue as to whether a defendant was guilty, under the statute, of having made false statements as to overdrafts in a report to the comptroller made by him as an officer of a national bank, where the defendant claimed that a part of such overdrafts bore interest, and were reported by him, in good faith, under the head of "Loans and Discounts," it was not reversible error to refuse a special instruction requested, stating that the defendant could not be found guilty on such charge if the jury found that the entries in the reports were made by him in good faith, and with the honest belief that they were correctly made, when in its general charge,

not excepted to, the court stated that the defendant could not be convicted on such charge unless the entries were "knowingly and intentionally false when made," and were made with intent to defraud or deceive, and that if the jury found that the defendant "honestly believed, and had good reason to believe," that the entries were correct, he would not be guilty. Such charge, taken together, was substantially that requested, and the difference in the language so slight that it cannot be supposed to have been regarded by the jury.

6. SAME—ABSTRACTING MONEY OF BANK—SUFFICIENCY OF EVIDENCE.

The conviction of a defendant charged with having, as a director and agent of a national bank, unlawfully abstracted money of the bank, is sufficiently supported by evidence which warranted a finding that defendant procured the making of two notes, for \$4,500, by an employé who was wholly irresponsible, without consideration, and, having access to the funds and books of the bank, appropriated that sum of the bank's money to his own use, leaving the notes in exchange therefor.

7. SAME—PROOF OF CRIMINAL INTENT—EVIDENCE OF OTHER TRANSACTIONS.

On the trial of a defendant upon charges of having, while an officer of a national bank, unlawfully abstracted money from such bank, and having made false entries in reports made to the comptroller, evidence that, at about the same time as the acts charged, the defendant made other reports to the comptroller, containing similar false statements, and that he also procured the execution by an irresponsible third party of a note without consideration, which he discounted on behalf of the bank, and appropriated the proceeds, is admissible on the question of intent, as showing that defendant had acted in bad faith towards the bank in such transactions, although such acts are not counted upon in the indictment.

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska.

E. F. Gray, for plaintiff in error.

A. J. Sawyer (W. S. Summers and S. R. Rush, on the brief), for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This writ of error was brought to review a judgment of the district court of the United States for the district of Nebraska, whereby Frank M. Dorsey, the plaintiff in error, was sentenced to imprisonment for various violations of the act relating to national banks. Three indictments were returned against the accused, which were subsequently consolidated for trial, and together contained numerous counts, charging different offenses. Upon the trial the accused was convicted on 13 counts. A like sentence of six years' imprisonment was imposed for the offense described in each of the 13 counts, but, as the sentences run concurrently, the accused was, in effect, sentenced to one term of imprisonment, for the period of six years. The indictments are framed under section 5209 of the Revised Statutes of the United States, and charge three kinds of offenses, namely, six counts charge the making of false entries in the bills-receivable register of the First National Bank of Ponca, Neb., of which bank the accused was cashier, five counts charge the making of false reports to the comptroller of the currency, and the remaining two counts charge the unlawful abstraction of funds. The offenses were committed between July 19, 1892, and April 13, 1893, during which time, or at least until February 1, 1893, the accused was

acting in the capacity of cashier as well as director of the bank. The false entries in the bills-receivable register consist of entries therein showing that certain notes held by the bank had been paid, and the dates of their payment, when they had not been paid, while the false entries in the reports to the comptroller consist either of false statements concerning the amount of overdrafts upon the bank, or concerning the amount of its loans and discounts, or concerning the amount due to it from other banks and bankers, or concerning the extent of the liability of the directors to the bank. The assignments of error are very numerous, but as counsel have grouped them, for convenience, into classes, and have thereby reduced their number somewhat, we shall pursue the same course.

The government claimed on the trial that the accused had practically the entire control of the First National Bank of Ponca during the period when the alleged offenses were committed, and prior thereto; that he had made a practice of rediscounting notes held by the bank, with the bank's indorsement thereon to give them currency; that many of such notes were worthless when they were thus discounted; and that on the rediscount of such worthless paper, with the aid of the bank's indorsement thereon, the accused had caused entries to be made in the bills-receivable register of the bank that such notes were paid, with intent to conceal the bank's liability upon the paper. The testimony which was offered to sustain these charges was both voluminous and cogent.

The first assignment of error is that the court erred in admitting in evidence the following entry, "Paid 11/19/92," which was found in the bills-receivable register of the First National Bank of Ponca, in the column of "Remarks," opposite a note made by J. E. Strong, dated "9/7/92," which the bank had discounted, and which matured, according to the bills-receivable register, on March 7, 1893. The objection to this entry when it was received and read in evidence was "that no foundation has been laid, and it has not been shown that defendant was sufficiently connected with it; that it is not shown that he has ever directed this entry." While the objection so made is not as specific as it might have been, yet we understand that it was intended to raise the point, first, that the Strong note had not been produced, and that it had not been shown that the entry complained of was made by direction of the accused. It appears, however, that the assistant cashier of the bank, who seems to have acted at all times under the immediate direction of the accused, gave evidence which tended to show that the accused had on several occasions given him instructions to enter notes, which were held by the bank, as paid, although they were not paid, but were merely rediscounted with other banks, and that the entry in question was an entry made by him pursuant to such instructions. Other evidence that was introduced showed that a note made by J. E. Strong for \$2,000, dated "ninth month, seventh day, 1892," and due on March 7, 1893, was rediscounted by the First National Bank of Elkader, Iowa, for the First National Bank of Ponca, Neb., on November 25, 1892, and that it was held by the former bank until March 15, 1893, and was not then paid, but was replaced by other notes received from the

First National Bank of Ponca. There was other evidence produced which showed that due search had been made for the Strong note, and that it could not be found, but had probably been lost or destroyed. The evidence, taken altogether, was sufficient, we think, to warrant a jury in finding that the First National Bank of Ponca had held a note of J. E. Strong for the sum of \$2,000, and had procured its rediscount with another bank, and had entered it as paid on its own books, although it was not paid, but was simply rediscounted, and that this had been done by direction of the accused. The point which is made in this court respecting said note and one or two other rediscounted notes, which were not produced,—that there was no specific proof in the trial court to show that such rediscounted notes were indorsed by the First National Bank of Ponca when it procured their rediscount,—was not made in the trial court as an objection to their introduction, and for that reason the point is not open for consideration here. But it will be proper to observe in this connection that there was testimony to the effect that “rediscounted notes” are notes held by a bank, which it indorses and procures another bank to discount, so that, when the various witnesses testified in respect to the several notes that the First National Bank of Ponca had rediscounted them, the statement implied, in the light of the testimony as to the meaning of the word “rediscounted,” that the notes had been indorsed. Moreover, such of the rediscounted notes as the government was able to produce were indorsed by the last-named bank. We are of opinion, therefore, that the objection to the introduction of the entry in the bills-receivable register to the effect that the Strong note was paid on November 19, 1892 (that being the purport of the entry), was not well made, and was properly overruled.

The second, third, fourth, and sixth grounds for reversal that are relied upon by counsel for the plaintiff in error have reference to entries found in the bills-receivable register of the First National Bank of Ponca, and relate to notes held by that bank which were made by W. A. Hickman, John Forbes, J. E. Barker, and W. E. Holmes, and were subsequently rediscounted with other banks. These entries are the same as the one already considered. They showed that the several notes were marked as paid on the bills-receivable register as of given dates. The objections made at the trial to the introduction of the entries were in substance the same as those already noticed, and the proof tending to show that the several notes were outstanding and unpaid long after they were marked “Paid” was substantially the same as that respecting the Strong note. There was also the same species of proof tending to show that the false entries as respects these notes were made in obedience to instructions, general or special, that were given by the accused to his subordinates, and in accordance with which they acted. We think, therefore, that the objections to the admission of these several entries were properly overruled.

Complaint is made of the admission of an entry found in the bills-receivable register showing the payment of a note of I. Conner for \$458 on January 11, 1893. The facts having reference to the ad-

missibility of this entry are slightly variant from those affecting the admissibility of the entries concerning the other notes. There was evidence tending to show that the bank held such a note as the one last described; that it was executed on December 8, 1892; that it matured on March 8, 1893; that it was rediscounted with the German Savings Bank of Davenport, Iowa; and that it remained in that bank until its maturity, notwithstanding the fact that it was entered as paid on the bills-receivable register of the First National Bank of Ponca on January 11, 1893. These facts were established mainly by a private memorandum book which was kept by the accused, as cashier, showing with what banks notes had been rediscounted. It seems to have been his practice, or the practice of the bank with which he was connected, to keep track of notes that had been rediscounted and entered on its own books as paid, by making a memorandum showing the amount thereof, by whom they were made, and by whom held,—in this private memorandum book. No error is assigned because of the admission of the book, and as that showed that the Conner note was not paid on January 11, 1893, but was outstanding, and then held by a bank in Davenport, Iowa, we perceive no merit in the objection which was made to the entry found in the bills-receivable register, showing that it was paid on the latter date.

In this connection it will be most convenient to notice another exception, which was taken to the refusal of the court to give an instruction to the jury that there was no sufficient evidence to show that the alleged false entries in the bills-receivable register were made by the accused, and that a verdict of acquittal should be returned upon all of the counts containing such charges. This instruction was properly refused, because there was, as we think, some evidence tending to show that the aforesaid entries were false, and that they were made by direction of the accused. Besides, if there was evidence sufficient to go to the jury upon any of the counts charging false entries in the bills-receivable register, as there clearly was as respects some of the counts, this instruction directing a verdict for the defendant on all of such counts ought not to have been given. This court has so decided in *Harless v. U. S.*, 34 C. C. A. 400, 92 Fed. 354.

It is next assigned for error that the court should have excluded from the jury a report to the comptroller of the currency which was made by the accused, purporting to show the condition of the First National Bank of Ponca on December 9, 1892. The objection to this report was "there is no sufficient count in the indictment relating to said report, and that each of the counts relating to said report is insufficient, in not setting out the report sufficiently, and the report is irrelevant." It is contended, as we understand, that the count was insufficient because it did not set out the entire report to the comptroller. The count respecting which this objection is made specified, in substance, that the accused, in and by said report, the date whereof was correctly stated, "unlawfully, knowingly, and willfully did make a certain false entry in said report; * * * that is to say, a false entry to the effect that at the close of business on said 9th day of December, 1892, the amounts of loans and discounts was \$137,072.64, whereas in truth and in fact the amount of the loans and discounts of

the said association was then a much smaller amount, to wit, \$125,-732.14,—he, the said Frank M. Dorsey, then and there well knowing said entry to be false,—thereby intending to injure and defraud,” etc. None of the counts of the indictment were challenged by a demurrer or motion to quash the same for insufficiency, and, not having been so challenged, the count from which the above excerpt is made should at least be held good after verdict. But on broader grounds we think that the point is untenable. It has never been ruled, so far as we are aware, that an indictment like the one at bar, charging a particular false statement in a report made to the comptroller of the currency, should set out the report in full. Such reports are usually very lengthy documents, and would incumber the record needlessly, and render pleadings interminable, if they were set out at length. Nor is it necessary for the protection of the accused that they should be so pleaded. A reference to the report by its date, etc., so as to fully identify the document, and a specification of the particular false statement complained of, in such language as will advise the accused beyond peradventure of what he is accused, is all that should be required in an indictment. Any further prolixity of statement would embarrass pleading unnecessarily, and would prove of no service to the accused, except, perhaps, to afford him a better opportunity to take advantage of an alleged variance between the proof and the pleading when the report is produced. We are of opinion that the count to which the objection was addressed was sufficient, and that the objection as made was properly overruled.

It is further urged with respect to the count last referred to that the evidence was insufficient to sustain a conviction thereunder. This point was not made, however, in the trial court, by a motion to direct a verdict in favor of the defendant; and, as it was not made in that form, the defendant may be regarded as having consented to allow the jury to determine whether the evidence respecting the alleged false statement was sufficient to warrant a conviction. *Insurance Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Village of Alexandria v. Stabler*, 4 U. S. App. 324, 1 C. C. A. 616, 50 Fed. 689; *City of Lincoln v. Sun Vapor Street-Light Co. of Canton*, 8 C. C. A. 253, 59 Fed. 756, 761. But, without basing our conclusion on the last-mentioned rule, which is more especially applicable to civil cases, we have examined the testimony, and reached the conclusion that there was sufficient evidence to warrant the trial court in submitting to the jury the issue concerning the falsity of the report.

The next assignment is that another count of the indictment on which there was a conviction was insufficient, and that the trial court erred in admitting in evidence a report to the comptroller of the currency which was intended to substantiate the charge contained in such count. It is also said that there was no sufficient evidence to warrant a conviction on the count. The count to which these objections were addressed, after describing the report of December 9, 1892, in such manner as to fully identify it, charged, in substance and in apt language, that it contained a statement that \$4,140.44 was due to the First National Bank of Ponca from state and private banks at the close of business on December 9, 1892, whereas, in truth and in fact,

nothing was then due from such banks, as the accused well knew, and that the statement was made by him with intent to deceive, etc. We perceive no defect in the count which can avail the accused after verdict, and are of the opinion that the count was good even before verdict. Concerning the sufficiency of the evidence to sustain a conviction on the count now under consideration, it may be said that the accused did report to the comptroller of the currency that \$4,140.44 was due from state and private banks to the First National Bank of Ponca on December 9, 1892, whereas the daily-statement register of the bank showed that nothing was so due. The accused attempted to show that the item in the report could be accounted for by a note for \$4,000, secured by a mortgage, that had been sent to another bank for collection some time prior to the making of the report, and that it had reference to such collection. The government claimed, on the other hand, that no money was ever received or expected to be received on the note which was thus transmitted for collection, and that, some time after the report was made, said note was taken up by other worthless notes, and that nothing was received thereon, and that the accused was guilty of intentional deceit in making the statement in his report that \$4,140.44 was at that time due and in transit from other banks. It is manifest, we think, in view of all the evidence concerning this transaction, that it was the province of the jury to determine whether the entry in question was false and was made with an intent to deceive. Counsel for the accused seems to have entertained a similar opinion at the trial, inasmuch as he failed to ask an instruction for an acquittal upon this count.

It is also contended that three other counts of the indictment upon which a conviction was had, to wit, those counts which charge the making of false statements concerning the liabilities of directors to the bank and concerning overdrafts upon the bank, are insufficient to sustain a conviction. The supposed defects in these counts are similar to those already noticed, and, in view of what has already been said respecting the other counts, they do not require special notice. The offense in each instance was described with sufficient clearness to advise the defendant of the precise nature of the false statement of which he was accused, and to enable him to make his defense thereto, and to preclude further prosecution for the same offense if he was either acquitted or convicted. They must accordingly be adjudged sufficient after verdict.

It is also insisted by the accused that the evidence was inadequate to convict him on two of the last-mentioned counts; being those which charge the making of false statements concerning overdrafts in reports that were sent to the comptroller, showing the condition of the bank on July 12, 1892, and on September 30, 1892. In the first of these reports the accused stated the existing overdrafts to be \$564.48, and in the latter to be \$888.12. The government claimed, and likewise proved, that on July 12, 1892, the actual overdrafts were \$5,564.48, and that on September 30, 1892, they were \$9,888.12. The accused then attempted to explain the discrepancy by showing that on each occasion a large part of the existing overdraft bore interest, and that he did not esteem it his duty to report an account as

overdrawn if interest was being paid on the same. Concerning this contention it is sufficient, we think, to say that it was the province of the jury to decide whether the discrepancy shown between the actual overdraft and the reported overdraft on each of these occasions had been satisfactorily explained; whether the bank was in fact receiving interest on those accounts which were overdrawn, but not so reported; and whether, in failing to report such accounts as overdrawn, the accused had acted in good faith, and without intent to deceive. The jury had an undoubted right to determine these questions, and the counts ought not to have been withdrawn from their consideration on the assumption that the evidence was inadequate to sustain a conviction.

The next point which should be considered in this connection consists in the refusal of the court to give an instruction that was requested by the accused. This instruction was to the effect that, even if the entries relating to overdrafts in the reports to the comptroller were not made correctly, yet that the defendant could not be found guilty under the counts relating to the overdrafts, if the jury found from the evidence that the entries were made by the accused in good faith, and with the honest belief that they were correctly made. The trial court did not refuse the instruction because the rule of law therein declared was erroneous, but, as the record shows, "because given in the general charge." The general charge of the court was not excepted to, but stands unchallenged in all of its parts, so that the error assigned on this head is not that the general charge was erroneous, but that the rule stated in the special instruction was not sufficiently stated by the court of its own motion. We feel constrained to hold that this proposition is untenable. In its general charge the court instructed the jury to the following effect:

"So far as these counts charging false entries are concerned, under the evidence in this case there remain but two questions for you to determine under any of the counts of the indictment submitted to you. They are, first, did the defendant make any of the false entries charged? If you find that he did, then, second, did he make any of them knowingly, with the intent to injure and defraud the bank or any other body politic or corporate or individual person, or to deceive any officer of the association, or to deceive any person appointed or thereafter to be appointed by the comptroller to examine the bank? The false entry that is punishable under this statute is an entry that was knowingly and intentionally false when made. It was not the purpose of congress to punish an officer who, through an honest mistake, makes an entry in one of the books or reports of the bank which he believed to be true, when it is in fact false. It follows that, in order to convict the defendant, you must find, beyond a reasonable doubt, not only that he made a false entry in one of the books or reports of the bank, but also that he knew the entry to be false when he made it."

In another part of the charge, while referring to the evidence in the case, the learned trial judge used the following language:

"There has been evidence introduced in the case on the part of the defendant for the purpose of explaining some of the entries made in the reports. Evidence has been received tending to show that some of the items alleged to be false in the report were stated as they were for the reason that some of the items which the prosecution claim ought to have been reported under a certain head were reported under other heads. For instance, defendant seeks to explain alleged false entries in regard to overdrafts by testifying that over-

drafts upon which interest was agreed to be paid were listed under the head of 'Loans and Discounts.' If you find from the evidence that the defendant honestly believed, and had good reason to believe, that it was his duty to list overdrafts, upon which interest was to be paid by agreement, under the head of 'Loans and Discounts,' and actually did list such overdrafts under such head, and that such overdrafts did actually draw interest, by agreement with the parties who made the overdrafts, then he would not be guilty as to that particular charge."

In view of these excerpts from the charge, we think it must have been made exceedingly clear to the jury that with respect to the several reports concerning overdrafts the defendant could not be held liable as for a crime if he had acted in good faith under the impression that the overdrafts were reported correctly under appropriate heads, and this was the substance of the special instruction. In a case of this character, where it appears that the jury were fully and clearly instructed by the court, of its own motion, on every vital point in the case, and in such a manner that it seems impossible that they could have been misled, and where no part of the charge in chief is excepted to, we feel greatly indisposed to reverse a judgment, that has been rendered after a lengthy and costly trial, because of a difference between the language used in a special instruction which the court declined to give, and the court's own language in the general charge, which difference is so slight that it would doubtless have passed unnoticed if the special instruction had been given, and obviously would not have affected the result of the trial.

Another error assigned upon the record is the admission in evidence of two notes made by M. Gonigal,—one for the sum of \$2,500, and the other for \$2,000. These notes were offered, as it seems, to substantiate a charge laid in two counts of the indictment, that the accused, as a director and agent of the First National Bank of Ponca, had willfully, knowingly, and unlawfully abstracted money of the bank to the amount of the two notes. The sole objection which was made, when the notes were offered in evidence was that they "were irrelevant; that no foundation has been laid." This objection is not adequate to raise any question with respect to the sufficiency of the two counts of the indictment in question, and we shall indulge in no discussion of that question, as no demurrer was interposed to the counts, or motion made in arrest of judgments thereon. To sustain these counts the government showed that M. Gonigal, by whom the notes were signed, was a stable boy or horse wiper in the employ of the accused; that he was dissipated and had no means; that the notes were utterly worthless; that they were in the handwriting of the accused, and appeared to have been placed to his credit on the books of the bank, and were found in its possession by the receiver thereof when the bank became insolvent. The accused testified in his own favor that he presented these notes to E. D. Higgins, the cashier of the First National Bank of Ponca, after he had himself ceased to act in that capacity, and that he obtained the money thereon by discount, in the usual way. But Higgins denied these statements, and denied that he was consulted at any time by the accused with reference to any such discount. The evidence concerning this transaction, taken in connection with all the other facts and circumstances in evidence,

was quite sufficient, in our judgment, to warrant any jury in concluding that the accused, having access to the books and the funds of the bank by virtue of his position as a director therein, had deliberately taken the money of the bank without the consent of any one, and had appropriated it to his own use, leaving in exchange therefor two notes which were utterly worthless, and rested upon no consideration whatever as between himself and the stable boy whose signature he had obtained. Such an act, if committed, was a willful misappropriation or abstraction of the funds of the bank by a director thereof. The two notes were properly admitted in evidence.

There remain but two other assignments of error which we feel called upon to notice, and they embrace exceptions that were taken to the admission of a note which was executed by W. E. Holmes for \$1,500 on December 27, 1892, and an exception that was taken to the admission of a report which was made by the accused to the comptroller on May 17, 1892. The Holmes note was objected to for irrelevancy, whereupon counsel for the government stated that he did not offer it to prove any substantive charge contained in the indictment, but to disclose the intent that had actuated the accused in doing certain acts which were counted upon in the indictment. The proof as respects this note showed that it was in the handwriting of the accused; that it had been made by Holmes at the instance and request of the accused when the former was clerk for a town-site company of which the accused was general manager; that the note was not founded upon any consideration, as between the maker and the payee; and that the maker of the note, when he executed it, was financially irresponsible, and did not execute it with an intent to pay it. This note, it seems, was discounted by the defendant with the First National Bank of Ponca while he was its cashier; and, as we infer from the testimony, it was among the worthless notes held by the bank when it became insolvent and passed into the hands of a receiver. The particular act which the trial court permitted to be proven was nearly contemporaneous with other acts that were counted upon in the indictment as offenses. The proof in question showed that the accused had acted in bad faith towards the institution of which he was a trusted officer, that he had used its funds to discount worthless notes for his own benefit, and that his conduct was such as would naturally lead one in his position to indulge in misrepresentation and deceit concerning the affairs of the bank. Taken altogether, the transaction in question was so nearly related in point of time to the offenses charged in the indictment, and had such a marked tendency to show that the accused was acting in bad faith and with a dishonest purpose as respects the bank and its creditors, that we feel constrained to hold that proof of the transaction was properly admitted in evidence, although no count of the indictment was founded upon that transaction. The same may be said of the admission of the report to the comptroller which was made by the accused under oath on May 17, 1892. When that report was offered in evidence, counsel for the government also stated to the court that they offered it merely for the purpose of showing that the report contained a false statement of the amount of existing overdrafts which was of the same

character as the false statements contained in the report to the comptroller of July 12, 1892, and September 30, 1892, which were counted upon in the indictment, and that they offered the report for the purpose of showing the intent that had inspired all of the reports. The report stated that the overdrafts amounted to \$29.27 on May 19, 1892, but other testimony offered in connection therewith showed that such statement was false, and that the overdrafts at that time aggregated \$6,029.17. We are of opinion that both the Holmes note and the report to the comptroller of May 17, 1892, and the other evidence that was offered with respect to the note and the report, were relevant and competent to establish a criminal intent on the part of the accused, and that the object which the prosecution had in view in offering said testimony was so fully explained to the court and jury as to prevent any possible misconception of the purpose for which it was admitted. We refer to what has heretofore been said by this court concerning the admission of similar testimony in *Dow v. United States*, 49 U. S. App. 605, 27 C. C. A. 140, 82 Fed. 904, 909, and in *Bacon v. U. S.*, 38 C. C. A. 37, 97 Fed. 35, 42. Our conclusion is, after an attentive study of the record, that the verdict below was well supported by the evidence, and that nothing transpired at the trial which would warrant a reversal. It is accordingly ordered that the judgment below be affirmed, and that the defendant below surrender himself to the United States marshal for the district of Nebraska, in execution of the sentence heretofore imposed by the trial court.

SANBORN, Circuit Judge (dissenting). In my opinion, there were three grave errors in the trial of this case, which entitle the plaintiff in error to another hearing:

1. The government was permitted to introduce in evidence, over the objection of defendant, as a part of its case in chief, a report of the comptroller of the currency dated on May 17, 1892, which was not counted on in any of the indictments, "for the purpose," as counsel for the government stated, "of showing that certain items were falsely made in that report, of a similar kind to those charged in other reports, and for the purpose of showing the intent of defendant in making false entries in reports, aside from those on which he is specifically charged." That is to say, this report was offered in evidence for the purpose of showing an independent offense with which the plaintiff in error was not charged, and for the purpose of showing his intent to commit that offense, in the hope, doubtless, that the jury would infer from this that he intended to commit and did commit some of the offenses with which he was charged. This report seems to me to be irrelevant, because it is not mentioned in the indictments; because no charge of false entries in it had ever been made in any way before it was offered in evidence upon the government's case in chief; because no proof that any of the entries in it were in fact false had been produced when it was received in evidence; because it was not competent to try or convict the plaintiff in error of the offense of making false entries in this report, without indictment or notice, and it was not competent to convict him of any other offense

by proof of this crime with which he had never been charged, of which he had received no notice, and against which he had no opportunity to prepare his defense.

2. The note of W. E. Holmes was allowed in evidence, over the objection of the plaintiff in error, for the purpose of showing his intent to abstract money from the bank. But there was no evidence that the plaintiff in error had ever indorsed that note, that he had ever discounted it at the bank, or that he had ever received or tried to obtain a cent of money from the bank on account of it. The note therefore had no tendency to show any intent on his part to abstract anything from the bank, because there was no evidence that he obtained anything, or tried to obtain anything, from the bank on account of it.

3. The plaintiff in error requested the court to instruct the jury that, if certain entries in the reports were not correctly made, yet if they believed from the evidence that they were made in good faith, and in the honest belief that they were correctly made, it would be their duty to find the defendant not guilty. The court refused to give that request, and charged the jury that if they found from the evidence that the defendant honestly believed, and had good reason to believe, that the entries were correct, he would not be guilty of making false entries. The request appears to me to be the law, and the charge seems to be erroneous. The plaintiff in error was not guilty of the offense of making false entries, if he made them in good faith, in the honest belief that they were right and true, after he had made an honest effort to ascertain the truth, even though his reasons for his belief may not have been good, either in law or in fact. *Graves v. U. S.*, 165 U. S. 323, 17 Sup. Ct. 393, 41 L. Ed. 732; *U. S. v. Allis (C. C.)* 73 Fed. 165, 170.

TOWNSEND et al. v. MICHIGAN CENT. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 781.

1. RAILROADS—RIGHT OF WAY—ABANDONMENT.

The abandonment by a railroad company of a right of way acquired by deed is a question of intent, and, while such intent may be found as a fact from long nonuse, the nonuser itself does not constitute abandonment, nor operate to defeat or impair the right to the easement.

2. SAME—RIGHT OF CROSSING—MICHIGAN STATUTES.

The consent of the crossing board created by the laws of Michigan to the crossing by one railroad of a right of way previously acquired by deed, and owned by another company, confers no right upon the crossing company to make such crossing, without either an agreement with the other company, or the acquiring of right of way over its property by condemnation proceedings. The company owning the prior right of way has property rights therein which are protected by the constitution of the state, and of which it cannot be deprived without just compensation.

3. SAME.

The receivers of a railroad filed a bill in equity for an injunction restraining another railroad company from constructing a spur track upon a right of way to which it was admitted the defendant had obtained a deed some four years before, but which it was alleged it had never used. Complainants alleged that they had been authorized by the state crossing

board to construct a track across such right of way, and desired to construct the same on a different grade from that on which defendant was about to build its track, but did not allege that they had obtained the consent of defendant to such crossing, or had taken any steps to acquire the right by condemnation. *Held*, that the bill stated no grounds for the relief prayed for.

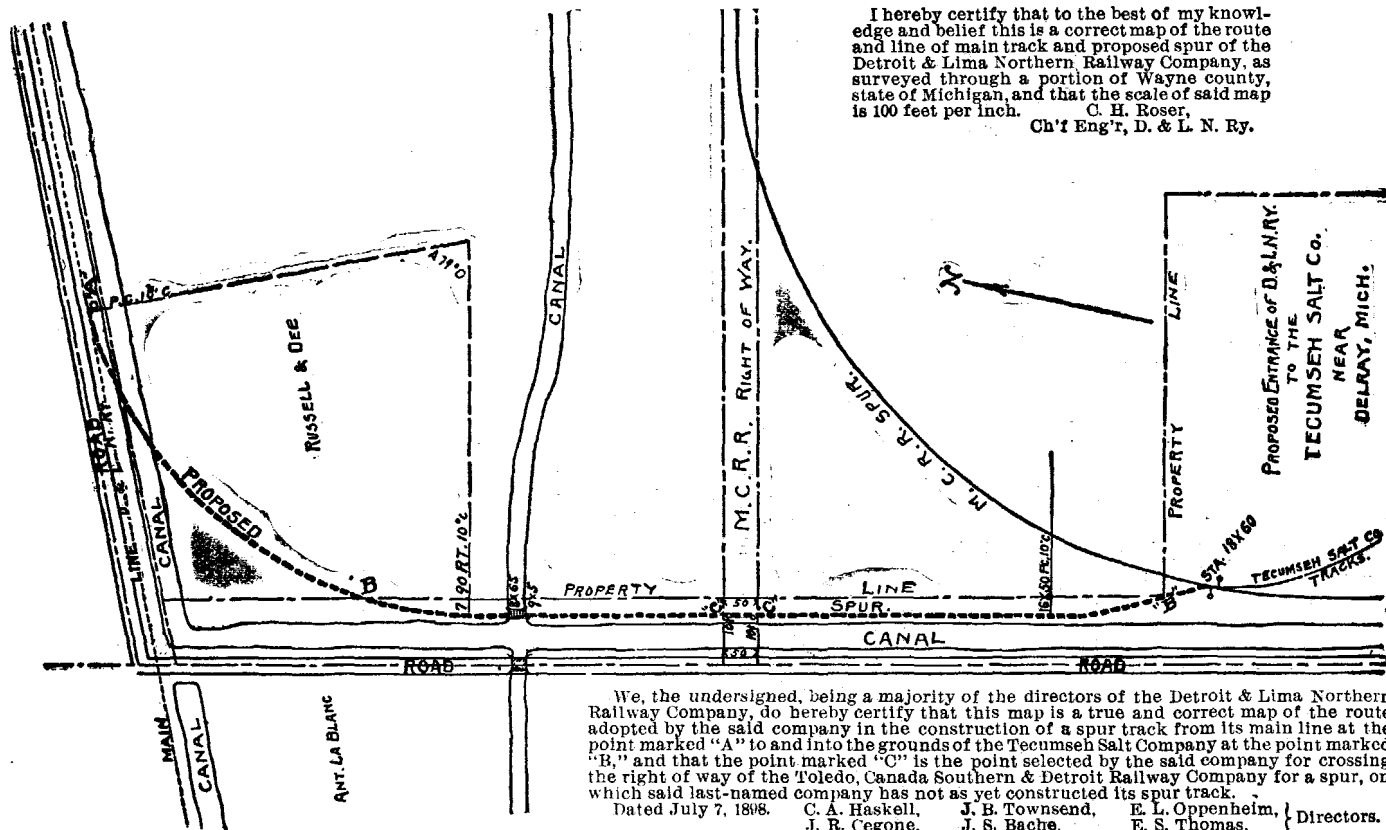
Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

John C. Donnelly, for appellants.

Ashley Pond, for appellees.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

DAY, Circuit Judge. A petition was filed in the court below by the receivers of the Detroit & Lima Northern Railway Company against the Michigan Central Railroad Company and the Toledo, Canada Southern & Detroit Railway Company, seeking to enjoin the Michigan Central Railroad Company from extending its track along a certain right of way deeded to the Toledo, Canada Southern & Detroit Railway Company, and by it leased to the Michigan Central Railroad Company. The court below, upon the filing of the petition, granted a restraining order, but upon final hearing dissolved the same, and denied the prayer of the petition. To reverse this decree of the court below appeal has been taken to this court. The petition sets out that the receivers, in performance of their duties, are engaged in the construction of a spur track from the main line of the Detroit & Lima Northern Railway Company into the manufacturing plant of the Tecumseh Salt Company, in the township of Ecorse, Wayne county, Mich.; that the proposed spur track crosses a heretofore unused right of way of the Michigan Central Railroad Company. It is averred that said company has owned said right of way for a number of years, having acquired the same in connection with the construction of a spur track from their main line to the Tecumseh Salt Company's plant, but before reaching the point of intersection with the proposed spur track the track of the Michigan Central Railroad Company turns into the grounds of the salt company, leaving a portion of said right of way unoccupied. The petition also avers that the receivers have obtained from the crossing board of the state the right to cross said right of way; that in the construction of said spur track it became necessary to throw up an embankment about two feet high; that since the construction of said embankment, without consulting said petitioners or the engineers in charge of said work, the Michigan Central Railroad Company has commenced the laying of a track along the unused right of way, which, if continued upon the grade and in the direction in which it is being constructed, will intercept the spur track of petitioners at a grade two feet lower than the spur being constructed by them. The unused right of way, it is alleged, does not extend any further than the western side of the right of way of petitioners, and it is averred that it cannot be used for any practical purpose, in the opinion of the petitioners, especially at the point where the same intersects the spur being constructed by the petitioners. A plat is attached to the petition, copy of which is herewith given:



This map shows in the red line¹ the proposed spur about to be constructed by the receivers; also the right of way of the Michigan Central Railroad Company, and the proposed crossing thereof, and intersection of the proposed spur with the tracks of the salt company, which are already connected by a spur with the track of the Michigan Central Railroad Company. The proposed crossing of the spur track over the right of way of the defendant companies is shown at CC. It is averred that the unused portion of the right of way is about 600 feet in length. The answer of the railroad company sets up that the Toledo, Canada Southern & Detroit Railway Company acquired the strip of land in question as a right of way for a spur track, and that it still contemplates the construction of said spur track; that the Michigan Central Railroad Company is the lessee of said Toledo, Canada Southern & Detroit Railway Company, and that neither the complainant nor its receivers or others have acquired the right to cross this strip of land; that said crossing board, mentioned in the petition, has no authority or jurisdiction to grant the right to cross said land, but that such right can only be acquired in the manner specified in the constitution of the state and the statutes thereof; that the allowance of the injunction as prayed for would be in violation of the fourteenth amendment of the constitution of the United States and the constitution of the state of Michigan.

Examination of the petition will show that the relief sought was based upon several grounds. We will examine the same in the order set forth. The petition admits that the right of way is owned by defendant railway companies, but avers that this right of way is unoccupied. It is a familiar principle of law that the mere failure to occupy a right of way, without other circumstances to show abandonment or failure of the purpose for which the way is granted, will not operate to divest the title of the owner thereof. It is next averred that the crossing board of the state has granted the right to the receivers to cross this right of way. An examination of the Michigan statutes shows that while such board has the authority to determine the place where, and the manner in which, a railroad crossing shall be constructed, it still requires the interested companies to agree upon the terms upon which the crossing shall be made. Failing an agreement, the crossing company may acquire the right to make the same by condemnation in the same manner as prescribed by the act for obtaining title to real estate or other property. Comp. Laws Mich. 1897, §§ 6232, 6261. It is not averred in this petition that there has been an agreement with the owner of this right of way or any proceedings had to appropriate the right of way by the crossing company. It is also averred that the right of way is about to be occupied by the Michigan Central Railroad Company in the laying of a track two feet lower than the grade of the track as contemplated by the receivers, and that the said unused right of way cannot be used for any practical purpose in the opinion of the petitioners. In the latter averment it is sought to bring the case within the rule that, when an easement has become incapable of use for the purpose

¹ The red line is indicated on the plat by a heavy dotted line.

granted, there is an end to the easement. The principle here sought to be invoked was under consideration in this court in the case of *Southern Ry. Co. v. City of Memphis*, 38 C. C. A. 498, 97 Fed. 819, in which it was held that an easement granted for a particular purpose ceases when the particular purpose is or becomes impossible under the grant. The principles upon which this rule is based are fully discussed by Judge Lurton, who gave the opinion. A number of cases are cited, including a case cited by petitioners herein (*Hahn v. Baker Lodge*, No. 47, 21 Or. 30-34, 27 Pac. 166, 13 L. R. A. 158). We do not perceive that the receivers bring themselves within this rule. No facts are averred tending to show that this unused portion of the right of way is incapable of use for the purpose granted. Looking to the testimony, it appears that when this right of way was granted it was insisted by the railway company that it should extend across the premises of the salt company.

It is true that the spur of the Michigan Central Railroad Company, to connect with the track of the salt company, deflects from this right of way at a point said to be about 600 feet from the proposed crossing by the spur about to be built by the receivers. But we discover nothing in the record to show that this right of way is incapable of use for a practical purpose contemplated in the grant, and there is no further averment in the petition to support that allegation than those above quoted.

In the record it appears that the railroad companies hold their rights under a deed dated September 19, 1895, from one Raymond, trustee, to the Toledo, Canada Southern & Detroit Railway Company. The premises described in this deed are conveyed "for a right of way for the construction, maintenance, and operation of a railroad thereon, and for the conduct of business incidental thereto, and for no other purpose: provided, that in case the said grantee, its successors or assigns, shall at any time hereafter permanently abandon the same for such purpose, then this grant shall cease and determine, and said premises shall, without further conveyance, revert to the grantor herein, his heirs or assigns." This deed conveys an easement or right of way for the use and purpose therein stated. As to the abandonment thereof, without reference now to the language in the instrument upon this subject above quoted, there is nothing in the record to show that the mere nonuser after the grant shows an intention to abandon the rights conveyed. "A mere nonuser of an easement of this character, acquired by deed, will not operate to defeat or impair the right." *Barlow v. Railroad Co.*, 29 Iowa, 276. Abandonment is a question of intent. From long nonuse it may be found as a matter of fact. *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 69, 22 C. C. A. 334, 76 Fed. 296. To constitute abandonment of a right of way there must be a clear, unequivocal, and decisive act of the party showing a determination not to have the benefit intended. *Dawson v. Daniel*, 2 Flip. 305, Fed. Cas. No. 3,669. The proviso in this instrument is that "in case the said grantee, its successors or assigns, shall at any time hereafter permanently abandon the same for such purpose, then this grant shall cease." There is no proof in this record of any permanent abandonment. Indeed, the

contrary appears in the very allegations of the petition averring that the railroad company is about to use the property for the purpose for which it was granted.

This deed conveyed to the railroad company valuable property rights in this strip. It is not necessary to determine the nature and extent of this property right, or what would be the rule of compensation should the Detroit & Lima Northern Railway Company, or its receivers, seek to appropriate a right to cross the same. If the defendants had valuable property rights which they had neither agreed to part with, nor had lost by appropriation proceedings duly had for that purpose, such rights are within the protection of the constitution of Michigan, which, like the constitutions of other American states, protects private property from being taken for the use or benefit of the public without just compensation. "It is immaterial in what way property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the law of the land." *Cooley, J., in City of Detroit v. Detroit & Howell Plank-Road Co.*, 43 Mich. 148, 5 N. W. 275.

When a railroad company acquires by purchase for a consideration lands for a right of way to be used in the exercise of its franchises, unquestionably it is under obligation to use such land for the uses and purposes of its organization, and to carry out such purposes. But it becomes the owner of such way, and, as such, entitled to its possession, and to the protection of the law, as against those who would interfere with the property rights granted to it. As we understand the Michigan cases, the property of one railway may be taken for the construction of another in all cases where the property of an individual might be, but only on making compensation therefor. *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich. 265; *People v. Lake Shore & M. S. Ry. Co.*, 52 Mich. 277, 17 N. W. 841.

It is further averred that the deed contains a reservation which authorizes the grantor to convey to the receivers the right to construct a crossing over the right of way in question. The language of this reservation is as follows:

"And the grantor herein reserves the right to a crossing of said premises at a convenient point thereon for a private way or public highway or street, of a width not greater than necessary for such purpose, together with the right to enter upon said premises, and construct and maintain thereon a good and safe crossing which shall conform as nearly as practicable to the standard of crossings which shall at that time be constructed by the grantee upon its line and lines of railroad; and such crossing and repairs shall be made only after due notice to, and under the supervision of, and to the satisfaction of, the chief engineer of the Michigan Central Railroad Company."

It is claimed that this reservation is broad enough to include, and under a proper construction should include, the right to construct a railway crossing over said strip. We think that this construction would defeat the manifest purpose of the reservation. It is for a highway or street, the width occupied to be enough for such purpose. This language certainly does not refer to a railroad crossing. On

the contrary, it clearly expresses the purpose of the grantor to have a right to construct either a private way or public highway and place for travel, with enough ground for such purpose. In this connection, and to make the reservation for this purpose effectual, a right is reserved to enter upon the premises, and construct and maintain a crossing. It is true that it is said that this crossing shall conform as near as practicable to the standard of crossings which shall then be constructed by the grantee for its line of railroad, and such crossing to be made only after due notice to, and under the supervision and to the satisfaction of, the chief engineer of the Michigan Central Railroad Company. The purpose of this privilege for a crossing is to make effectual the reservation for the private way or street. Streets and highways undoubtedly do cross the right of way of the grantee railroad company, and it is provided that the crossing shall come up to the standard of other crossings constructed by the grantee upon the line of its railroad, and shall be constructed under the supervision of the chief engineer. The intention to keep this open for highway purposes is shown in the following stipulation that the railway company shall not block the same except in the movement of its cars. Certainly, the parties did not contemplate, in making this instrument, that the reservation of the right to cross this right of way was for the purpose of constructing another railroad. The situation of the parties, as well as the language used, negatives this conclusion. However desirable it may be that the salt company have access to a competing railroad, or that the latter shall reach the business to be obtained in connection with the works of the salt company, it seems clear that the Michigan Central Railroad Company has neither forfeited nor abandoned the right of way in question, and that the attempt to cross the same in the manner indicated in this case would be an invasion of its rights, to which it has not agreed, and which have not been taken from it by appropriation proceedings as required by law. We find no error in the action of the court below in dissolving the restraining order and dismissing the petition. Its judgment is therefore affirmed.

SCHREIBER v. ANDREWS et al.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1900.)

No. 1,306.

1. SALES—CONSTRUCTION OF CONTRACT—BREACH OF WARRANTY—NONPERFORMANCE—DAMAGES.

Defendant telegraphed plaintiffs, in regard to wheat offered for sale, "Take fifty-eight net, fifteen thousand bushels two hard;" and on next day again wired, "If you can use it at fifty-seven, will sell." To the latter telegram plaintiffs responded by wire, "Accept your fifteen thousand 2 hard fifty-seven track Otis." Afterwards defendant wrote plaintiffs that, in case some of the wheat failed to grade, he wanted them to notify him, as F. & Co. looked after his business at the point to which the wheat was to be shipped. As fast as the cars were delivered on the track, the defendant took bills of lading in his own name, indorsed them, and drew on plaintiffs for the contract price of the wheat; and they paid these drafts

before the inspection. The first cars of wheat shipped graded No. 2, but, upon the arrival of a car which graded No. 3, plaintiffs notified defendant of the fact, and that they had applied it on the contract at 1½ cents off. Twenty-one cars were delivered, 7 of which graded No. 2 hard, and 14 No. 3, so that the plaintiffs overpaid for the wheat delivered \$489.60. When all but two cars had been shipped, defendant telegraphed plaintiffs: "Can't stand one-half off on car graded three. Turn them over to F."—and, plaintiffs refusing to obey the instruction, defendant refused to make further shipments to complete the contract. *Held*, that the telegrams first exchanged constituted a complete contract for the sale of 15,000 bushels of No. 2 hard wheat, and contained an implied warranty that the wheat should be of that grade, and entitled plaintiffs to recover of defendant their overpayments for wheat delivered, and damages for breach of warranty of the grade of the wheat and for the failure to complete the performance of the contract.

2. SAME—DELIVERY—WHEN TITLE PASSES—INSPECTION BY VENDEE.

Since defendant delivered the wheat at the point of shipment, took bills of lading in his own name, indorsed them, drew for and received payment of the full purchase price before inspection, the title passed to plaintiffs when the drafts were paid, and the purpose of inspection by plaintiffs was to determine whether the wheat complied with their contract with defendant for No. 2 hard wheat, and not to select wheat of that quality from the shipments made by defendant.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Samuel W. Moore (Gardiner Lathrop, Thomas H. Reynolds, Thomas R. Morrow, and John M. Fox, on the brief), for plaintiff in error.

Edwin C. Meservey (Arba F. Pierce and Charles W. German, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This case presents but one question, and that is whether the plaintiff in error, L. Schreiber, made a contract to sell and deliver to C. C. Andrews and C. G. Benton, the defendants in error, 15,000 bushels of No. 2 hard wheat, whose compliance with the contract in grade and weight was to be determined by an inspector and weighmaster at Kansas City, or a contract to sell and deliver out of a larger quantity to be shipped by him 15,000 bushels of No. 2 hard wheat which the inspector and weighmaster were to select out of the larger quantity, and identify. If he made the former contract, the judgment below must be affirmed; if the latter, it must be reversed. It is conceded that the parties made a contract for the sale of wheat subject to an inspection and determination of its grade and weight at Kansas City. The question is whether that inspector was to determine how far the wheat complied with the contract, and thus to form a basis for the measure of damages for failure to comply with it, or was to select out of a larger quantity, and thus to identify the wheat sold; and this question must be determined by the correspondence which constituted the contract, and by the acts of the parties under it. That correspondence, so far as it is material to this issue, ran in this way: On July 23, 1897, Schreiber telegraphed from Otis, Kan., to the defendants in error at Kansas City, "Take fifty-eight net, fifteen thousand bushels two hard." On July

24th he telegraphed to them, "If you can use it at fifty-seven, will sell," and they answered: "Accept your fifteen thousand 2 hard fifty-seven track Otis. Rush shipment." On the same day they wrote: "We now have your wire offering 15,000 bushels two hard at 57 cents, your track, which we now confirm for fifteen-day shipment. * * * Please bill wheat to us here, making draft without exchange, leaving us fair margins;" and Schreiber wrote them: "We expect you people to give us 10-15 days. But I believe we can make it next week as we have 3 lakh cars Monday morning. Now as you are stranger to me in case some of the wheat suit file to court I want you to notify me by wire as I have Mr. E. D. Fisher & Co. to look after my business in K. C. so I will make draft within 10.00 to \$20.00 per car and if you want some reference about me or Mr. Fisher and J. V. Brinkman Co. Bank at Gt. Bend as I do my business through their bank." On July 28, 1897, Schreiber commenced shipping the wheat. He took the bills of lading in his own name, indorsed them, and then forwarded them with drafts attached for the purchase price of the No. 2 hard wheat, and the defendants in error paid the drafts and took the bills of lading as fast as they were presented, and before the wheat for which they were respectively drawn was inspected. The first cars of wheat shipped graded No. 2 hard, but on July 31, 1897, a car arrived which graded No. 3 wheat, and thereupon the defendants in error notified Schreiber of the fact, and that they had applied it to the contract at $1\frac{1}{2}$ cents off. Schreiber shipped 21 cars. Seven of them graded No. 2 hard wheat and 14 of them graded No. 3 wheat. On August 2, 1897, all but two cars had been shipped, and the vendees had given notice of the grade of each carload as soon as it was inspected. On that day Schreiber telegraphed the defendants in error: "Can't stand one-half off on car graded three. Turn them over to Fisher." The defendants in error refused to obey this instruction, and applied the wheat, which they had already paid for, on their contract. Schreiber then refused to complete the performance of his agreement. He had drawn, and the defendants in error had paid him, for more wheat than he had delivered. Thereupon the vendees sued him, and recovered \$489.60 for overpayments, \$166.95 for breach of warranty of the grade of the wheat, and \$41.90 damages for his failure to fulfill the contract. The plaintiff in error presented a counterclaim for the conversion of the wheat which graded No. 3, but the court held that the wheat was no longer his after he had shipped it and received the purchase price of it, and that, consequently, there was no conversion of it as against him. 93 Fed. 367.

These conclusions of the court below are assailed on the ground that the agreement between the parties was that the vendor should ship a large quantity of wheat of different grades to the vendees, that the inspector should select out of all this wheat 15,000 bushels of No. 2 hard, that the vendees should buy and pay for this wheat so selected, and should hold all other wheat received from Schreiber for him, and should turn it over to Fisher. There are several reasons why this contention cannot be maintained. In the first place, the contract was complete when the telegrams and letters of July 24, 1897, had

passed. They constitute a plain agreement for the sale of 15,000 bushels of No. 2 hard wheat to be delivered by the vendor on the track at Otis. Schreiber's statement in his letter of that date that in case some of the wheat should fail to grade he wanted the vendees to notify him by wire, as he had Mr. E. D. Fisher & Co. to look after his business in Kansas City, was no notice that he intended to ship No. 3 wheat, or that he wanted any of the wheat he shipped applied in any other way than on the contract of sale. Under that contract he had no right to ship to the vendees any wheat that was not No. 2 hard wheat, nor any wheat which he did not intend to apply on the contract, because the only wheat which the vendees had bought or had agreed to receive was the 15,000 bushels of No. 2 hard wheat. Moreover, the contract contained an implied warranty that the wheat delivered to fulfill it should be No. 2 hard, and, when some of it proved to be of an inferior grade, the vendees had the option to return it, and to sue the vendor for the purchase price they had paid, or to retain it, and recover the difference between its actual value and the value it would have had if it had filled the warranty. *Whalen v. Gordon*, 37 C. C. A. 70, 78, 95 Fed. 305, 312; *Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847; *Woodruff v. Graddy*, 91 Ga. 333, 335, 17 S. E. 264; *Day v. Pool*, 52 N. Y. 416, 420; *Weed v. Dyer*, 53 Ark. 155, 159, 13 S. W. 592; *Manufacturing Co. v. Vroman*, 35 Mich. 310; 28 Am. & Eng. Enc. Law, 814; *Benj. Sales*, § 894. Again, the vendor delivered the wheat on the track at Otis, took the bills of lading in his own name, indorsed them, drew for and received payment of the full purchase price of all this wheat before it was inspected. The title to goods consigned to a purchaser by the indorsement of the bill of lading and an attached draft for the purchase price passes to the vendee when the draft is paid. *Erwin v. Harris*, 87 Ga. 333, 335, 13 S. E. 513; *Benj. Sales* (2d Ed.) § 399; *Farlow v. Treadwell* (C. C.) 13 Fed. 22, 24; *Forty Sacks of Wool* (C. C.) 14 Fed. 643, 645; *Dows v. Bank*, 91 U. S. 618, 631, 23 L. Ed. 214; *The Merrimack*, 8 Cranch, 317, 332, 3 L. Ed. 375. The result is that the only office of the inspection and weighing of the wheat was to determine in what respect and how far it complied with the contract. Their office could not have been and was not to select and identify the property sold, because that was selected by the vendor, and delivered and paid for before the inspection could be made. The contract was to sell and deliver 15,000 bushels of No. 2 hard wheat, without any intimation that the vendor had or would deliver any other wheat. The delivery was of wheat to fulfill that contract. The contract, the delivery of and the payment for each carload of the wheat were made, and the title to it passed to the purchaser before the inspection and weighing were or could be had, and the conclusion is irresistible that they neither conditioned the sale nor the identity of the property sold. The judgment is affirmed.

BOARD OF COM'RS OF BARBER COUNTY, KAN., v. SOCIETY FOR SAVINGS.

(Circuit Court of Appeals, Eighth Circuit. May 14, 1900.)

No. 1,352.

1. COUNTIES—REFUNDING BONDS—AUTHORITY TO ISSUE—REPEAL.

The authority of a county to issue refunding bonds under Laws Kan. 1879, c. 50, authorizing counties, municipal corporations, etc., to refund their indebtedness, was not repealed by Id. c. 69, authorizing such county to issue bonds within a specified amount to pay orders or warrants issued between specified dates.

2. SAME—RECITALS OF BONDS—RECOVERY BY PURCHASER—ESTOPPEL.

Where recovery was sought against a county by a bona fide purchaser of its refunding bonds, reciting that they were issued under Laws Kan. 1879, c. 50, authorizing counties to refund their indebtedness, such county was estopped by such recitals to set up as a defense that the indebtedness refunded was fraudulent.

In Error to the Circuit Court of the United States for the District of Kansas.

E. F. Ware (Charles S. Gleed, James Willis Gleed, D. E. Palmer, and J. L. Hunt, on the brief), for plaintiff in error.

James T. Herrick (Ivan D. Rogers, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action by a bona fide purchaser of refunding bonds issued under a general law of the legislature of the state of Kansas approved March 8, 1879, entitled "An act to enable counties, municipal corporations, the boards of education of any city, and school districts, to refund their indebtedness," known as chapter 50 of the Laws of Kansas of 1879. The defenses were that, so far as this general law gave authority to the commissioners of Barber county to issue refunding bonds, it was repealed by the special act of the legislature of Kansas approved March 17, 1879, which authorized the board of county commissioners of Barber county to issue bonds, not exceeding the amount of \$20,000, for the purpose of paying the county orders or warrants of that county issued between the 7th day of July, 1875, and the 31st day of January, 1879, known as chapter 69 of the Laws of Kansas of 1879, and that the warrants and bonds which were surrendered for the refunding bonds were dated prior to July 7, 1875, and were all fraudulent in their origin and in their issue. The refunding bonds contained a recital that they were issued in accordance with the provisions of the general law found in chapter 50 of the Laws of 1879. The circuit court rendered judgment in favor of the holder of the bonds. The decision of the court below that the general law of Kansas found in chapter 50 of the Laws 1879 is not repealed by the special law found in chapter 69 of the Laws of Kansas of 1879 is affirmed on the authority of Board of Com'rs of Pratt Co. v. Society for Savings, 61 U. S. App. 61, 32 C. C. A. 596, 90 Fed. 233, and Board of Com'rs of Seward Co. v. Aetna Life Ins. Co., 61 U. S. App. 41, 32 C. C. A. 585, 90 Fed. 222.

The decision of the court below that the county was estopped by the recitals in the bonds from showing that the bonds and warrants for which the refunding bonds were issued were fraudulent in their origin or in their issue is affirmed on the authority of *City of Huron v. Second Ward Sav. Bank*, 57 U. S. App. 593, 600, 603, 30 C. C. A. 38, 41, 43, 86 Fed. 272, 275, 277; *Board of Com'rs of Seward Co. v. Aetna Life Ins. Co.*, 61 U. S. App. 41, 32 C. C. A. 585, 90 Fed. 222; and *West Plains Tp. v. Sage*, 32 U. S. App. 725, 733, 16 C. C. A. 553, 557, 69 Fed. 943, 946.

BOARD OF COM'RS OF COWLEY COUNTY, KAN., v. HEED.

(Circuit Court of Appeals, Eighth Circuit. May 14, 1900.)

No. 1,362.

COUNTIES—RAILROAD BONDS—RECITAL—ESTOPPEL.

Where county bonds issued in aid of a railroad recited that they were issued in accordance with a certain act to enable counties, townships, and cities to aid in the construction of railroads, and in pursuance and in accordance with the vote of a majority of the qualified electors of the county at a special election, regularly called and held therein on a certain day, the county was estopped from claiming that the bonds were void because the proposition which received the favorable vote of the electors was to issue bonds due in 30 years, but payable on call in 10 years, while the bonds actually issued bore interest for 30 years, and were not payable, on call or otherwise, until the expiration of that period.

In Error to the Circuit Court of the United States for the District of Kansas.

S. R. Peters, John C. Nicholson, John C. Pollock, and Joseph T. Lafferty, for plaintiff in error.

E. F. Ware, Charles S. Gleed, James Willis Gleed, D. E. Palmer, and J. L. Hunt, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action by a bona fide purchaser of coupons cut from bonds issued under chapter 107 of the Laws of Kansas of 1876. The defense was that the proposition upon which the bonds were issued, and which received the favorable vote of the electors of the county, was to issue bonds due in 30 years, but payable upon call at any time after 10 years; that the coupons in suit were for interest due after the expiration of the 10 years, and after the bonds had been called for payment. The bonds themselves were not payable at the expiration of 10 years, but were bonds payable 30 years after their date. They contained this recital:

"This bond is one of a series of one hundred and thirty-six bonds of a like tenor, effect, and amount, executed and issued by the county commissioners of said Cowley county by virtue and in pursuance of an act of the legislature of the state of Kansas entitled 'An act to enable counties, townships and cities to aid in the construction of railroads, and to repeal section eight of chapter thirty-nine of the Laws of 1874,' approved February 25, 1876, and the acts of the legislature of said state amendatory thereof and supplemental thereto, and in pursuance of and in accordance with the vote of a majority of the qualified electors of said Cowley county at a special election regularly called and held therein on the 29th day of April, 1879."

The circuit court held that the county was estopped by this recital in the bonds from defeating the bonds or the coupons on the ground that the proposition which received the vote of a majority of the qualified electors of the county did not correspond in terms with the conditions of the bond. 82 Fed. 716. That decision is affirmed on the authority of *National Life Ins. Co. v. Board of Education of City of Huron*, 27 U. S. App. 244, 266, 10 C. C. A. 637, 651, 62 Fed. 778, 792; *Walnut v. Wade*, 103 U. S. 683, 696, 26 L. Ed. 526.

CHICAGO, M. & ST. P. RY. CO. v. METALSTAFF et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,289.

TRIAL—NONSUIT—TIME FOR GRANTING.

Under Rev. St. U. S. § 914, providing that the practice in the United States courts shall conform as near as may be to the practice of the courts of the state in which the United States court is sitting; and Rev. St. Mo. 1899, § 639, providing that plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury or to the court,—it was not error for the United States court sitting in Missouri to grant plaintiff's motion for a nonsuit, made subsequent to the announcement by the court of its intention to direct a verdict in favor of defendant, but before the jury had retired from the court room or returned a verdict.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Frank Hagerman (Willard P. Hall, on the brief), for plaintiff in error.

Hugh C. Ward (Herbert S. Hadley and R. D. Brown, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In this case, which was a suit for personal injuries, after the conclusion of the plaintiff's testimony, the plaintiff in error, who was the defendant below, asked an instruction in the nature of a demurrer to the evidence directing the jury to return a verdict in favor of the defendant railway company. The trial court announced its intention to give the instruction; whereupon, before the jury had retired from the court room or returned a verdict, the plaintiff below, through his counsel, asked leave to take a nonsuit. The trial court granted such leave, holding that it had no power to refuse the request. Thereupon the jury was discharged from further consideration of the case, and a judgment was entered that the defendant company go hence, and recover of the plaintiff its costs. The defendant company excepted to the allowance of a nonsuit after the court had granted its instruction, and it brings the case here for review; insisting that the trial court should have required the jury to return a verdict, and denied the plaintiff leave to take a nonsuit. The action of the learned judge of the trial court was in strict accordance with a practice which has long ob-

tained in the state of Missouri, from whence this case comes, and has been repeatedly approved by the supreme court of that state. Section 639, Rev. St. Mo. 1899, is as follows:

"Non-Suit, When Taken. The plaintiff shall be allowed to dismiss his suit or take a non-suit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards."

This provision of the Code of Procedure has been in force in the state in its present form since 1865 (Gen. St. Mo. 1865, p. 662, § 47). The construction which has been invariably placed upon the statute, so far as the decisions show, is that after a demurrer to the plaintiff's evidence has been sustained, or after a peremptory instruction is given at the close of all the evidence directing the jury to return a verdict for the defendant, the plaintiff may then take a nonsuit before the jury has actually retired to consider of its verdict, and that he may take a nonsuit either with or without leave to subsequently move to set the nonsuit aside. It matters not that leave to take a nonsuit is not sought until after the law of the case has been fully declared by the court, since the plaintiff has the right under the aforesaid statute to take a nonsuit at any time before the jury has actually retired. *Wood v. Nortman*, 85 Mo. 298, 304; *Templeton v. Wolf*, 19 Mo. 101; *Lawrence v. Shreve*, 26 Mo. 492; *Mayer v. Old*, 51 Mo. App. 214, 218; *Bank v. Gray*, 146 Mo. 568, 570, 48 S. W. 447; *Wilson v. Stark*, 42 Mo. App. 376. Indeed, the rule of practice last stated is so well settled and so well understood in the state of Missouri that it is almost a work of supererogation to cite the authorities. It is claimed, however, in behalf of the defendant company,—and this is the only question presented by the record that can be said to admit of any controversy,—that the rule of practice which obtains in the courts of the state is not obligatory upon the federal courts, but may be rejected by them. Concerning this contention, it may be said that while section 914 of the Revised Statutes of the United States, as heretofore construed (*Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Railroad Co. v. Horst*, 93 U. S. 291, 299, 23 L. Ed. 898), does not require that the mode of procedure in the courts of the United States, in law cases, shall conform in all respects to the practice which obtains in the courts of the state where the court is held, yet the statute does enjoin that the practice shall be the same "as near as may be." This implies, of course, that the federal courts cannot arbitrarily reject established rules of procedure which are observed in the courts of the state, in accordance with local laws, but must be governed thereby, except in those cases where the rule is in conflict with some federal law or rule of procedure, or where the observance of such rules by the federal courts would occasion great inconvenience or interfere with the due administration of the law. We perceive no sufficient reason why the federal courts sitting in Missouri should decline to be bound by the rule of procedure now in question, which is so well established in the courts of the state, and has been in force for so many years, that it would doubtless have been abrogated long since, if it had led to any considerable inconvenience or to the increase of litigation, or had tended in any way to

defeat the ends of justice. It is desirable for many reasons that those rules of practice which govern the local courts, and with which the bar are familiar, should likewise receive recognition by the federal courts, and control the conduct of litigation therein, when no evil results are liable to ensue. We accordingly conclude that the trial judge properly allowed the plaintiff below to take a nonsuit under the circumstances heretofore indicated. The judgment below is therefore affirmed.

MOFFAT v. SMITH, U. S. Marshal, et al.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1900.)

No. 1,309.

1. CORPORATIONS—TRUST FUND—DISSOLUTION—APPLICATION OF ASSETS.

The owner of all the stock of a corporation, who, pending the determination of an action for a tort against the corporation, which subsequently results in a judgment against it, procures the corporation to convey all its assets to him in consideration of the surrender and cancellation of his stock, has not such an equity as will enable him to maintain a bill to enjoin the judgment creditor from selling on execution against the corporation the assets so conveyed, on the ground that such sale would create a cloud on the transferee's title, since such conveyance does not affect the right of the corporation's creditors to subject its assets to the payment of their claims.

2. APPEAL—AFFIRMANCE.

The appellate court will affirm a judgment of the trial court, if correct, though by the latter decided on erroneous ground.

Appeal from the Circuit Court of the United States for the District of Colorado.

On October 26, 1883, John Munson, the appellee, recovered a judgment in the circuit court of the United States for the district of Colorado against the Henriett Mining & Smelting Company, Limited, of London, England, on account of personal injuries sustained by him through the negligence of the company while working in its mines. On June 13, 1885, an execution was issued on this judgment and placed in the hands of the United States marshal, who levied the same upon the Henriett lode-mining claim, and advertised the same for sale under the levy. The appellant thereupon filed the bill in this cause, and obtained a temporary restraining order enjoining the appellees from selling the mining claims levied on under and by virtue of the execution in the hands of the marshal in favor of the appellee Munson. The bill alleges that on October 10, 1883, before the rendition of Munson's judgment against the mining company, the mining company had sold and conveyed by deed all of its property, including the above mining claim, to appellant, for \$250,000; that the deed was filed for record in the proper recorder's office in Lake county, Colorado, in which this mine is situated, on November 3, 1883; that for this reason the mining claim is not subject to seizure and sale under the execution; and that the sale thereof would cast a cloud on appellant's title. Upon this ground he prayed that the injunction be made perpetual. The answer admitted the recovery of the judgment, and the issue of the execution and levy on the mine, also that a deed for the same had been executed by the mining company to the appellant, but charges that the title was taken by him only as trustee, and subject to the appellee's judgment. It further charges that the mine had originally belonged to appellant and certain other parties, and that it was by them sold to the mining company, a corporation created under the laws of Great Britain, for the purpose of selling it; that the stock was sold to certain parties, with certain guaranties; and that afterwards the parties became dissatisfied, and they reconveyed the property to

the appellant. A replication was filed and testimony taken, and upon final hearing the injunction was dissolved and the bill dismissed, from which decree this appeal was taken.

Branch H. Giles and Gerald Hughes (Charles J. Hughes, Jr., on the brief), for appellant.

A. S. Blake, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

One who acquires all the stock of a corporation cannot extinguish the debts of the corporation, or exempt its property from liability for the payment of its debts, by taking a conveyance of its property to himself, and canceling the stock of the corporation, or procuring its dissolution. From the testimony of the appellant it appears that, while the corporation owned the mining claims, he purchased all the shares of the corporation, and thereupon, in his own language—"After I had gotten all the stock, I could not see the propriety of a continuation of the company in England, so I asked for a liquidator. That was given me,—a liquidator appointed, who deeded the property back."

Further on he testifies:

"Q. To whom did you apply to have the company dissolved, and how? A. Francis Andrews acted for me,—as my agent and broker. Q. Was he an officer in the company? A. Yes, sir; he was secretary. Q. And he acted as your broker? A. He got the broker to do it. Q. To buy the stock? A. Yes. Q. Through whom did you apply, and through whom was it brought about? A. Through an application to the board of directors to have it dissolved, and they had to go to some court and get a liquidator appointed. They could only do that on my having possession of all of the stock. Q. It was a voluntary dissolution of the company at your solicitation and request? A. Yes, sir. Q. What property did this company own, other than the Henriett and the interests in the Maid of Erin, if any, that you know of? A. Nothing besides its furniture in its office over there, and machinery and stuff on the mine. * * * Q. What, Mr. Moffat, was the consideration that you paid for the deeds that you got from the company, conveying the Henriett mine and the interests in the Maid of Erin; those being the deeds that you have introduced in evidence? A. The return and the cancellation of the stock, under the English laws, before a liquidator could be appointed or could give a deed. That had to be done. Q. Then, if I understand it correctly, you purchased the stock from the stockholders, paying them for the stock, and then you turned it into the company,—the stock to be canceled? A. Yes, sir; and I paid all indebtedness against the company that there was in England. Q. What indebtedness was there, if you remember? A. My recollection is, one item was something like three or four hundred pounds, which I paid. They had rented an office for a term ahead. To sublet it, I lost three or four hundred pounds. I think there were some little clerk bills. I can't tell. My recollection is, it amounted to between two and three thousand dollars,—something like that."

It thus appears from the testimony of the appellant himself that, at the time of the conveyance of the property in controversy to him by the corporation, he was the owner of all the stock of the corporation, and that, as he could not see the propriety of the continuation of the company under these circumstances, he had the entire property of the corporation conveyed to himself. Under such circumstances, the appellant certainly has not established such a superior

equity as entitles him to any relief in a court of equity against a bona fide creditor of the corporation. If a corporation whose stock has all been acquired by one person can, by conveying all of its property to the stockholder in consideration of his surrendering the stock, defeat the creditors of the corporation, it can as well divide its property among its stockholders when they are more numerous; thus defeating the claims of its creditors, and enabling its stockholders, who are really the corporation, to enjoy the benefits of the corporate property regardless of the claims of creditors. That this cannot be done has been firmly established by authoritative decisions of the supreme court of the United States. *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705; *Barings v. Dabney*, 19 Wall. 1, 22 L. Ed. 90; *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55. In *Curran v. Arkansas*, supra, the state of Arkansas was the owner of all the stock of a bank. When the bank became insolvent the state attempted to apply the assets of the bank to its own use, but Mr. Justice Curtis, delivering the judgment of the court, said:

"The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts."

In *Barings v. Dabney*, supra, the state of South Carolina was the sole owner of the stock of a bank which became insolvent. The state, by legislative enactment, appropriated the assets to its own use. This was held to be invalid, for the reasons stated in *Curran v. Arkansas*, supra.

In *Angle v. Railway Co.*, supra, it was charged in the bill that the Omaha Company became the sole stockholder of the Portage Company, which was indebted to Angle. The Portage Company had property with which its debts could be paid. The Omaha Company, as such sole stockholder, used its power to transfer the property of the Portage Company to itself. The court said:

"Now, what rights, if any, a corporation may have against a sole stockholder who wrongfully causes the transfer of all the property of the corporation to be made to himself, need not be inquired into. It is clear that this stockholder cannot secure this transfer from the corporation to itself of the property of the latter, so as to deprive a creditor of the corporation of the payment of his debt. To put it in another way: The Portage Company, a corporation, owed Angle \$200,000. It had property with which that debt could be paid. The Omaha Company became the sole stockholder in the Portage Company. As such sole stockholder, it used its powers to transfer the property of the Portage Company to itself, and its conduct all the way through was marked by wrongdoing. Whatever the Portage Company might do, Angle may rightfully hold the sole stockholder responsible for that payment, which the corporation would have made but for the wrongful acts of such stockholder."

The rights of stockholders upon dissolution of a corporation are to receive the assets remaining after the payment of all the corporate debts. Until the debts are paid, the assets are a trust fund, which

may be followed in the hands of any person having notice of the trust. *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Graham v. Railway Co.*, 102 U. S. 148, 26 L. Ed. 106; *Railway Co. v. Ham*, 114 U. S. 582, 5 Sup. Ct. 1081, 29 L. Ed. 235; *Manufacturing Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. 496; *Railway Co. v. Evans*, 14 C. C. A. 116, 66 Fed. 809; *Railway Co. v. Paul*, 35 C. C. A. 639, 93 Fed. 878; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* (C. C.) 13 Fed. 516; *Jones, McDowell & Co. v. Arkansas M. & A. Co.*, 38 Ark. 17; *Thomp. Corp.* §§ 375, 1569 et seq., 2951; 2 Story, Eq. Jur. § 1252 et seq.

The appellant, upon his own showing, was the sole owner of all the stock of the corporation, and for this reason saw no necessity for continuing the corporation. Under such circumstances, he clearly took the property charged with the just debts of the corporation; and the appellee Munson was, by the judgment of a court of competent jurisdiction, declared to be a just creditor. When the appellant comes into a court of equity for the purpose of preventing a sale of property, the legal title of which is in him, he must show that his equities are superior to those of the defendant. But he seeks affirmative relief, when, according to his own showing, his legal title rests solely on a conveyance from the corporation, whose sole shareholder he was, while the appellee Munson's claim was in existence and pending in the court for adjudication, and afterwards adjudged to be a valid liability against the corporation. Whether in such case the creditor shall proceed at law or in equity manifestly depends on the facts in the particular case. In the absence of specific liens, the creditors are entitled to share ratably; but in this case there is no suggestion that the corporation was insolvent, or that there are other creditors. We decide nothing more now than that the taking over to himself by a sole stockholder of all the property of a corporation does not affect the right of a creditor of the corporation to subject its property to the payment of his debt. The ground on which the court below dismissed the bill is immaterial. Upon the bill and proofs, its decree dismissing the bill was right, and is affirmed.

CHANDLER v. RUTHERFORD et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,313.

1. UNITED STATES MARSHALS—BOND—LIABILITY OF SURETIES.

When an officer assumes to act under color of his office, having no writ or process whatsoever, or having process which on its face is utterly void, it is the prevailing doctrine that whatever he may do under such circumstances imposes no liability on his sureties. To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity.

2. SAME—DEPUTY MARSHAL—LIABILITY OF SURETIES.

A United States deputy marshal having been informed that a felony had been committed, but without being advised that the plaintiff was the person who had committed the offense, and without the exercise of any

diligence to ascertain that fact, shot the plaintiff, who was an innocent party, for the purpose of arresting him. No warrant had been issued for the supposed offense. *Held*: (1) That, though Mansf. Dig. § 2002, authorized arrest for felony without warrant "where the officer had reasonable grounds for believing that the person arrested had committed the felony," the officer's act was not done colore officii, and that the marshal's sureties were not liable therefor in an action on the marshal's bond, which was conditioned for the faithful performance of official duty by him and his deputies; (2) that, when an officer seeks to justify an arrest without a warrant under a statute like the one quoted above, and the act for which the arrest was made was not committed in the officer's presence, he must show, in order to justify his conduct, that he acted on information such as would justify a reasonable man in believing that the particular person arrested was guilty of a felony.

In Error to the United States Court of Appeals in the Indian Territory.

This case was tried and determined below on demurrer to the complaint, which was adjudged insufficient to sustain a judgment. The first paragraph of the complaint, which was filed by James Chandler, the plaintiff in error, alleged, in substance, that Samuel M. Rutherford, one of the defendants in error, and one of the defendants below, was the duly appointed and acting United States marshal in and for the Northern district of the Indian Territory, and that the other defendants in error, to wit, George Sparks, John F. Williams, Clarence W. Turner, Andrew W. Robb, Pleasant N. Blackstone, and James D. Lankford, were sureties upon the official bond of said Samuel M. Rutherford as such United States marshal in and for the Northern district of the Indian Territory, a copy of which bond was attached to the complaint. The remaining material allegations of the complaint were as follows:

"The plaintiff says: That on or about the 8th day of August, 1895, said defendant Samuel M. Rutherford, United States marshal as aforesaid, had in his office in the town of Muskogee, in said Northern district of the Indian Territory, A. A. McDonald, his duly appointed and acting chief deputy marshal, who was, in the absence of said United States marshal from his office, fully authorized to act for and in the room and stead of said United States Marshal Rutherford, and to do and perform all the duties pertaining to the office of United States marshal. That on the day and date last aforesaid, in the absence of said defendant Samuel M. Rutherford, United States marshal as aforesaid, from his office in said town of Muskogee, complaint was made to his said chief deputy marshal, A. A. McDonald, at his office in said town of Muskogee, by Dave Purty, of said Northern district of the Indian Territory, of his having had some horses stolen from him by a man by the name of Flave Carver, and that said horse thief was then in the vicinity of said town of Muskogee; and thereupon said Chief Deputy Marshal A. A. McDonald went to the office of the United States commissioner in said town of Muskogee, to obtain a writ for the arrest of said horse thief, Flave Carver, but the commissioner was absent from his office, and no writ was obtained; and thereupon, on the same day, said Chief Deputy Marshal A. A. McDonald, at the suggestion and request of James M. Givens, the assistant United States attorney in and for said Northern district of the Indian Territory, sought for Dave Adams, a duly appointed and acting deputy marshal in and for said Northern district, Indian Territory, and found him at his house in said town of Muskogee, and then and there made known to him that there was reasonable ground to believe that Flave Carver had committed the crime of 'horse larceny' (a high felony), and it was believed the horse thief, Flave Carver, was then in the vicinity of the town of Muskogee, and he, the said chief deputy marshal aforesaid, wanted said Deputy Marshal Adams to go with said Dave Purty and

arrest said horse thief, Flave Carver; and said Chief Deputy Marshal A. A. McDonald then and there requested the said Deputy Marshal Adams to meet him and Purty on that evening at a storeroom next door to the post office in said town of Muskogee. After leaving the Deputy Marshal Adams' residence, and before the meeting at the store, said Chief Deputy Marshal A. A. McDonald furnished said Purty with a double-barrel shotgun, and also loaded shells, loaded with BB shot, or small-size buckshot; and then, on their meeting said Deputy Marshal Adams, about 8 o'clock on the evening of the same day, at said store next door to the post office, he, said Deputy Marshal Adams, refused to go or to undertake to arrest the horse thief, Flave Carver, with no one but said Purty to go with him; and thereupon said Chief Deputy Marshal A. A. McDonald got Joseph N. Walker to get his gun, and go with said Deputy Marshal Adams and said Purty to arrest said horse thief, Flave Carver; and immediately thereafter, to wit, about 8 o'clock, on the evening of August 8, 1895, said Deputy Marshal Adams, with the said Walker and Purty, started from said store, which was on Main street in said town of Muskogee, to try to find and arrest said horse thief, Flave Carver. They went from said store up to the Missouri, Kansas & Texas Stockyards, in said town of Muskogee, and there the said Deputy Marshal Adams got two other posse men, namely, Joseph Hayes and Richard Brim, to go with him, and assist in finding and arresting said horse thief, Flave Carver. From said stock yards said Deputy Marshal Adams and his then posse of four men started, and went on the west side of a switch of the Missouri, Kansas & Texas Railway Company, and when they had reached the north part of the said town of Muskogee they crossed from the west side to the east side of said switch, and just at that time, to wit, between 8 and 9 o'clock in the evening of the 8th day of August, 1895, the plaintiff was walking with a lady in the north end of Cherokee street, in said town of Muskogee, and while so walking the said Deputy Marshal Dave Adams and his posse of four men, all of whom were seeking the horse thief, Flave Carver, came up stealthily within some twenty or thirty steps of the plaintiff and the lady with whom he was walking, and, without making any proclamation of their character and their purpose, and without the exercise of reasonable diligence, or any diligence whatever, to ascertain whether or not the plaintiff was the horse thief, Flave Carver, they were seeking to arrest, some one of them simply called out 'Hey, there!' and the plaintiff and the lady stopped for a moment, and in answer to an inquiry made by the lady the plaintiff expressed it as his opinion that they were boys in the grass; and when the plaintiff and the lady had walked but a few steps further on the same call, 'Hey, there!' was made by some one of said deputy marshal's posse, and the plaintiff then stopped, and, as he was turning around, said deputy marshal, or his posse men, or some one of them, fired upon, shot, and severely wounded the plaintiff with leaden bullets or shot in the left side of his head and face, also in his left shoulder, left arm and in his back, they supposing him to be the horse thief, Flave Carver. * * * By reason of all which the plaintiff says he has been permanently injured to his damage twenty-five thousand dollars. Wherefore he prays judgment for twenty-five thousand two hundred and fifty-seven and ⁰⁰/₁₀₀ dollars and all other proper relief."

A demurrer to the foregoing complaint was sustained *ad nisi prius*, and the complaint was thereupon dismissed. This judgment was affirmed in the United States court of appeals in the Indian Territory, whereupon the plaintiff in error brought the case to this court by a writ of error.

Napoleon B. Maxey (J. P. Clayton, Benjamin Martin, Jr., and Shackelford & Shackelford, on the brief), for plaintiff in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is now well settled, although the proposition was at one time disputed, that the sureties on the official bond of a marshal, sheriff, con-

stable, or other ministerial officer may be held liable when the officer having process in his hands commanding him to seize the property of one person in fact seizes the property of another. In such cases the trespass is not the act of a mere individual, but is perpetrated *colore officii*, and for that reason the act imposes a liability on the officer's sureties to the same extent as when, having a writ in his hands, he fails to execute it, or makes an excessive levy, or is guilty of some other wrongful or oppressive act in the execution of the process. *Lammon v. Feusier*, 111 U. S. 17, 21, 4 Sup. Ct. 286, 28 L. Ed. 337, and cases there cited; *People v. Schuyler*, 4 N. Y. 173; *Holliman v. Carroll's Adm'rs*, 27 Tex. 23; *Carmack v. Com.*, 5 Bin. 184; *Forsythe v. Ellis*, 4 J. J. Marsh. 299. But when an officer assumes to act under color of his office, having no writ or process whatsoever, or having process which on its face is utterly void, it seems to be the prevailing doctrine that whatever he may do under such circumstances imposes no liability on his sureties. To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties in his official bond. Thus, where a constable, by representing that he had an execution in his hands against the plaintiff, when he had no such execution, succeeded in collecting from the plaintiff a certain sum of money, it was held that the constable's sureties were not liable. *Com. v. Cole*, 7 B. Mon. 250. And where a sheriff claiming to have an execution in his hands, but having no such process, sold lands, and received the proceeds, his sureties were held to be exempt from liability. *Eaton v. Kelly*, 72 N. C. 110. And where a warrant was issued to arrest certain unknown persons, their names not being specified in the writ, and an arrest was made thereunder, it was held that the warrant was void, and that the act of the officer imposed no liability upon his sureties. *Allison v. People*, 6 Colo. App. 80, 39 Pac. 903. And where an officer goes outside of the line of his official duty, and acts without the scope of his authority, such an act, though done *colore officii*, is not a breach of his bond for the faithful performance of his duty. *State v. McDonough*, 9 Mo. App. 63. See, also, *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157, and cases there cited, where it was held that when an officer, though he assumes to act as such, commits a wrong under circumstances where the law does not impose on him a duty to act at all, the wrong is not a violation of any official duty, and is not embraced within the sponsorship of the surety. In the case at bar the complaint shows that at the time of the attempted arrest of Flave Carver the marshal's deputy had no warrant for the arrest of any one, and no warrant had in fact been issued on account of the supposed offense, but a statute of the state of Arkansas (Mansf. Dig. § 2002) was in force in the Indian Territory, which is as follows:

"A peace officer may make an arrest: First, in obedience to a warrant of arrest delivered to him. Second, without a warrant where a public offense is

committed in his presence or where he has reasonable grounds for believing that the person arrested has committed a felony."

The contention is that, as this statute authorizes an arrest without warrant in two instances, the deputy marshal must be regarded as having acted *colore officii* in such a sense as will render the marshal and his sureties liable for the wrong committed. It will be observed, however, that no offense had been committed in the deputy marshal's presence when he attempted to arrest the plaintiff, and that such knowledge as he had of an offense having been committed was derived wholly from hearsay. It is further noticeable that the complaint fails to show that prior to the arrest the deputy marshal had been informed that the plaintiff was Flave Carver, or that any effort was made by the officer or any member of his posse to ascertain whether he was in fact Flave Carver, who had been accused of horse stealing, while it is expressly averred in the complaint that the arrest was attempted "without the exercise of reasonable diligence, or any diligence whatever, to ascertain whether or not the plaintiff" was the person whom they were looking for and seeking to arrest. It is clear, therefore, under the averments of the complaint, that, if the arrest had been consummated, without the use of firearms, or any unusual force or violence, the deputy marshal would have been guilty of a trespass, and could not have justified his conduct under the statute aforesaid, because, having no knowledge or information whatever as to who the person was whom he attempted to arrest, he cannot be said to have had any ground for believing that the plaintiff had committed a felony. When an officer seeks to justify an arrest without a warrant under a statute like the one now under consideration and the act for which the arrest was made was not committed in his presence, it is manifest that he must show that he acted on information such as would justify a reasonable man in believing that the particular person arrested was guilty of a felony. Where he has no such information, but nevertheless makes an arrest, he acts entirely outside of the line of his duty and authority; as much so, we think, as an officer who arrests without a warrant where there is no law permitting an arrest without process. We are of opinion, therefore, that the facts stated in the complaint will not warrant a judgment against the marshal and his sureties in an action on the marshal's bond. The liability on the bond, by the terms whereof the sureties agreed that the marshal and his deputies should faithfully perform the duties of his office, is purely contractual. Such an obligation is materially different from an undertaking by the sureties to be responsible for any wrongful act of the marshal and his deputies which they may commit under the pretense that they are discharging an official duty. When the marshal's deputy undertook to arrest the plaintiff, he had no information, so far as the case discloses, which either required or authorized him as an officer to lay hands on the plaintiff, much less to make use of a deadly weapon for the purpose of arresting him. The deputy's act on the occasion in question was not only unauthorized, but it did not have the appearance of being done in obedience to the mandate of the law; in other words, he did not act *colore officii* in any such sense or under such circumstances as will render the sureties responsible. And while

it may seem a hardship that the plaintiff should be remitted to his action against the individuals who were guilty of the outrage, yet it must be borne in mind that it would be equally unjust to impose on the sureties a liability for a wrong in which they were in no wise concerned, and which is not within the terms of the bond. The judgment of the United States court of appeals in the Indian Territory and the judgment of the United States court in the Indian Territory, Northern district, are therefore affirmed.

SOUTHERN PAC. CO. v. COLORADO FUEL & IRON CO. et al.

COLORADO FUEL & IRON CO. v. SOUTHERN PAC. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

Nos. 1241, 1242.

1. CARRIERS—REGULATION OF CHARGES—RATES ON INTERSTATE COMMERCE.

Under the decisions of the supreme court, which have conclusively determined that the interstate commerce commission has no power to fix rates for the carriage of interstate freight, a decree of a court for the enforcement of a rate so fixed by the commission is without authority; nor has the court itself the power to determine in advance what is a reasonable rate, and to enjoin the future observance of such rate, such power being legislative, and not judicial, in its character.

2. SAME—POWERS OF INTERSTATE COMMERCE COMMISSION—FIXING RATES.

Certain interstate carriers having established and for some time maintained a rate on steel rails and fastenings and other iron products from Chicago, Ill., to San Francisco, Cal., and other Pacific Coast points, the interstate commerce commission ordered that the rates on such products from Pueblo, Colo., an intermediate point, to such Pacific Coast points, should not exceed 75 per cent. of the rates contemporaneously in force from Chicago to the same points on the Pacific Coast, and that the rate on steel rails and fastenings from Pueblo to San Francisco should not exceed 45 cents per hundred, and that the rate on other iron products should not exceed 37½ cents per hundred. *Held*: (1) That the commission had no more power to fix a rate from Pueblo to Pacific Coast points by relation to the Chicago rate that had been or that might be established by the carriers themselves than it had to prescribe a maximum rate from Pueblo to Pacific Coast points upon an independent consideration of what would be a reasonable charge for the service, and that its order was therefore void; (2) that the circuit court of the United States had no power to make such an order as was made by the interstate commerce commission, based on the Chicago rate, since such action was tantamount to an exercise of the legislative power to prescribe rates, which does not belong to the courts.

3. INJUNCTION—INTERSTATE COMMERCE ACT.

A restraining order that neither forbids nor commands the doing of any specific act, but simply repeats the general admonitions of the interstate commerce act, should not be granted, since such an injunction does not give any additional sanction to the statute, but leaves all vital questions concerning violations of the law to be tried by proceedings for contempt, instead of being tried in the usual manner before a court and jury.

4. RELIEF BY INJUNCTION—EXCESSIVE RATES.

It is not within the legitimate province of a court of equity, in a controversy between interstate carriers and shippers, to interpose and fix a maximum freight rate, either upon an independent consideration of what is a reasonable charge or by relation to some other rate then or theretofore in force, and thereupon enjoin the carrier from demanding more than the rate so established, inasmuch as such an order effectually deprives an

interstate carrier of the right to fix its rate in the first instance, and to change the same, which power, as it seems, is conceded to the carrier by the interstate commerce act.

Appeal from the Circuit Court of the United States for the District of Colorado.

On October 28, 1898, the Colorado Fuel & Iron Company, a corporation of the state of Colorado, exhibited its bill of complaint in the circuit court of the United States for the district of Colorado against the Southern Pacific Company, a corporation of the state of Kentucky, and against numerous other railroad companies which did business in connection with it, for the purpose of preventing said railroad companies from putting in force freight rates on merchandise shipped from Pueblo, in the state of Colorado, to San Francisco and other points on the Pacific Coast, which were alleged to be extortionate and unreasonable. Relief was prayed on two grounds, and the bill consisted of two parts or counts. In the first count it was averred, in substance, that on February 18, 1895, the Colorado Fuel & Iron Company, the complainant below, was engaged at Pueblo, in the state of Colorado, in the manufacture and sale of steel rails and fastenings and other steel and iron products, but had been unable before that date to market its product at points on the Pacific Coast because the rate charged for transportation was unreasonable, the same being \$1.60 per hundred pounds; that complaint was made by it to the interstate commerce commission of the excessive rate charged as aforesaid between Pueblo and Pacific Coast points; that a hearing was had before said commission with respect to the matters complained of, which hearing resulted on November 25, 1895, in a decision by the commission that any rate on iron or steel products between Pueblo, Colo., and San Francisco, Cal., which was greater at any time than 75 per cent. of the rates contemporaneously in force on like traffic from Chicago to San Francisco, was unreasonable, and in violation of the interstate commerce act, and in an order by said commission to the effect that the defendants should put in force from Pueblo to San Francisco a rate not exceeding 45 cents per hundred on steel rails and fastenings, and 37½ cents per hundred on bar iron, cast iron, water pipe, billets, blooms, rivets, nails, and spikes, and that the rate from Pueblo to San Francisco on such iron and steel articles should never at any time be greater than 75 per cent. of the rates contemporaneously in force on like traffic from Chicago to San Francisco; that at the time said decision and order were promulgated by the commission the rate per hundred pounds from Chicago to San Francisco in car-load lots was 60 cents per hundred on steel rails and fastenings, and 50 cents on other steel and iron products; and that by said decision and order the rates from Pueblo to San Francisco were respectively made on the species of traffic aforesaid 45 cents and 37½ cents per hundred pounds. It was averred that on March 30, 1896, the interstate commerce commission filed a bill to compel the Southern Pacific Company and other defendants to comply with its aforesaid order, they having at first refused to do so; that during the pendency of said cause the rate prescribed by the aforesaid order of the interstate commerce commission was put in force, and had ever since been maintained, but that on October 17, 1898, the Southern Pacific Company had given notice that from and after November 7, 1898, the rate per hundred pounds on steel rails and fastenings from Pueblo to San Francisco would be advanced to 60 cents per hundred, and on other steel and iron products to 75 cents per hundred; and that the rates so proposed to be put in force were unreasonable and unjust, and would constitute an unlawful discrimination against the complainant, and in favor of all manufacturers of iron products east of Pueblo, and would exclude the complainant from the Pacific Coast market, and cause it great and irreparable loss and damage. In the second part of its bill all of the allegations of the first count were reaffirmed, and in addition thereto the following facts were averred: That from October 22, 1892, to June 2, 1896, the defendants had exacted a rate on iron products from Pueblo to San Francisco and other Pacific Coast points in the sum of \$1.60 per hundred, the distance being substantially 1,500 miles, while at the same time they only charged a rate of 60 cents per hundred on steel rails and fastenings, and 50 cents per hundred on other steel and iron products, from the city of Chicago to the same

Pacific Coast points, the distance being substantially 2,500 miles, the conditions of transportation substantially the same, and the shorter route being included in the longer and a part thereof; that by so doing the defendants had charged complainant more than they charged other persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar conditions and circumstances, and had given an undue and unreasonable preference and advantage to particular persons, corporations, and localities, and had subjected the complainant and the city of Pueblo and its traffic to an undue and unreasonable prejudice and disadvantage, and had also charged a greater compensation in the aggregate for the transportation of a like kind of property under similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer haul, and had violated the interstate commerce act; that by reason of said wrongful acts the petitioner, who was the owner of large and productive iron and coal mines, and an extensive plant for making steel and iron products, had been compelled to restrict its manufacture thereof greatly below its capacity, and had been in effect excluded from Pacific Coast markets; that as to all Pacific Coast points except San Francisco the defendants had charged a rate of \$1.60 per hundred pounds from Pueblo since October 22, 1892; that on June 2, 1896, the defendants had put in force a tariff of 45 cents per hundred pounds on steel rails and fastenings, and of 37½ cents per hundred pounds on other steel and iron products, between Pueblo and San Francisco, the same being three-fourths of the rate from Chicago to San Francisco, and had ever since maintained the last-mentioned rate, to wit, three-fourths of the Chicago rate, as between Pueblo and San Francisco, the result being that the petitioner had been enabled to market its products on the Pacific Slope; and that the Southern Pacific Company was the owner of lines of railroads which enabled it to control the entrance of all the other defendant railroad companies into the city of San Francisco, and to dictate to the other defendants named in the bill the rates to be charged, and the divisions thereof, as respects Pacific Coast traffic. It was finally averred, as in the first count, that the Southern Pacific Company on October 17, 1898, had given notice of a proposed increase in rates, as heretofore stated, on iron and steel products, the same to become effective on November 7, 1898; "that in so advancing said rates said defendants will and are proposing and intending to make, as against this petitioner, an unjust and unreasonable charge, and will charge and demand a greater compensation for service to be rendered petitioner than they charge and receive from other persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and give an undue and unreasonable preference and advantage to particular persons, corporations, and localities in Chicago and elsewhere east of said city, and their traffic, and subject petitioner and its traffic to undue and unreasonable prejudice and disadvantage and unjust discrimination, and will prevent the petitioner from having its interstate traffic moved by said defendants upon terms and conditions as favorable as those given by them for like traffic under similar conditions to other shippers, all in violation of said [interstate commerce] act." In view of the premises, the petitioner prayed for a mandatory injunction commanding the defendants to transport the petitioner's steel and iron products from Pueblo to San Francisco at the then existing rates, to wit, 45 cents per hundred pounds on steel rails and fastenings, and 37½ cents on other steel and iron products, and restraining them from canceling or advancing such rates until further order, and that the petitioner be awarded a judgment against the defendants for the sum of \$100,000 for the damages theretofore sustained. A demurrer to the bill was interposed by the Southern Pacific Company, which was overruled on November 4, 1896. No answers having been filed, a decree pro confesso was subsequently entered. Subsequent proceedings were taken before a master to ascertain the amount of the complainant's damages, and after the master had filed his report recommending a decree for damages in the sum of \$35,300 the case came before the court for final hearing and decree. The court rejected the complainant's demand for damages, but awarded an injunction to the following effect: First, that the defendants be enjoined and restrained from further continuing to violate and

disobey the interstate commerce act, and particularly to abstain from violating the order of the interstate commerce commission of November 25, 1895, the substance of which order has been heretofore stated; second, that the defendants be enjoined and required, in respect of complainant's traffic from Pueblo to San Francisco, Sacramento, Stockton, San Jose, Marysville, or Oakland, in the state of California, to cease and desist, on and after March 25, 1899, from unjust and unreasonable charges, or from demanding a greater compensation for service to be rendered complainant than they charge other persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, or from giving undue and unreasonable preference and advantage to particular persons, corporations, and localities at Chicago, Ill., and elsewhere eastward of said city, or from subjecting the complainant and its traffic to undue and unreasonable prejudice and disadvantage and unjust discrimination, or from preventing the complainant from having its interstate traffic moved upon terms and conditions as favorable as those given by them for like traffic under similar conditions to other shippers; and, third, that the defendants be required and commanded to move the interstate traffic of the complainant, on and after March 25, 1899, at the same rates charged and upon terms as favorable as those given by the defendants, under similar conditions, to any other shipper, to the end that they charge and demand from said complainant for transportation from Pueblo to San Francisco, Sacramento, Stockton, San Jose, Marysville, and Oakland, or from Pueblo to either of said points, on steel rails and railway fastenings, no more than 45 cents per hundred pounds, and on bar iron, cast iron, water pipe, pig iron, billets, blooms, rivets, or spikes no more than 37½ cents per hundred pounds. From the final decree so made the Southern Pacific Company prosecuted an appeal, and assigns error as respects the injunction. The complainant below also appealed, and assigns error as respects the disallowance of the damages assessed by the master.

Joel F. Vaile (Edward O. Wolcott, on the brief), for Southern Pac. Co.

David C. Beaman (Fred. Herrington, on the brief), for Colorado Fuel & Iron Co.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first paragraph of the restraining order which is quoted above in the statement, namely, that part of the order which requires the defendant company to comply with the order of the interstate commerce commission of date November 25, 1895, and in obedience thereto to transport steel and iron products from Pueblo, Colo., to San Francisco, Cal., for 45 cents and 37½ cents per hundredweight, and in no event to charge more than 75 per cent. of the rate on similar products between Chicago and San Francisco, cannot be upheld consistently with the decisions of the supreme court of the United States in at least three cases, namely: *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 16 Sup. Ct. 700, 40 L. Ed. 935; and *Interstate Commerce Commission v. Alabama M. Ry. Co.*, 168 U. S. 144, 161, 18 Sup. Ct. 45, 42 L. Ed. 414. These decisions conclusively establish the proposition that the order of the interstate commerce commission which the defendant company was enjoined to obey was a void order, because the commission undertook to prescribe a maximum rate between Pueblo, Colo., and San Francisco, Cal., which it

had no power under the interstate commerce act to prescribe directly, or indirectly by determining with reference to the past what was a reasonable rate and thereupon declaring that the rate should not be raised above that which it had adjudged to be reasonable. The order of the commission having been made without authority, it follows that so much of the restraining order is erroneous as seeks to put that order in force.

The third clause of the restraining order, which is quoted above in substance, in our judgment is also erroneous. In this paragraph of the restraining order the lower court, acting, no doubt, upon the allegations contained in the second part of the bill, which were admitted by the demurrer, undertook to do that which the interstate commerce commission had previously done; that is to say, prescribe a maximum rate of 45 cents and $37\frac{1}{2}$ cents per hundred on steel and iron products between Pueblo and certain cities on the Pacific Slope. This seems to have been done by the court on the same theory as by the commission; that is to say, by determining with reference to past rates what was a reasonable charge, and then enjoining the defendant from charging more in the future than it had found to be reasonable compensation in the past. In the cases already cited the reasoning of the court by which it reached the conclusion that the interstate commerce commission has no power to fix maximum or minimum rates, either directly or indirectly, is founded upon the fundamental proposition that the fixing of rates for interstate carriers involves an exercise of legislative as distinguished from judicial power, and that the power does not belong to the commission, because it was not granted by the interstate commerce act. For much stronger reasons the power to fix a schedule of rates for interstate carriers does not belong to the federal courts, because congress has not attempted to delegate that authority to the courts, even if it could divest itself of that legislative function, and impose it upon the judicial branch of the government.

It is urged, however, in behalf of the complainant below, that although the interstate commerce commission is not empowered to fix either a maximum or minimum rate upon an independent consideration of what is a reasonable charge, yet, when carriers have themselves established a rate between two points, the commission may fix a rate to or from an intermediate point by declaring that it shall be a certain proportion of the established through rate. Upon this ground it is said that so much of the order of the commission of November 25, 1895, as made the rate from Pueblo, Colo., to San Francisco 75 per cent. of the rate from Chicago to San Francisco was valid, and may be upheld, although that portion of the order fixing an absolute rate of 45 cents and $37\frac{1}{2}$ cents per hundredweight was void and in excess of its power. The decisions of the supreme court in *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, and in *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, are principally relied upon in support of this contention. With reference to this point it may be said that both of the cases last cited dealt mainly with the long and short haul clause con-

tained in section 4 of the interstate commerce act (1 Supp. Rev. St. p. 530). In that clause of the act, congress, in the exercise of its legislative power to fix rates, has enacted "that it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. * * *". In the first of the cases last cited several railroad companies, as the court found, had formed a joint through line between two points in different states over which merchandise was carried under through bills of lading. The rate charged to an intermediate point (Social Circle) on this joint line was 30 cents per hundred greater than the through rate for the longer distance, although the circumstances and conditions of the carriage were substantially the same. The action of the carriers in exacting a higher rate for the shorter distance was therefore in open violation of the rate prescribed by congress. The interstate commerce commission made an order commanding the carriers to desist from this violation of the law, and the supreme court affirmed this part of the order. In the second case above cited the commission had made and sought to enforce an order that freight received from abroad by water, and destined to an inland point under a through bill of lading from abroad, should be carried from the port at which it was received to the inland point at the same rate charged from such port to the inland point for other like freight of a domestic character. The supreme court declined to enforce this order of the commission, holding that the conditions under which the two classes of traffic were carried were dissimilar; that the dissimilarity of the conditions should have been considered by the commission, inasmuch as they might have been found to be of such a character as justified the carrier in transporting merchandise received from abroad to the inland point at a less rate than it charged on domestic or local traffic.

Considering the questions which were involved in these cases and the points adjudicated, we discover nothing therein which impairs the force of the later decisions in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243, and in *Interstate Commerce Commission v. Alabama M. Ry. Co.*, 168 U. S. 144, 161, 18 Sup. Ct. 45, 42 L. Ed. 414, holding that the interstate commerce commission has not been vested with the legislative power to prescribe rates, either directly or indirectly. Prescribing a rate from Pueblo, Colo., to San Francisco, Cal., by reference to a rate that had theretofore been established by carriers between Chicago and San Francisco, involved the exercise of legislative functions to the same extent as fixing the rate between the former points on an independent consideration of what would be a reasonable compensation for the service. In either event, far-reaching questions of public policy arise, and many circumstances and conditions affect the question to be solved, so that it cannot be said that the problem of fixing a reasonable rate from Colorado points to the Pacific Slope became a simple one involving no exercise of legislative discretion, when

it appeared that the carriers had established a rate from Chicago to Pacific Coast points. It must also be borne in mind that in the case in hand we are not called upon to deal with a joint through line, and with a rate to an intermediate point on that line, which, by the express command of congress, cannot be made greater than the through rate, if the conditions of carriage are substantially the same. No joint through line under a common control and management is disclosed by the present record. Besides, the commission by its order of November 25, 1895, did not enjoin that the rate for the short haul from Pueblo to San Francisco should not exceed the rate for the long haul from Chicago, but it went beyond that limit, and undertook to declare that the rate for the shorter distance should not exceed three-fourths of the rate for the longer distance, thereby assuming to establish a rate by relation. We feel constrained to hold that the commission exceeded its authority in this part of the order, and that it had no more power to fix a rate from Pueblo to San Francisco by relation to the theretofore existing rate from Chicago to San Francisco than it had to fix the former rate upon an independent consideration of what would be a reasonable charge.

It is further insisted by the complainant below that in view of the allegations contained in the second count of its bill, wherein threatened violations of the interstate commerce act are averred, it was entitled to injunctive relief on general equitable grounds; that is to say, because the damage to be apprehended from the threatened wrongful acts was incapable of being adequately redressed at law. It will be observed that by the second clause of the restraining order, which is quoted above in substance, the defendants were restrained from demanding unreasonable rates, from giving undue and unreasonable preferences to persons or localities, or from subjecting the complainant to an unreasonable disadvantage, etc. This clause of the order might possibly be upheld, but it is not apparent that any special advantage would result to the complainant from an order couched in such general terms, which merely repeats the general admonitions of the interstate commerce act. Such an order does not give any additional sanction to the statute; neither does it forbid the doing of any specific acts. It simply leaves the questions whether the threatened rate is reasonable, or whether it would operate as an undue preference or as an unreasonable discrimination, to be tried and determined in a proceeding for contempt before a chancellor, instead of being tried in the usual way before a court and jury, in an action for damages, after the rate has been exacted or actually demanded on a tender of property for shipment. Perceiving, apparently, that the general language of the order left all vital questions undetermined and open for consideration in supplementary proceedings, the trial court next addressed itself to the task of fixing a maximum rate to be thereafter observed, and in the third paragraph of the restraining order prescribed such a rate, and commanded the defendants to conform thereto. In so acting the trial court, in our opinion, exceeded its lawful powers. In the first instance interstate freight rates must be established and put in force by the carrier, or by the national legislature, or by some commission or administrative body on whom the authority to prescribe rates has been

duly conferred by the national legislature. When the carrier promulgates a schedule of rates without previous conference with its patrons, it acts under the mandate of the statute and the common law that all rates must be fair and reasonable, and under and subject to the rule that it may be called to account by the shipper in an action at law for damages, provided any unreasonable or unjust rate or charge is either exacted from the shipper or demanded. When a rate that has been exacted or demanded is challenged on the ground that it was unreasonable or unjust, it is within the province of a court and jury to determine the issue so raised, and to redress the wrong, if one has been committed; but, before an alleged unreasonable rate has been either paid or demanded on an actual tender of merchandise for shipment, it is not within the legitimate province of a court of equity to interpose and fix a maximum rate, and thereupon enjoin the carrier from demanding more than the rate so established. Such an order effectually deprives an interstate carrier of its right to change and fix rates which is conceded to it by the interstate commerce act. It is tantamount both to making a contract between the shipper and the carrier, and to an exercise of the legislative power of prescribing rates, neither of which powers properly belongs to a court of equity. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 493, 17 Sup. Ct. 896, 42 L. Ed. 243; *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; *Express Cases*, 117 U. S. 1, 29, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 685, 686, 4 Sup. Ct. 185, 28 L. Ed. 291; *Pullman Palace-Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 598, 6 Sup. Ct. 194, 29 L. Ed. 499; *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 27 U. S. App. 380, 387, 11 C. C. A. 417, 63 Fed. 775; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.* (C. C.) 41 Fed. 559, 563.

Aside from the foregoing considerations, we perceive no reason why the remedy at law for the threatened wrong should be pronounced ineffectual or inadequate. The damages that the complainant will sustain if it is right in its contention as to the unreasonableness of the proposed rates can be ascertained by a court and jury, while it is not suggested that the defendant company is insolvent, or that it will be unable to respond for such damages as a jury may assess. Besides, a single verdict before a jury establishing the unreasonableness or discriminating character of the proposed rate would probably lead to a withdrawal of the rate, and avoid the necessity of further actions. But, be this as it may, we are of opinion that so much of the restraining order from which the appeal is taken as afforded any substantial relief to the complainant company, namely, that part thereof which prescribed a maximum rate, and enjoined the defendant company from demanding greater compensation, was in excess of the power of the court, and cannot be upheld. It may well be that the interstate commerce act would be much more effectual in accomplishing the objects which it was designed to accomplish if the commission provided for therein was empowered to prescribe a schedule of maximum rates in cases like the one in hand. But that power, it seems, has not been

conferred, and the courts cannot enlarge the authority of the commission by enforcing orders of that body which it has no power to make. Neither can the courts undertake to name a maximum rate in advance, and enjoin a carrier from violating it.

There were some other questions of a jurisdictional nature discussed at the bar, but we have not deemed it expedient or necessary on the present occasion to examine them critically, and accordingly shall express no opinion thereon. In view of what has been said we conclude that the decree below should be reversed, with directions to dismiss the bill of complaint; and it is so ordered.

NEININGER v. COWAN et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 347.

1. TRIAL—DIRECTION OF VERDICT.

A court may properly direct a verdict for defendant on the conclusion of plaintiff's evidence in an action in which the right of recovery depends upon the questions of negligence and contributory negligence, where the conclusion follows, as a matter of law, that no recovery can be had upon any view that can properly be taken of the facts the evidence tends to establish.

2. SAME—ISSUE UPON MOTION TO DIRECT VERDICT.

A motion for direction of a verdict, like a demurrer to evidence, admits, not only what the evidence proves, but the ultimate facts which it tends to prove.

3. RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company to recover for an injury at a crossing, it clearly appeared that defendant was guilty of negligence, in failing to guard the crossing as required by an ordinance, or to give the statutory signals. It also appeared from plaintiff's own evidence that he was familiar with the crossing, which was on a principal street of a city; that he approached the crossing, driving a wagon, in the early morning, on the side of the street where his view of the track in the direction from which the train approached was obstructed by buildings until he was within 10 feet of the track, although from the other side of the street he could have seen along the track in both directions for a considerable distance; that he observed that there was no watchman, as was usual during the daytime, but drove upon the track without stopping to look or listen. *Held*, that such evidence disclosed contributory negligence, which was a proximate cause of the injury, and justified the court in directing a verdict for the defendant.

Waddill, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of West Virginia.

John A. Howard and J. B. Driggs, for plaintiff in error.

Henry M. Russell, for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the circuit court of the United States for the district of West Virginia. The action was brought by the plaintiff, Frederick W.

Neininger, against John K. Cowan and Oscar G. Murray, receivers of the Baltimore & Ohio Railroad Company. The cause of action is injuries received by the plaintiff in a collision with the railroad train of the defendants at a railroad crossing at the intersection of Main and Sixteenth streets, in the city of Wheeling, W. Va. The cause was heard in the circuit court with a jury. Only the testimony on the part of the plaintiff was taken. From this it appeared: That the plaintiff is by occupation a butcher, resident in the town of Bridgeport, Ohio. That he had frequent occasion to cross the bridge leading from Bridgeport to Wheeling, and to visit the latter city. The chief purpose of his visit was to purchase meat from the Swift Beef Company, which had a place of business close to the depot of the Baltimore & Ohio Railroad. His visits had been made chiefly in the daytime, towards the afternoon. Several times he had been there in the early morning, about 4 o'clock. On the morning of 23d April, 1896, a little before or about 5 o'clock, he crossed the bridge from Bridgeport, and drove into Wheeling, in a two-horse wagon, covered, with wooden sides. The driving seat was in front of the wagon, and outside of the sides, protected with curtains, which folded up, and which were so folded on this occasion. On the morning in question he entered Main street to the north of Sixteenth street, and the place of the crossing of the railroad track. His horses were trotting, and continued to trot until he got within about 50 or 60 feet of the railroad track, when he pulled his team down to a walk, and, without stopping, continued his course up to and upon the railroad track. Just as he got on the track the train of the defendants, which had left the depot a short distance from that point, going east, collided with his horses and wagon, killed one horse, injured another severely, smashed the wagon, threw him out on the pavement, and inflicted very serious injuries upon him, from which he has only partially recovered. The point of collision was the railroad crossing at the intersection of Main and Sixteenth streets. The plaintiff, in his wagon, approached this point, passing on the west side of Main street, between the curb of the pavement and the track of the Wheeling Street-Railway Company. The distance between this curb and this railway is 19 feet 4 inches. On this side of Main street, at the corner of Main and Sixteenth streets, there is a two-story brick building, and on Main street, next adjoining, are two other brick buildings, of two stories each. These prevent any one from seeing on the railroad track until he comes within 10 feet of the track, and from that point he can see about 64 feet on the railroad track. Had he gone on the east side of Main street, he could have had, from a point 18 or 20 feet from the railroad track, an unobstructed view of the track from every direction. The ordinances of Wheeling provided that this Baltimore & Ohio Railroad Company should erect and maintain in good order a gate at this crossing, properly managed by a watchman. It was further provided that, until gates should be erected and put in operation, no railroad company should run a train through the city at a greater speed than 4 miles an hour, and, after the gates were so put up and in operation, at a greater speed than 6 miles an hour. The

railroad company had, some years before this accident, erected and maintained a gate at this point; but it had been removed more than a year before this, and no gate had thereafter been constructed. The testimony showed that the railroad company, in the daytime, had a man with a flag at this place to give warning of approaching trains, and plaintiff had seen this precaution taken. On the morning in question, which was just about daybreak, they had no such flagman stationed at that point. There is some confusion in the testimony as to the speed with which the train was moving. Some of the witnesses say at 15 miles an hour; some, as low down as 4 miles an hour. As soon as the accident occurred, the train was stopped, and when stopped it had passed the place of the accident the length of the locomotive and tender, and a large part of the baggage car. The plaintiff did not stop his wagon. He says that he listened for a train, and heard neither the bell nor whistle, nor the puffing of the engine, nor the noise of the train. Any sound which could come to him would be obstructed by the buildings on Main street, which were between him and the coming train. There is no evidence that any bell was rung or whistle sounded. One of the witnesses speaks of the puffing of the engine so loud as to induce the belief that they were going up a grade. The law of West Virginia requires a bell or steam whistle to be sounded by every locomotive at a distance of at least 60 rods from any place where the railroad crosses any public street or highway. At the close of the plaintiff's testimony, and after argument, the court instructed the jury to find for the defendant, because of the negligence of the plaintiff, which contributed to the injury. Thereupon plaintiff excepted, a writ of error was allowed, and the case in here on assignments of error as follows: Because the court erred in sustaining the motion of the defendants to exclude the plaintiff's testimony, and directing the jury to find a verdict for defendants; because the court erred in overruling plaintiff's motion to set aside the verdict and grant a new trial, and in rendering judgment for the defendants; because the court erred in holding that the plaintiff, on facts shown by the testimony set forth in the bill of exceptions, was guilty of contributory negligence. The first and third grounds of exception will be considered. The second assignment of error cannot be considered here. *Railway Co. v. Struble*, 109 U. S., at pages 384, 385, 3 Sup. Ct. 270, 27 L. Ed. 970.

The court instructed the jury to find for the defendant. This it was competent to do. "It is now the settled rule in the courts of the United States that when, on the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts, and promotes the ends of justice." *Bowditch v. Boston*, 101 U. S. 18, 25 L. Ed. 980; *Griggs v. Houston*, 104 U. S. 533, 26 L. Ed. 840; *Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403, 27 L. Ed.

436. In *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1070, it is held:

"Though questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

See, also, *Mitchell v. Railroad Co.*, 146 U. S. 513, 13 Sup. Ct. 259, 36 L. Ed. 1064.

This ruling of the trial court is a ruling upon the law. It, in effect, holds, as a matter of law, that the party cannot recover. "The case should be left to the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." *Dunlap v. Railroad Co.*, 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058. The motion made in the case at bar is the one now made, taking the place of a demurrer to the evidence. "In such a case," says the court in *Railroad Co. v. Woodson*, 134 U. S., at page 621, 10 Sup. Ct. 630, 33 L. Ed. 1035, "the practice of a demurrer to the evidence can be resorted to, or a motion to exclude the evidence from the jury, or to instruct them that plaintiff cannot recover, which motions are in the nature of demurrers to the evidence, though less technical, and have in many states superseded the ancient practice of a demurrer to the evidence." This being so, although the ruling of the court below depended largely upon its discretion (*Stewart v. Lansing*, 104 U. S. 511, 26 L. Ed. 866), yet it was such an exercise of discretion as is reviewable in this court,—a decision upon a question of law, which properly comes here on a writ of error. We must then inquire, was this discretion rightfully exercised in the case at bar? The ruling governing the court when this motion is presented is that stated in *Dunlap v. Railroad Co.*, *supra*:

"The case must be left to the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

Such a motion, like the demurrer to the evidence, admits, not only what the testimony proves, but what it tends to prove. The ultimate facts are admitted. *Railroad Co. v. Woodson*, 134 U. S. 621, 10 Sup. Ct. 628, 33 L. Ed. 1032. This being the law applicable to this case, was the court below in error in directing a verdict for defendant? There can be no doubt, from the testimony presented at the trial, that the defendants were guilty of negligence. The train approached a crossing of two important streets in the city, and gave no notice whatever of its coming. The witnesses heard no bell, and no whistle was sounded. No gates had been erected at the crossing, and no person was stationed at that place to give notice of a moving train. The defendants had neglected to observe the regulations prescribed both by an act of the legislature and by the ordinances of the city. So it must be assumed that at the time of the accident, and as one cause of the accident, there was negligence on the part of the defendants. But this does not decide the case. "The question in such cases" as this at bar "is (1) whether the damage was occasioned en-

tirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened." *Railroad Co. v. Jones*, 95 U. S. 442, 24 L. Ed. 507; *Railway Co. v. Ives*, 144 U. S. 424, 12 Sup. Ct. 679, 36 L. Ed. 485.

The law is well settled by Judge Sanborn (Mr. Justice Brewer sitting with him and concurring) in *Railway v. Moseley*, 6 C. C. A. 643, 57 Fed. 922, 12 U. S. App. 601:

"In order to maintain an action for negligence, when the injury was not wantonly, maliciously, or intentionally inflicted, it must appear that the negligence of the defendant was the proximate cause of the injury, and it must not appear that the negligence of the plaintiff contributed to that injury. When a diligent use of the senses by plaintiff would have avoided a known or apprehended danger, a failure to use them is, under ordinary circumstances, contributory negligence, and should so be declared by the trial court; and, when contributory negligence is established by the uncontroverted facts of the case, it is the duty of the trial court to instruct the jury that the plaintiff cannot recover."

Negligence is the failure to do what a reasonable and provident person would ordinarily have done under the circumstances. *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 406. That negligence is the proximate cause of an injury from which the injury might and ought to have been foreseen or reasonably anticipated under the circumstances as its probable result. It goes without saying that injury from engines or cars can be and ought to be foreseen or anticipated as the probable result of walking across or on a railroad track without looking both ways and listening for approaching engines. This is demonstrated by the fact that so universal is the experience that it has become a settled rule of law that such action is negligence. *Railway v. Moseley*, *supra*; *Elliott v. Railway*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068. The negligence of the servants of a railroad company in not sounding a whistle or ringing a bell does not excuse a person for not exercising ordinary care in crossing a track. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542.

In the case before us the plaintiff was no stranger to the city of Wheeling. He was in the habit of going into it frequently, and was perfectly familiar with the place of the accident. He knew that the railroad track crossed at that place. He knew that the depot was a very short distance from it, and that trains left it for the East in the early morning. The track at the crossing in itself gave warning of danger. The absence of gates and the nonappearance of a flagman at that point gave significance to this warning. Entering Main street in his wagon, he trotted his horses towards the railroad crossing until he reached a point 50 or 60 feet from it. Then he slowed down to a walk, but kept going on. His plain duty, approaching that crossing, was to stop, look, and listen. Had he, instead of going on the west side of the street, gone on the opposite side, he could have looked upon the track, up and down, before he reached the crossing. Instead of this, he selected the other side, from which his opportunity of seeing was prevented by the buildings at the corner of the crossing, and his

ability of hearing distinctly was diminished by the same cause. Under these circumstances, unable to see as well as to hear, it was all the more incumbent upon him to stop. This he did not do. Something must have prevented him from hearing the train. One of his witnesses, who was on that train, whose attention was not specially called to the fact, stated that as they were approaching the crossing the engine was giving that loud, puffing noise, indicating that it was going up grade. Plaintiff did not hear this,—whether from inattention, or because of the noise of his moving wagon, does not appear. He did not hear. All the more was it his duty to stop. Ordinary caution would have compelled him to stop. Had he done so before crossing the track, the accident could not have happened. He went on, got on the track, and was injured. He himself contributed to the injury. The judgment of the circuit court is affirmed.

WADDILL, District Judge, dissents.

CHICAGO G. W. RY. CO. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,250.

CONTRACTS—AGREEMENT FOR JOINT USE OF RAILWAY TRACK—CONSTRUCTION BY PARTIES.

A contract between railroad companies for the joint use of a track provided that one of the companies should keep and maintain the property to be so jointly used in good order, condition, and repair, renewing and replacing the same, and the different parts thereof, as necessary, and that the second company should pay its proportionate share of the cost thereof, on a wheelage basis, on receipt of monthly itemized statements. For 10 years such statements included the expense of maintaining and paying flagmen, station agents, operators, switch-lamp tenders, tower men, and similar employes whose services were necessary to the safe and orderly operation of the trains of the parties over the joint track, and the second company, without objection, paid its proportion of such expenses. *Held* that, in view of such construction of the contract by the parties, it must be considered as having been intended to include such expense, either by the terms used or by implication, as a part of that to be borne by the parties jointly, and that after such a length of time neither the parties nor their successors in interest could insist on a different construction.

In Error to the Circuit Court of the United States for the District of Minnesota.

On the 21st day of September, 1885, a contract was entered into between the St. Paul & Northern Pacific Railway Company, party of the first part, the Northern Pacific Railroad Company, party of the second part, and Minnesota & Northwestern Railroad Company, party of the third part, relating to the joint use and operation of a certain portion of the St. Paul & Northern Pacific Railway Company's tracks. The plaintiff in this case has succeeded to the rights of the Northern Pacific Railroad Company and the St. Paul & Northern Pacific Railroad Company under that contract. The defendant is successor to the obligations of the Minnesota & Northwestern Railroad Company. This action is brought by the Northern Pacific Railway Company against the Chicago Great Western Railway Company to recover \$4,685.21 alleged to be the defendant's proportionate share, computed on a wheelage basis, according to the terms of the contract, for "salaries of flagmen, station agents, operators,

switch-lamp tenders, tower men, and similar employes necessarily and properly engaged in the operation of the lines used by the defendant, and without which the defendant could not operate over said lines, and for material, such as oil for switch lamps, materials used in stations, and the like, which material was necessary to the operation of said lines, without the use of which the defendant could not have operated over the same." The defendant denied its liability. The parties waived a jury, and the case was tried by the court, whose finding was general in favor of the plaintiff for the amount claimed. Judgment was rendered accordingly, and the defendant sued out this writ of error.

F. B. Kellogg (Daniel W. Lawler, on the brief), for plaintiff in error.

C. W. Bunn, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Contracts between railroad companies similar to the one in suit are not uncommon, and the obligations of the companies entering into them are commonly well understood. While such contracts provide for the joint use of the railroad track, it is obvious that the several companies cannot each have its own time-table, train master, tower men, operators, and the like for regulating the movement of its trains over the joint track. The regulation and movement of trains over the joint track must necessarily be committed to a single head. That is a business which admits of no divided authority. And so, too, it must be made the special duty of some one of the companies to keep the joint track and its appurtenances in good order and condition for the running of trains. While these duties in the first instance are devolved on some designated company, the cost thereof is usually chargeable to the joint account of the companies using the joint track, in proportions agreed upon.

The provisions of the contract involved in this suit on the subject of the joint expenses, and necessary to be considered in the disposition of the case, are as follows:

"Sixth. The Pacific Company shall and will keep and maintain in good order, condition, and repair, during the continuance of this agreement, the property, the right to the joint use whereof is hereby granted, renewing and replacing the same and the different parts thereof as necessary. And the Minnesota Company does hereby covenant, promise, and agree to and with the Pacific Company that, in addition to the said rentals, it, the Minnesota Company, shall and will pay to the Pacific Company, on the 10th day of each month after the rentals aforesaid shall have begun to accrue, and during the existence of this agreement, such proportion of the cost and expense of keeping in good order, condition, and repair, and of maintaining, renewing, and replacing, the property covered by this agreement, including premiums paid for insurance thereon, during the then last preceding calendar month, as the number of wheels per mile it shall have run over the said property, or any part thereof, during such month bears to the whole number of wheels per mile run over the same during the same month.

"Seventh. The Pacific Company shall keep true and accurate accounts in detail of the actual cost and expense of any and all substantial and permanent improvements it shall make, or cause or procure to be made, upon or to the property covered by this agreement, and of the actual cost and expense of the maintenance, and the keeping in good order, repair, and condition, of said property, and of any and all renewals and replacements it shall make of any part thereof, and also of the number and mileage of wheels run on or over said

property, or any part thereof, during each month. And the Pacific Company shall, on or before the 5th day of each month, furnish to the Minnesota Company, at its office in the city of St. Paul, a statement of all said costs and expenses paid during the then last preceding month, and also a statement of the entire number of wheels run over the property covered by this agreement by all parties using the same during said last preceding month, and the total mileage thereof; and the Minnesota Company shall furnish to the Pacific Company, at its office in the city of St. Paul, on or before the 10th day of each month, a statement of the number of wheels run by it over its said property, during the then preceding month, and the total mileage thereof."

By the express terms of the contract, the Northern Pacific Company covenants that it "will keep and maintain in good order, condition, and repair, during the continuance of this agreement, the property, the right to the joint use whereof is hereby granted, renewing and replacing the same, and the different parts thereof, as necessary"; and the Minnesota Company covenants that it "will pay the Pacific Company, on the 10th day of each month, * * * such proportion of the cost and expense of keeping in good order, condition, and repair, and of maintaining, renewing, and replacing, the property covered by this agreement, including premiums paid for insurance thereon, * * * as the number of wheels per mile it shall have run over said property, or any part thereof, during such month, bears to the whole number of wheels per mile run over the same during the same month."

The contention of the defendant is that the clause of the contract which imposes on it the obligation to pay this agreed proportion of the expense of maintaining the property does not impose on it the obligation to pay the like proportion of the cost and expense of maintaining and paying flagmen, station agents, operators, switch-lamp tenders, tower men, and similar employes whose services are necessary to the safe and orderly passage of trains over the joint track. If the paragraph of the contract quoted imposes on the Northern Pacific Company the obligation to pay the last-named expenses, then the same paragraph imposes on the defendant the obligation to pay its proportionate share thereof, because the same language is used in both instances. If these expenses are not covered by this paragraph of the contract, then there is no provision whatever for their payment by either company; and in that aspect of the case it might well be contended that these operating expenses necessarily incurred in the joint use of the track, and for the equal benefit of the companies using the joint track, should be shared in the same proportion as the expense of maintaining the joint track. It was obvious that these expenses would have to be incurred by the joint use of the track, and that they would have to be paid by one party or the other, or shared between them.

The most that can be claimed by the defendant is that the contract does not in express words impose on either party the obligation to pay these expenses or any part of them. Conceding this to be so, the inquiry arises, what implications in this regard may be fairly drawn from the express provisions of the contract taken as a whole? A part of the obligations arising out of every contract, no matter how detailed its provisions may be, are implied obligations, and what is implied in a contract is as much a part of it as what is expressed. And, when

we come to the consideration of the implications in this contract, we have the best possible light to guide us in its construction. We have the explicit and long-continued construction placed upon the contract by the parties themselves.

From the very inception of the contract, and continuing for a period of 10 years, the Northern Pacific Company claimed, and the defendant company paid, a share of these operating expenses on monthly bills, which set forth clearly and distinctly each item of expense here sued for. During that long period there was no suggestion from any quarter that the defendant company, or its predecessor in interest, was not obligated to pay the same proportion of these operating expenses as those incurred in maintaining, repairing, and insuring the property. Its obligation to do so was admitted every month in the year for 10 years by the payment, without protest or question, and with full knowledge of all the facts, of the monthly bills for its share of these expenses. It is a canon in the interpretation of contracts that the practice of the parties under them may furnish a solid basis on which their construction may rest. "Tell me," says Lord Chancellor Sudgen, "what you have done under a deed, and I will tell you what that deed means." Attorney General v. Drummond, 1 Dru. & Wal. 353, 366, affirmed on appeal in Drummond v. Attorney General, 2 H. L. Cas. 837. This remark of the lord chancellor has come to be accepted as a maxim in the construction of contracts. *Topliff v. Topliff*, 122 U. S. 121, 127, 7 Sup. Ct. 1057, 30 L. Ed. 1110; *Steinbach v. Stewart*, 11 Wall. 567, 576, 20 L. Ed. 56; *Chicago v. Sheldon*, 9 Wall. 54, 19 L. Ed. 594; *Hamm v. City of San Francisco (C. C.)* 17 Fed. 119, 124; *Mathews v. Danahy*, 26 Mo. App. 660; *Jennings v. Machine Co.*, 138 Mass. 594; *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526; *Knox Co. v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; *Leavitt v. Investment Co.*, 54 Fed. 439, 4 C. C. A. 425, 12 U. S. App. 193; *Metropolitan Nat. Bank v. Benedict Co.*, 36 U. S. App. 604, 20 C. C. A. 377, 74 Fed. 182; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.)* 34 Fed. 254. The last case cited was strikingly like the case at bar, and we refer to and adopt the reasoning of Judge Thayer in that case as a sound exposition of the law applicable to this case.

There is in this case no inconsistency between the terms of the contract and the practice of the parties under it. There is no provision in the contract that the Northern Pacific Company shall pay these joint operating expenses, or that they shall not be shared between the parties in the same proportion as the expenses of maintaining and repairing the property and paying the insurance thereon. Neither party to the contract was more intelligent, or had a better opportunity of understanding the obligations it imposed, or was more familiar with its subject-matter, than the other. Each party to the contract had a copy of it. They were on equal terms in every respect. The contract related to a subject-matter peculiarly within the knowledge of all the contracting parties, and they, better than any one else, knew the duties and obligations it imposed on them, respectively; and having agreed in placing the same construction on its words or its implications—and it is immaterial which—for such a long period,

and that construction harmonizing with the provisions of the contract, and certainly not being inconsistent with anything contained therein, it is now too late for one of the parties, or the court, to change it. This was the construction placed on the contract by those who made it as long as they were in authority, but in the lapse of years they seem to have passed out, and "now there arose up" new men in authority, "which knew not" the meaning of the contract as did those who made it, and hence this lawsuit. But a change of officers cannot be permitted to work a change in the meaning of a contract long ago settled and agreed upon. The judgment of the circuit court is affirmed.

NORCROSS v. NAVE & McCORD MERCANTILE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,273.

BANKRUPTCY—APPEAL—TIME OF TAKING APPEAL.

Where the appellant, within 10 days after a decree of the district court adjudging him a bankrupt, prayed an appeal therefrom, which was allowed by the judge, and filed an appeal bond, but the prayer for the appeal, and its allowance, and the citation and service thereon were not filed in the district court until after the expiration of the 10 days, *held*, that the appeal was not "taken" within the time limited by Bankr. Act 1898, § 25a, and must be dismissed.

Appeal from the District Court of the United States for the Western District of Missouri.

J. W. Sullinger and Benjamin Phillip, for appellant.

George W. Groves, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. On the 20th day of April, 1899, John R. Norcross, the appellant, was adjudged a bankrupt by the district court of the United States for the Western district of Missouri, St. Joseph division. On the 29th of April, 1899, he prayed, and was allowed by the district judge, an appeal to this court from the decree adjudging him a bankrupt; but the prayer for the appeal, and its allowance, and the citation and service thereon were not filed in the district court until the 2d day of May, 1899. Section 25a of the bankruptcy act, which allows an appeal from the court of bankruptcy to the circuit court of appeals from a judgment adjudging the defendant a bankrupt, provides that "such appeal shall be taken within ten days after the judgment appealed from has been rendered." In *re Good*, 39 C. C. A. 581, 99 Fed. 389. Under the decisions of the supreme court of the United States an appeal is not taken within the meaning of the section quoted until the petition and allowance of appeal (where there is such a petition and allowance) and the appeal bond and the citation are presented to and filed in the court which made the decree appealed from. In this case these papers, save the bond, were not filed in the district court until the 2d day of May, 1899, more than 10 days after the judgment was entered adjudging

the appellant a bankrupt. From the indorsements on the bond it sufficiently appears that it was filed within the 10 days, but that is only one step towards perfecting the appeal. The presumption that might arise from the filing and approval of the bond (*Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989) does not obtain when the record affirmatively discloses that there was a prayer for the appeal, and its allowance, and a citation, none of which were filed in the court until after the expiration of the 10 days allowed to perfect the appeal. The case of *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448, is directly in point, and concludes the question; and to the same effect are *Fowler v. Hamill*, 139 U. S. 549, 11 Sup. Ct. 663, 35 L. Ed. 266; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. The appeal is dismissed.

CHATFIELD et al. v. O'DWYER et al.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1900.)

No. 1,249.

1. **BANKRUPTCY—APPEAL—WHO MAY APPEAL.**

Under Bankr. Act 1898, § 25a, an appeal from an order of the district court allowing a claim presented by a creditor against the estate of a bankrupt, and which was objected to and contested by another creditor, cannot be taken by such objecting creditor, but only by the trustee in bankruptcy, as the representative of all the creditors.

2. **SAME.**

If the trustee, in such a case, refuses to appeal from the allowance of the claim, on the request of the objecting creditor, the latter may move the district court to direct the trustee to take an appeal as requested, or to permit the creditor to prosecute an appeal in the name of the trustee. The granting of such leave is in the discretion of the district court, and may be conditioned on the payment of the costs of the litigation by the objecting creditor if the appeal is unsuccessful.

Appeal from the District Court of the United States for the Western District of Arkansas.

J. N. Cook, T. E. Webber, W. F. Kirby, and J. M. Carter, for appellants.

R. B. Williams and W. H. Arnold, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. On January 14, 1899, the Little River Lumber Company was adjudged a bankrupt, and the first meeting of its creditors was appointed to be held on January 25, 1899. At the first meeting the bankrupt company submitted a list of its creditors, showing that it was indebted to O'Dwyer & Ahern, the appellees, in the sum of \$7,949.74. At a later date the appellees filed proof of their claim in proper form. Thereafter the appellants, J. L. Chatfield and W. J. Buhrman, interposed objections to the allowance of the claim of the appellees. The objections were sent to a referee for a hearing and determination, who thereafter filed a report recommending a disallowance of the appellees' demand for the amount which they claimed

to be due. The case was then taken for review in the mode provided by the bankrupt act, before the judge of the district court, sitting in bankruptcy, who reversed the action of the referee, and allowed the claim. 92 Fed. 585. From this latter order the objecting creditors, J. L. Chatfield and W. J. Buhrman, have appealed to this court, under the provisions of section 25 of the bankrupt act, approved July 1, 1898. No one else has united in the appeal. A motion has been filed to dismiss the appeal, and the question to be determined is whether the appeal to this court can be prosecuted by the appellants, or whether the appeal should have been prosecuted by the trustee of the bankrupt, as the representative of all of its creditors.

Section 8 of the bankrupt law of 1867 (now section 4980 of the Revised Statutes of the United States) allowed an assignee who was dissatisfied with the allowance of a claim against the bankrupt's estate to appeal from the decision of the district court by which the allowance was made to the circuit court for the same district; and it was well established under that act that a creditor could not appeal from the allowance of a claim against the bankrupt estate, because the right of appeal was given to the assignee, as the representative of creditors, and was not in terms conferred on creditors. In *re Troy Woolen Co.*, 9 Blatchf. 191, 24 Fed. Cas. 244; In *re Joseph*, 2 Woods, 390, 13 Fed. Cas. 1124; In *re Place*, 8 Blatchf. 302, 19 Fed. Cas. 790. There was some conflict of opinion whether under section 2 of the old bankrupt act (now section 4986 of the Revised Statutes) the action of the district court in allowing a claim could be reviewed by the circuit court on a petition for review, or whether such allowance could only be reviewed by appeal, under section 8 of the act. Judge Woods maintained the affirmative view in *Re Joseph*, *supra*, while Judge Woodruff maintained the negative in *Re Troy Woolen Co.*, *supra*. But it was conceded by all the courts before whom the question arose that, when an appeal was taken from an allowance under section 8 of the old bankrupt law, it could only be prosecuted by the assignee. In the case at bar we are not concerned with the question whether a creditor who has objected to the allowance of a claim of another creditor in the district court may file a petition to have the action of the district court reviewed under paragraph "b," § 24, of the present bankrupt act, since in the case in hand the appeal is prosecuted under section 25. This latter section, under which the appeal was taken, provides "that appeals as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals of the United States * * * in the following cases * * * (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." It will be observed that it differs from section 8 of the old bankrupt law, in that it does not say by whom such appeal may be taken. Subdivision "c" of section 25 does declare, however, that "trustees shall not be required to give bond when they take appeals or sue out writs of error"; and in view of this clause, and in view of the fact that it is incorporated into section 25, it is fair to infer that congress intended that an appeal from a judgment of the district court, allowing or rejecting a debt or claim, to the circuit court of appeals, should be prosecuted by the trustee. Moreover,

section 7 of the present bankrupt law makes it the duty of a bankrupt to "examine the correctness of all proofs of claims filed against his estate," and "immediately inform his trustee of any attempt by his creditors or other persons to evade the provisions of this act," and "in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee." The obvious purpose of these provisions of the act is to enable the trustee of a bankrupt's estate to take the proper and necessary steps to object to the allowance of a false or fictitious claim, and to take the proper steps to vacate the allowance of any such claims when they have been allowed, and the fact of their invalidity comes to his knowledge. The office of a trustee under the present bankrupt act is entirely analogous to that of an assignee under the bankrupt law of 1867. The trustee is elected by, and is the representative of, the creditors; and, following the general analogies of the law, he is the appropriate person to see that no unjust or fictitious claims are allowed to be paid out of the assets in his hands. His duties are very similar to those of an administrator or executor. It is his duty to ascertain that all claims presented for allowance, or that may have been allowed, are genuine; and under subdivision 6, rule 21, of the rules in bankruptcy formulated by the supreme court of the United States (89 Fed. x., 32 C. C. A. xxiii.), the trustee has been empowered to file a petition with the referee to have any claim further investigated, when for any reason he may desire a re-examination of the same. Furthermore, if one creditor of a bankrupt may prosecute an appeal, under section 25 of the bankrupt law, from the allowance of a claim, then any other creditor may take a like appeal upon the same or different grounds, and this court may be required to entertain a number of appeals, all of which are brought to test the validity of the same demand. In a case which arose under the old bankrupt law (*In re Randall*, 1 Sawy. 56, 20 Fed. Cas. 226, 228), Judge Deady pointed out very clearly the evil results which would follow if every factious creditor was allowed to litigate individually and in his own name the claims of other creditors, without the sanction or approval of the assignee or the bankrupt court. He ruled that it was the appropriate function of the assignee to conduct such litigation, as the representative of all the creditors; saying, in substance, that, if any creditor felt himself aggrieved by the action of the assignee in failing to object to the allowance of a claim, he might apply to the bankrupt court for a rule on the assignee, either requiring him to contest the claim, or to allow the objecting creditor to do so in the name of the assignee.

In view of these considerations, we are of opinion that after a claim against the estate of a bankrupt has passed the scrutiny of the district court, and has been allowed by that court, an appeal from such allowance, under section 25 of the bankrupt act, to this court, can only be taken by the trustee, as the representative of all the creditors. The appeal that is provided for under section 25 is the same as that which was provided for by section 8 of the old bankrupt law, except that the appeal is now prosecuted to a different court; and all of the considerations which influenced the lawmaker in framing the old bankrupt act to limit the right of appeal to the assignee are equally

applicable to the appeal which is provided for by the present bankrupt law. In so deciding, we recognize the right of a creditor to apply to the bankrupt court for an order permitting him to prosecute an appeal in the name of the trustee, when he has called upon the trustee to take an appeal from the allowance of a claim against the bankrupt's estate, and the latter has declined to appeal. As the trustee is an officer of the bankrupt court, and subject to its orders, that court has an undoubted power either to direct the trustee to appeal when it entertains doubts of the verity of its judgment, or to make an order permitting a creditor who so desires to appeal from the allowance in the name of the trustee when the latter declines to appeal. We have no doubt that such applications on the part of creditors will meet with favor from the respective bankruptcy courts whenever the question of the right to an allowance is so far doubtful as to warrant a review of their judgments. Where such leave is sought it will, of course, be discretionary with the district court to grant or refuse the application, and leave may be granted to prosecute an appeal upon condition that if it prove unsuccessful the objecting creditor shall pay the costs of the litigation. Any other construction of section 25 of the bankrupt act would, in our judgment, give captious creditors too much power to hinder and delay the settlement of bankrupt estates. Besides, it is a general rule applicable to appeals taken in equity cases that all persons who are interested in a decree must join in an appeal therefrom before the same will be heard, and all the creditors of a bankrupt estate are equally interested in having a fictitious claim disallowed. It results from what has been said that the present appeal cannot be entertained, and the same will be dismissed.

In re NOVAK.

(District Court, N. D. Iowa, Cedar Rapids Division. June 1, 1900.)

BANKRUPTCY—PETITIONING CREDITORS—WIFE OF BANKRUPT.

Where the law of the state permits the creation of enforceable debts as between husband and wife, a married woman who is an actual creditor of her husband in good faith, having a claim against him which would be provable in bankruptcy, may join in a petition in involuntary bankruptcy against him; or, if such claim amounts to \$500 or over, and all his creditors are less than 12 in number, she may maintain such petition alone; but her alleged debt will be carefully scrutinized, to prevent fraud upon other creditors.

In Bankruptcy. On review of decision of referee in bankruptcy.

John J. Ney, for petitioning creditors.

Rauk & Bradley, for Iowa Lumber Co.

SHIRAS, District Judge. From the certificate of the referee it is made to appear that Frank Novak was formerly in business as a carpenter and contractor in Iowa City; that he became indebted to the Iowa Lumber Company in the sum of \$1,605, and suit, aided by an attachment, was begun in the district court of Johnson county to enforce payment of this debt, the attachment being levied upon realty

situated in Iowa City, in Johnson county; that thereupon a petition in bankruptcy was filed by Barbara Novak, the wife, and Frank W. and Joseph H. Novak, sons, of the alleged bankrupt, averring that Frank Novak was insolvent and had committed an act of bankruptcy, that the petitioners were creditors of the alleged bankrupt in amounts in excess of \$500, and that the creditors were 11 in number, so far as known to the petitioners. No answer or other pleading was filed on behalf of the alleged bankrupt or any of his creditors in opposition to the petition within the time fixed by the provisions of section 18 of the act, and, the judge being absent from the division of the district wherein the proceedings were pending, the clerk on the next day after the expiration of the time for pleading to the petition referred the case to the referee for Johnson county, by whom the adjudication was duly entered, a day fixed for the first meeting of the creditors, and notice thereof was given to them. On the day thus fixed the Iowa Lumber Company, the attaching creditor, appeared before the referee and filed a so-called answer to the petition in bankruptcy, in which it averred that Frank Novak has absconded, that he owes debts in excess of \$1,000, and denies that the petitioning creditors hold any just claims to the amount of \$500 against the bankrupt; and it is then prayed that the petition in bankruptcy be dismissed. The Iowa Lumber Company also filed separate answers to the several claims of the petitioning creditors, denying the validity thereof. A hearing was had before the referee, and from the evidence submitted the referee found that the creditors of the bankrupt were 11 in number, and that Barbara Novak, the wife of the bankrupt, held a just claim against her husband in an amount in excess of \$500, and therefore the case should not be dismissed for want of jurisdiction.

From the record now certified up, it does not appear that the referee has yet passed upon the validity or amount of the claims asserted on behalf of the sons of the bankrupt. Furthermore, the record does not contain the evidence submitted to the referee, and the facts certified by the referee are therefore not open to re-examination upon this review; the only question that can be considered being whether a wife, holding a provable debt against her husband, can maintain a petition for adjudication against her husband. Under the provisions of the Code of Iowa, a wife may become the creditor of the husband. Thus, in *Knox v. Moser*, 69 Iowa, 341, 28 N. W. 629, it was held that "under our statutes a wife may hold separate property, and her husband may execute to her, for a lawful consideration, a promissory note, which she may enforce against his property." This being the settled rule in Iowa, I can see no ground for holding that the wife, being an actual creditor in good faith, may not exercise the right conferred by the bankrupt act upon creditors to initiate proceedings in bankruptcy when cause therefor exists. Certainly, if the husband, becoming insolvent, should be adjudged to be a bankrupt on his own petition or on a petition filed by other creditors, the wife is entitled to prove up her claim, if she is a creditor in good faith, and to share in the distribution of the estate; and, if this be true, why should she not be entitled to initiate proceedings in bankruptcy, if that be necessary, in order to insure to her a share in the division of his property?

If the wife holds a provable claim, then she comes within the provisions of section 59 of the act, which declares that "three or more creditors who have provable claims against any person * * * or if all the creditors of such person are less than twelve in number, then one of such creditors * * * may file a petition to have him adjudged a bankrupt." The objections to the exercise of this right, based upon the contention that frauds may thereby be rendered easy of perpetration as against third parties, while not sufficient to justify the denial of the right to a wife to invoke the protection of the bankrupt act, do demand that the claims advanced shall be carefully examined, so as to prevent the rights of third parties being infringed by bringing forward claims which, if they ever had an existence, have long lain dormant. The ruling of the referee that the court could take and hold jurisdiction over the proceedings in bankruptcy based upon a provable claim held by Mrs. Novak, the wife of the bankrupt, in an amount exceeding \$500, the number of creditors being less than 12, is affirmed.

It must not be understood that, in thus passing upon the question certified by the referee, it is intended to approve the practice adopted in this case, of allowing an attack upon the validity of the adjudication by proceedings taken before the referee at the first meeting of the creditors. The question whether, after an adjudication has been had after due notice in the mode required by the act, it is still open to a creditor to raise an issue upon the jurisdictional facts, and, if so, what is the proper mode of procedure, are matters not considered or passed upon in the present case.

In re CHRISTENSEN.

(District Court, N. D. Iowa, Cedar Rapids Division. May 29, 1900.)

1. BANKRUPTCY—PREFERENCES—PAYMENT OF MONEY.

A payment of money to apply upon a debt due is a transfer of property, and, if made by an insolvent debtor, with the effect of enabling the creditor to obtain a greater proportion of his debt than other creditors, constitutes a preference, within the meaning of Bankr. Act 1898, § 60a.

2. SAME—SET-OFF.

Where a trustee in bankruptcy opposes the allowance of a claim filed by a creditor, based on an open account for goods sold by him to the bankrupt, on the ground that the creditor has received preferences, which he has not surrendered, in the way of payments to apply on such account, the creditor cannot set off against the trustee's demand for the surrender of such preferences the amount due for the goods sold, such a case not being one of "mutual debts or mutual credits between the estate of a bankrupt and a creditor," within the meaning of section 68a.

3. SAME—NEW CREDIT.

Section 60c, providing that if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security for property which becomes part of the latter's estate, the amount of such new credit remaining unpaid at the time of the adjudication may be set off against the amount which would otherwise be recoverable from the creditor, is restricted to cases in which the trustee brings an action against the creditor, under subdivision "b" of the same section, to avoid the preference and recover the amount thereof; and such set-off cannot be claimed by the creditor when the trustee merely opposes the allowance of his proof of debt until the preference shall have been surrendered.

In Bankruptcy. On exceptions to ruling of referee on claims of Van Patten & Marks, creditors.

Barker & McCoy, for claimants.

Chase & Seaman, for trustee.

SHIRAS, District Judge. From the record submitted to the court it appears that on the 23d day of February, 1900, Erik A. Christensen was adjudged to be a bankrupt, and a trustee of his estate was duly appointed. On behalf of the firm of Van Patten & Marks, a claim was submitted for allowance, to which objections were filed by the trustee on the ground that the claimants had received, within four months preceding the filing of the petition in bankruptcy, payments aggregating the sum of \$984.70, which were in fact preferences, in that, when these payments were made, the bankrupt was insolvent, and, as the claimants had not surrendered these preferences, the claim presented could not be allowed. Upon the hearing before the referee it was shown that the claimants, commencing in May, 1899, had sold to the bankrupt goods to the total amount of \$1,740.92; that there was due to claimants the sum of \$746.22; that from and after October 23, 1899, the bankrupt was in fact insolvent; that the total payments made on the account in cash aggregate \$984.70, of which \$553.21 were made after October 23, 1899, during which time Christensen was in fact insolvent, although such fact was not known to the claimants when they sold the goods and received the payments on account; that after October 23, 1899, the claimants sold to the bankrupt, on credit, without security, goods to the amount of \$577.19, which were added to the stock in trade of the bankrupt, and of which goods there remained unsold and passed to the trustee the amount of \$46.92. Upon these facts the referee ruled that the claimants could not be allowed to prove their claim unless they first surrendered to the trustee all preferences received by them, and in support of such ruling the referee held, as matters of law, that the payment of money is a transfer of property within the meaning of these words as used in section 60 of the bankrupt act; that the payment of money to apply on an open account for goods sold does not create a case of mutual debts or mutual credits, within the meaning of section 68, so as to enable a creditor to set off against the claim of the trustee to recover preferences paid in violation of the bankrupt act the sums due for the goods sold constituting the debt upon which the preferential payments were made, and that in cases wherein the trustee defends against the allowance of a claim on the ground that the claimant has received a preference thereon which he has not surrendered to the trustee according to the provisions of clause "g" of section 57 the claimant cannot set off against the amount of the preference by him received the amount of a new credit extended without security to the bankrupt after the payment of the preference; or, in other words, that the provisions of clause "c" of section 60 are intended to apply only to cases wherein the trustee seeks to enforce the repayment of preferences under clause "b" of the same section. To reverse the ruling of the referee in holding that the claimants cannot be allowed to prove their claim unless they surrender the preferences received, the case is now

before the court upon review, and counsel have very fully argued the questions involved, which are two in number: First. Do payments in money, intended to be applied upon an existing open account, create a case of mutual debits and credits between the bankrupt and the creditor, within the meaning of section 68, so as to entitle the claimant to prove up a claim for the balance due on the account after allowing credit for all sums paid? Second. Do the provisions of clause "c" of section 60 allowing a creditor who has obtained a preference, but who has subsequently sold on credit, without security, property which has become part of the debtor's estate, to set off the amount of the new credit against the sum otherwise recoverable against him, apply to cases wherein the trustee is seeking to prevent the allowance of a claim under clause "g" of section 57? The reason for the enactment of section 68, providing for the allowance of a set-off in cases of mutual debits and credits, is that at the common law, and in the absence of a statute providing therefor, a set-off of mutual debits and credits could not be made. Thus, in *United States v. Eckford*, 6 Wall. 484, 18 L. Ed. 920, it is said, "Right of set-off, properly so called, did not exist at common law, but is founded on the statute of 2 Geo. II. c. 24, § 4." Instead of leaving the question of set-off to be determined under the variant statutes of the several states, congress, by the enactment of section 68, laid down the uniform rule to be followed in bankruptcy cases with respect to matters of set-off, and it is entirely clear that it is not the intent of the section to include mere matters of payment or defense within the terms "mutual debts or mutual credits." In the absence of any statutory enactment, it would be open to the trustee to show in opposition to the allowance of a claim that it had been paid, or to reduce the amount thereof by proof of partial payments; and it is clear, therefore, that section 68 was not enacted to secure this right, but it was enacted to declare the rule governing matters of mutual debits and credits not included within the rule applicable to payments upon account. If the contention of the claimants in this case should be sustained, it would result in the conclusion that in all cases wherein the trustee sought to recover back preferences received in violation of the act the recipient could set off the amount of the original debt due him from the bankrupt, and thus in every case defeat the recovery of the preference. A construction of this section which would thus completely defeat one of the main purposes of the act as a whole cannot be sustained.

The remaining question presented for review, briefly stated, is whether the set-off of a new credit, without security, provided for in clause "c" of section 60, is available to a creditor as against a preference he is required to surrender in order to secure the allowance of his claim under clause "g" of section 57. On behalf of the trustee it is contended that by its terms clause "c" applies only to the cases provided for in clause "b" of section 60, whereas on behalf of the claimants it is contended that the set-off thus provided for should be held applicable to the cases coming under clause "g" of section 57. It is not to be denied that there is much force in the contention of the claimants that equitably there is as good reason for allowing

the set-off in the one case as in the other, but the point for decision is whether the language of the section does not limit the set-off to one class of cases, to wit, those wherein a recovery of the preferences is sought from the creditors. The section declares that the set-off shall be against the amount which would otherwise be recoverable against the creditor receiving the preference, and, as no recovery against the creditor can be had except under the provisions of the preceding clause "b" of the section, it must be held that these two clauses, read together, define the cases wherein a new credit may be allowed as a set-off; and the court cannot, on supposed equitable considerations, read into the section cases not covered by its terms, but which are included in clause "g" of section 57. This question, as well as all others arising in the case, is so fully and ably considered in the opinion filed by Referee James that it is unnecessary for the court to further elaborate its conclusions upon the questions certified up by the referee, it being sufficient to say that the court affirms the ruling of the referee to the effect that a payment of money to apply upon a debt due is a transfer of property within the meaning of clause "a" of section 60; that payments made from time to time to apply on a running account do not constitute mutual debits or credits within the meaning of section 68; that the set-off rendered available to a creditor by the provisions of clause "c" of section 60, when sued under the provisions of clause "b," is not applicable to the surrender required by clause "g" of section 57; and that under the facts of this case the claimants, Van Patten & Marks, in order to secure an allowance of their claims against the bankrupt estate, must surrender to the trustee the preferences by them received in the nature of payments made upon the account since the insolvency of the bankrupt.

In re RUDE.

(District Court, D. Kentucky. May 24, 1900.)

1. BANKRUPTCY—FEE OF CREDITOR'S ATTORNEY—LIEN.

Where a creditor claims priority of payment out of the estate of a bankrupt on the ground of his having a lien on property of the bankrupt, and is opposed by the trustee and by other creditors, the attorney for such claimant, who successfully prosecutes the claim in the court of bankruptcy, and secures its allowance, is entitled to a lien for his services on the fund thus secured for his client; and the court of bankruptcy has jurisdiction to determine the right to such lien, fix its amount, and enforce it in the distribution of the property.

2. SAME—TRIAL BY JURY.

In a proceeding in a court of bankruptcy to determine the amount to be allowed as a fee to the attorney of a creditor out of such creditor's distributive share of the estate, a trial by jury may be allowed in the discretion of the court, but cannot be claimed as a matter of right, proceedings in bankruptcy being equitable in character.

3. SAME—UNAUTHORIZED DISTRIBUTION BY TRUSTEE.

Where a trustee in bankruptcy has paid to a lien creditor of the bankrupt his distributive share of the estate, but without any warrant or order of the referee or the court so to do, and the court afterwards determines that such creditor's attorney is entitled to a lien on the fund for his services in securing its allowance, the money must be regarded as still

in the hands of the trustee, and he will be required to satisfy the claim of the attorney.

4. SAME—AMOUNT OF FEE.

Where an attorney representing a lien creditor of a bankrupt received from his client a retainer of \$250, and successfully prosecuted the client's claim in the court of bankruptcy, expending not more than 35 days of professional labor upon it, and receiving payment from another for a material part of his work, and the amount finally established as due to the creditor and allowed out of the estate was \$7,300, and the referee in bankruptcy decided that the attorney was entitled to receive out of this sum a fee of \$2,500, *held*, that the allowance was excessive, and should be reduced to \$1,500.

In Bankruptcy. On review of decision of referee in bankruptcy.

T. F. Hallam, for claimant Sidney G. Stricker.

S. D. Rouse and J. W. Bryan, for trustee in bankruptcy.

EVANS, District Judge. The questions raised upon the petition of J. H. Mersman, trustee, for a review of the rulings of the referee on the claim of Sidney G. Stricker, an attorney, to a lien upon the avails of the claim of J. L. Board, doing business as G. A. Crosby & Co., a preferred creditor herein, and which the attorney has prosecuted to a successful result in these proceedings, are: First. Has this court jurisdiction in these proceedings to adjudicate and determine the right of the attorney to a lien upon the claim he prosecuted? Second. Was the refusal of the referee to have a jury pass upon the amount of the attorney's claim proper? Third. Has the attorney a lien in this instance of such a nature as to force the trustee to satisfy it, notwithstanding he has distributed the fund, such distribution having been made by him without the order of the referee or of the court? And, fourth, was the amount adjudged to the attorney by the referee excessive?

1. In order to settle and distribute a bankrupt's estate, all questions necessary to the ascertainment of the amount to be paid to each party to the proceedings must be adjudicated and determined by this court. We think this fairly includes matters like the one before us as necessary incidents. The assets of the bankrupt's estate were within the control of the court, and must be distributed under its orders. The distribution must extend to the entire estate. In fixing the amount to be paid to a creditor in such distribution, it would manifestly be unjust for the court to ignore the claim of his attorney to a lien upon that amount for services rendered by him in the case, and thus arbitrarily defeat the attorney's lien, however meritorious and valuable his services might have been in the effort to collect his client's claim through the bankruptcy proceedings. That there is a lien in favor of the attorney, and that it may be enforced in this court, seems to admit of no doubt. *Cowley v. Railroad Co.*, 159 U. S. 575, 16 Sup. Ct. 127, 40 L. Ed. 263; *Railroad Co. v. Pettus*, 113 U. S. 127, 5 Sup. Ct. 387, 28 L. Ed. 915; section 107, Ky. St.; and 3 Am. & Eng. Enc. Law (2d Ed.) 447-452.

2. Bankruptcy proceedings are equitable in character, and while the court, or, possibly, the referee, might have had a jury to pass upon the amount of the attorney's fee, that was a matter of discretion, and

not of right. The court does not understand that in equitable proceedings parties have a right to have an issue tried out of chancery by a jury. Section 19 of the bankrupt act, and section 648 of the Revised Statutes, in relation to trials in circuit courts, do not, in my judgment, affect this result.

3. The trustee made the distribution in this case without any order or judgment as a basis for it, and this action of his cannot defeat the rights of the attorney if they otherwise existed. There was no legal warrant for the distribution, and the trustee, when making it, took the chances of disapproval in whole or in part. The fund must be regarded as still in the hands of the trustee, and under the control of the court, to be paid out according to its order.

4. But the court is clearly of opinion that the amount of the fee, as fixed by the referee, is too large. There was no express contract between the attorney and his client for any fee, either certain or contingent. The attorney, therefore, upon the implied contract is only entitled to a just and reasonable compensation. The court is of opinion that \$1,500, exclusive of the retainer of \$250, already paid, would be a fair and just compensation for the services of the attorney. The client appears to have been perfectly solvent, so that there was no element of uncertainty about the payment of a proper compensation to the attorney. If the latter devoted himself and all his labors exclusively to this work for 35 full days, or their equivalent in fractions of days, the fee now fixed, including his retainer, would be \$50 per day on a demand for \$7,300. We do not find that he worked so much as this, but, giving him the benefit of a liberal construction of the evidence, we think the sum allowed is ample compensation, particularly as the testimony shows that he was paid by another for a material part of the labors he describes in his deposition. The referee will therefore reduce the amount adjudged to the attorney from \$2,500 to \$1,500. As thus modified, the rulings of the referee are approved and confirmed.

In re LUCKHARDT.

(District Court, D. Kansas. May 19, 1900.)

BANKRUPTCY—INVOLUNTARY—WHO MAY BE ADJUDGED.

Although Bankr. Act, § 4b, excepts from the operation of the provisions as to involuntary bankruptcy a "person engaged chiefly in farming," a merchant who commits an act of bankruptcy may be adjudged bankrupt on a petition duly filed by his creditors within the statutory period thereafter, notwithstanding the fact that, after the act of bankruptcy charged, he abandoned the business in which he had been engaged, and became chiefly occupied in farming, and so continued to the filing of the petition.

In Bankruptcy. On petition for adjudication in involuntary bankruptcy.

Dobbs & Stoker and Rossington, Smith & Histed, for creditors.
Eugene Hagan and W. G. & G. T. Pendleton, for bankrupt.

HOOK, District Judge. This is a proceeding in involuntary bankruptcy, brought on January 9, 1900, by a number of mercantile firms

and corporations, creditors of the alleged bankrupt. It is set forth in the petition, among other things, that Luckhardt is insolvent, and that on or about November 1, 1899, he conveyed, transferred, concealed, and removed a part of his property with intent to hinder, delay, and defraud his creditors, and that, while insolvent, he transferred a portion of his property to one or more of his creditors, with intent to prefer them over his other creditors. The alleged bankrupt has filed an answer, in which he does not deny the essential allegations in the petition, but sets up in bar to the relief prayed for by petitioners that from August 4, 1899, up to the filing of the petition he was, and is still, engaged chiefly in farming. Testimony has been taken on the part of the alleged bankrupt in support of his answer, and it is submitted to the court as upon a demurrer of the petitioning creditors to the evidence. It appears from the testimony that Luckhardt had been engaged in the retail boot and shoe business at Boonville, Mo., for about five years prior to March, 1899, and in that month he removed his stock of goods to North Topeka, Kan., and continued the same business there. In August, 1899, he determined to sell his stock, and quit the business, but he nevertheless continued the conduct thereof until the latter part of October, 1899. He continued to sell at retail in the usual and customary way, and to replenish his stock by purchases of new goods from time to time until the 26th of October, 1899. There was no apparent difference in the conduct of his business during the months of September and October from that of the previous period. The father-in-law of the alleged bankrupt died in April, 1899, seised of a farm in Missouri, consisting of 137 acres of land, which, upon his death, became the property of his widow, daughter, and two grandchildren, the offspring of a deceased son. The daughter is the wife of Luckhardt, the alleged bankrupt. About the 4th of August, 1899, Luckhardt and his family and his mother-in-law, who had come to Kansas, and lived with him, returned to Missouri, and went on the farm. He stayed there about a month, then returned to Topeka, where he remained a month. He then went back to the farm, and stayed a couple of weeks, and then returned to Topeka, where he remained until early in November. He then again returned to the farm, and has remained there ever since. During his absences from Kansas his boot and shoe business was left in charge of a clerk. On the 26th of October he sold his entire stock of merchandise, which invoiced \$6,370 in bulk, for \$2,870 in cash and 160 acres of land in Kansas, which was taken by him at \$3,500. This land he sold to his wife, but it does not appear what he received for it. Luckhardt testified that the proceeds of the sale received by him were in part disposed of as follows: \$628 was paid on a note held at Boonville, Mo., upon which his father, mother, and wife were sureties; \$200 was paid to his brother upon a note held by the latter; \$500 was paid to his mother, who lives in Oregon, Mo.; and from \$60 to \$75 was paid to a man in Topeka, Kan. None of his merchandise creditors were paid. During the cross-examination of Luckhardt, in which counsel for the petitioning creditors evidently desired to show an absence of good faith in the defense set up in the answer, he declined to testify as to what he did with the remainder of the money received by him, saying that he

could not answer without his books. Upon being requested to produce his books so that he could answer, his counsel objected to a postponement of the taking of the depositions to enable him to do so, and the notary sustained the objection. He also said that he could not even approximate the amount of his indebtedness, and that he could not tell how long it would take to figure it up. The farm of which his father-in-law died seised, and upon which he claims to be engaged in his farming operations, had been rented to a tenant for one-half of the crop raised thereon. Luckhardt did not know whether the term of the tenant had expired when he went on the farm on the 4th of August, 1899. He says he leased the farm from his mother and wife verbally, and that the terms of the arrangement were that he should give them one-half of the crop raised on the place. He immediately sublet to the former tenant all of the tillable land except a portion for oats, for half of the crop raised thereon. When he received the crop rent from the tenant, he was to turn it over to his wife and mother-in-law on account of the rent due from him to them. He retained for the use of his family and himself the house and about 35 acres of pasture and meadow land, and some of the cultivated land for oats. It is upon this situation and under these circumstances that the alleged bankrupt claims immunity from the proceeding against him.

The bankrupt act provides that "any natural person except a wage earner or a person chiefly engaged in farming or the tillage of the soil * * * may be adjudged an involuntary bankrupt," etc. Section 4b. The act is remedial in its nature and purposes, and is, therefore, not to receive a strict interpretation, but is rather to be construed reasonably, and with a view to effect its objects and to promote justice. The exemption from involuntary proceedings in favor of wage earners and persons engaged chiefly in farming or the tillage of the soil is not intended as a means of escape for insolvents whose property was acquired and whose debts were incurred in other occupations recently engaged in. If the right of the creditors to institute involuntary proceedings may be thus defeated by the debtors within the period allowed for the commencement of such proceedings, it could be defeated by a change of occupation made coincidently with the commission of an act of bankruptcy, and an insolvent debtor would thus be permitted to dispose of his stock of merchandise or other property, distribute the proceeds thereof in such manner as pleased him, immediately become for the time being a tiller of the soil, or a wage earner "at a rate of compensation not exceeding \$1,500 per year," and so avoid the operation of the bankrupt act. Such a result is not in accord with the purpose nor within the spirit of the law. A petition in an involuntary proceeding must be filed within four months after the commission of the act of bankruptcy relied on, and if an insolvent, who is engaged in an occupation which is within the purview of the law, has committed an act rendering him amenable to its provisions, and desires within such period to adopt one of the callings favored by the law, and exempted from its operation in respect of involuntary proceedings, he should not be permitted to carry with him the property previously accumulated, to the defrauding of pre-existing creditors. The excepted occupations are not designed as a refuge for insolvent debtors laden

with property and fleeing from other callings. The right of the creditors to proceed within the period limited after the commission of an act of bankruptcy cannot be thus defeated by the debtor. This interpretation is in entire harmony with the spirit and object of the law, and is in accord with the plain principles of right and justice, and it prevents the perversion of provisions designed for the favor and protection of those who are in good faith wage earners or tillers of the soil. Let an order be entered adjudging the said William Luckhardt to be a bankrupt.

RIPON KNITTING WORKS et al. v. SCHREIBER.

(District Court, D. Washington, E. D. May 23, 1900.)

1. **BANKRUPTCY—REQUIRING BANKRUPT TO SURRENDER PROPERTY.**

A court of bankruptcy has power and jurisdiction to order a bankrupt to surrender to his trustee money or other property found to be in his possession or control and which constitutes assets of his estate in bankruptcy.

2. **SAME—PUNISHMENT FOR CONTEMPT—TRIAL BY JURY.**

Where a bankrupt fails to obey an order of the court of bankruptcy requiring him to surrender to his trustee money or other property found to be in his possession and to belong to his estate in bankruptcy, such court has power and jurisdiction, on the petition of the trustee, to punish the bankrupt as for contempt, by committing him to jail until he shall obey the order in question, or until further orders of the court; and on the hearing of such petition the bankrupt is not entitled to a trial by jury.

3. **SAME—EVIDENCE.**

Where a bankrupt is shown to have had in his possession at the time of the adjudication assets greatly in excess of the amount actually surrendered to the trustee, and he does not satisfactorily or credibly account for the deficit, and it is impossible for the trustee or creditors to identify or trace the proceeds of the various sales made in the bankrupt's retail business, he cannot complain of an order of the court requiring him to pay over to the trustee the money found to be in his hands, on the ground that, for want of specifications as to the particular money or property in question, he was unable to produce evidence to exculpate himself from the charge of withholding or concealing it.

4. **SAME—CRIMINAL LIABILITY.**

The fact that a bankrupt who knowingly and fraudulently conceals from his trustee any property belonging to his estate in bankruptcy thereby commits a crime, for which he is liable to be prosecuted, and punished by imprisonment, does not deprive the court of bankruptcy of jurisdiction to order the bankrupt to surrender such property to his trustee, and, on disobedience to such order, to deal with him summarily for contempt.

5. **SAME—BURDEN OF PROOF.**

Where proceedings are taken to compel a bankrupt to pay over to his trustee money alleged to be in his hands, and to belong to his estate in bankruptcy, and the bankrupt, in answer, denies that he has any money in his possession, it must be proved beyond a reasonable doubt that he actually has the present possession or control of the money, or that any transfer or other disposition which he alleges he has made of it is a mere subterfuge, such as would not prevent him from producing it.

6. **SAME—IMPRISONMENT FOR DEBT.**

A court of bankruptcy has power to compel a bankrupt to surrender to his trustee money or other property which is in his possession or control, and which belongs to his estate in bankruptcy, by committing him to jail until he complies with its order in that behalf, notwithstanding the provision of Rev. St. U. S. § 990, that "no person shall be imprisoned for debt

in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished." If said section applies to proceedings in bankruptcy, it is in conflict with the bankruptcy act of 1898, and must give way to the later statute.

In Bankruptcy.

This is a case of involuntary bankruptcy. For a period of over two years prior to November 8, 1899, the bankrupt carried on business in the city of Spokane as a retail dealer in boots and shoes, and until February, 1899, he appears to have conducted his business honestly and successfully, so that he was able at that time to issue a statement of the condition of his business as a basis for credit, which gave him good standing as a merchant, and thereafter he was able to and did make liberal purchases of goods on credit. Between February and November he received in money from sales of goods, collection of accounts, and loans which he obtained, more than \$31,000, and upon his examination before the referee he appears to be unable or unwilling to show what disposition had been made of a considerable part of the money so received. His books of account are not complete, and no accurate statement of his affairs can be made therefrom. After examination of the bankrupt and hearing the evidence of his clerks and others, the referee made a finding that the bankrupt has in his possession, and unlawfully withholds from the trustee of his estate, at least \$6,000, and thereupon made an order requiring him to pay that amount to the trustee within a period of five days. Exceptions were taken to said findings and order, and the court, upon a review of the evidence, and further examination of all the books and memoranda relating to the business, reached the conclusion that the referee had not given full credit for all the money paid for merchandise and expenses of the business, and thereupon modified the order of the referee by fixing the amount of money adjudged to be in the possession of the bankrupt, and wrongfully withheld by him at \$3,000, which amount the bankrupt was required to pay to the trustee forthwith. Service of the modified order was made, and compliance therewith on the part of the bankrupt was demanded, and upon his failure to pay the money an application was made on behalf of the trustee and creditors to compel obedience to the order by proceeding against the bankrupt for contempt of court. An order was made requiring him to show cause why he should not be punished for contempt, to which he has filed an answer denying the jurisdiction of the court to proceed against him in this manner, and also contradicting the decision of the court that he has possession or control of money, and averring that he is unable to comply with the order of the court for the reason that he is penniless, and obliged to depend for his subsistence upon the charity of his friends. The case has been argued and submitted upon the question whether all or any of the defenses set forth in the answer are valid, or constitute a bar to the exercise of the power of the court to imprison the respondent for contempt.

Samuel R. Stern, for trustee.

F. M. Dudley, for respondent.

HANFORD, District Judge (after stating the facts as above). 1. The bankrupt claims that before he can be proceeded against for contempt of court it is necessary to formulate specific charges upon which an issue may be joined, and he also claims that for the determination of every question affecting his accountability he is entitled to a jury trial. It is my opinion that the constitutional guaranty of the right to a jury trial in all common-law actions is not applicable to statutory proceedings in which the court exercises the powers of a special tribunal. As a court of bankruptcy, this court is a special tribunal, and when a case proceeds according to the usual practice in courts of bankruptcy a party against whom a de-

cision is rendered has no more right to complain of being deprived of his rights without due process of law than have parties against whom judgments are rendered in equity or admiralty cases. In *re Purvine*, 37 C. C. A. 446, 96 Fed. 192, is a case in which the circuit court of appeals for the Fifth circuit held that a court of bankruptcy has jurisdiction and power to order a bankrupt to pay over to his trustee money found to be in his possession and control, and properly belonging to his estate; and, if the bankrupt fails to obey such order, the court may commit him for contempt until he complies. It appears from the report of that case that the proceedings had in the district court were similar to the proceedings in this case, and in the opinion of the court reference is made to several cases under the bankruptcy law of 1867, which may be regarded as precedents for this procedure. Substantially the same practice appears to have been followed in a number of cases under the present bankruptcy law. In *re Tudor* (D. C.) 96 Fed. 942; In *re Rosser*, Id. 308; In *re McCormick* (D. C.) 97 Fed. 566; In *re Schlesinger*, Id. 930; In *re Mayer* (D. C.) 98 Fed. 839; In *re Deuell* (D. C.) 100 Fed. 633. In the absence of any statute prescribing a different procedure, in special proceedings the court must conform to some system, and the practice which has been generally pursued in other courts, and which has the sanction of experience, is the safest, and most likely to lead to results consistent with the principles of law and justice. This branch of the respondent's defense is squarely met and fully answered by the supreme court of the United States in the *Debs Case*, 158 U. S. 565-600, 15 Sup. Ct. 910, 39 L. Ed. 1106. In the opinion by Mr. Justice Brewer the law is declared with great force and clearness as follows:

"Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that 'it matters not what form the attempt to deny constitutional right may take; it is vain and ineffectual, and must be so declared by the courts'; and we reaffirm the declaration made for the court by Mr. Justice Bradley in *Boyd v. U. S.*, 116 U. S. 616, 635, 6 Sup. Ct. 535, 29 L. Ed. 752, that 'it is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be "obsta principiis." But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. In the *Case of Yates*, 4 Johns. 314, 369, Chancellor Kent, then chief justice of the supreme court of the state of New York, said: "In the *Case of the Earl of Shaftesbury*, 2 State Tr. 615, 1 Mod. 144, who was imprisoned by the house of lords for "high contempts committed against it," and brought into the king's bench, the court held that they had no authority to judge of the contempt, and remanded the prisoner. The court in that case seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle that every court, at least of the superior kind, in which great confidence is placed, must be the sole judge, in the last resort, of contempts arising therein, is more explicitly defined and more emphatically enforced in the two subsequent cases of *Reg. v. Paty*, 2 Ld. Raym. 1105, and of *Rex v. Crosby*, 3 Wils. 188.' And again, on page 371, 'Mr. Justice Blackstone pursued the same train of observation, and declared

that all courts—by which he meant to include the two houses of parliament and the courts of Westminster Hall—could have no control in matters of contempt. That the sole adjudication of contempts, and the punishment thereof belonged exclusively, and without interfering, to each respective court.' In *Watson v. Williams*, 36 Miss. 331, 341, it was said: 'The power to fine and imprison for contempt from the earliest history of jurisprudence has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the reculant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.' In *Cartwright's Case*, 114 Mass. 230, 238, we find this language: 'The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our declaration of rights.' See, also, *U. S. v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Mugler v. Kansas*, 123 U. S. 623-672, 8 Sup. Ct. 273, 31 L. Ed. 205; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 52 L. Ed. 405; *Ellenbecker v. District Court*, 134 U. S. 31, 36, 10 Sup. Ct. 426, 33 L. Ed. 803,—in which Mr. Justice Miller observed: 'If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it.' *Commerce Commission v. Brimson*, 154 U. S. 447, 488, 14 Sup. Ct. 1138, 38 L. Ed. 1061. In this last case it was said: 'Surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable of right by a jury.' In brief, a court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

2. The bankrupt has also complained of unfair treatment in this: that he was not given an opportunity to introduce evidence to exculpate himself from the charge of concealing or withholding money which he should have paid to the trustee. As a matter of fact, there was no refusal to receive evidence offered in behalf of the bankrupt, nor to issue process for witnesses, and it is not pretended that he knows of any evidence which will have a tendency to place him in a more favorable situation. It is my understanding of the argument made by counsel for the bankrupt that the real point upon which the bankrupt relies is that he was unable to produce evidence because he was not informed as to what particular property or money was supposed to be abstracted or concealed; in other words, that no particular property or money was described in any pleading on file. This ground of defense is technical, but unavailing. The principles of reason and justice do not exact of those who have incurred losses by extending credit to a dishonest merchant the impossible thing of tracing the proceeds of merchandise which he has handled before compelling him to surrender money in his possession which rightfully should be applied to the payment of their accounts. In this case it is impossible for the trustee or the creditors to identify the pieces of money which have come to the bankrupt's hands, or to identify or describe the particular pairs of shoes which were sold for money which the bankrupt now conceals; and, being impossible, it

3. To the merely formal objection that the bankruptcy law does not confer power upon the court to compel a bankrupt to surrender his estate to a trustee there are two sufficient answers. In the first place, the act does give the power specifically. The seventh section requires the bankrupt to "submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate." Subdivision 7 of section 2 expressly confers power upon the court to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto"; and subdivision 13 of the same section also expressly confers power upon the court to "enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment." The power thus conferred upon the court has been frequently exerted, as will be seen by reference to the list of cases under this law above cited. See, also, *Loveland, Bankr.* § 238. In the second place, the court, having acquired complete jurisdiction of the bankrupt and his estate, has inherent power to imprison him for contumacy, and compel obedience to its order. In the case of *U. S. v. Hudson*, 7 Cranch, 32, 34, 3 L. Ed. 260, the supreme court affirmed the doctrine relating to this subject in the following words:

"To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others."

This doctrine has been often reaffirmed and uniformly sustained, as in the *Debs Case*. See, also, 7 Am. & Eng. Enc. Law (2d Ed.) 68.

4. The decision in the *Debs Case* also disposes of another argument advanced but abandoned by counsel for the bankrupt, which is that the criminality of the bankrupt's conduct, and his amenability to a criminal prosecution, ousts the court of its jurisdiction to deal with him summarily for contempt. In the opinion in that case the court says:

"The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. * * * And it is no defense to the civil action that the same act by the defendant exposes him as well to indictment and punishment in a court of criminal jurisdiction."

5. One of the principal grounds of defense upon which the respondent relies is contained in his answer denying that he has any money. His answer is not conclusive, but the rule in such cases requires that the denial be overcome by evidence proving beyond a reasonable doubt that the bankrupt actually has the present possession or control of money, or that any alleged transfer or other disposition of it is a mere subterfuge which does not prevent him from producing it. *U. S. v. Sweeney* (C. C.) 95 Fed. 434; *In re Purvine*, 37 C. C. A. 446; 96 Fed. 192; *In re Mayer* (D. C.) 98 Fed. 839. The decision of the court that the bankrupt has at least \$3,000 in his possession or under his control is based upon convincing evidence to the effect that a large amount of money actually came into his

possession within a few months before the adjudication. Of the money so received more than \$2,000 remains entirely unaccounted for after giving full credit for all expenditures shown by the respondent's books of account, and after allowing in full the extravagant amount which he claims to have used for his personal expenses, and in dissolute practices, and losses in gambling. As to so much of the money, this is not a case of failure to give a satisfactory account, or to show in a satisfactory way how it has been disposed of, but it is a case of total failure to account in any way whatever, or to give any explanation. I am also convinced that the amount which the respondent claims to have lost in gambling is considerable in excess of the total amount of his actual losses. I am also convinced that, with a deliberately formed intention to defraud his creditors, the respondent proceeded methodically to make liberal purchases of merchandise on credit, and to dispose of his stock for cash as rapidly as possible. During the spring and summer months he conducted a slaughter sale, selling goods so much below the market value as to create a rush of business. In the month of August he pledged a large amount of new goods as security for \$2,500, which he borrowed. In September, he purchased other goods on credit, and soon afterwards permitted the pledgee to sell the goods held as security for the \$2,500 for a price much below the market value thereof, without making any attempt to redeem them. In view of the indisputable evidence which I have to consider, it would be ridiculous for the court to permit its decision holding that the respondent has money to the amount of at least \$3,000 in his possession, or subject to his control, to be reversed by the mere denial of this bankrupt, who stultifies himself by alleging in his answer that he has squandered money which should have been paid to his creditors in gambling and indulgence in other vices.

6. The last defense to be considered is the right claimed by the respondent to exemption from imprisonment for debt. Section 990, Rev. St. U. S., provides that no person shall be imprisoned for debt in any state on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. The seventeenth section of article 1 of the constitution of this state provides that "there shall be no imprisonment for debt except in cases of absconding debtors," and from these provisions the respondent would draw the deduction that a bankrupt debtor, who has, in fraud of the rights of his creditors, purchased goods on credit, and disposed of the same for cash, and converted all of his assets into money, may with impunity retain the money, and defy the power of the courts to compel him to surrender it to the trustee of his estate, lawfully entitled to have possession of it. If it be true that the people, out of tender regard for poor debtors, have ordained an absolute and inflexible rule, by which the courts have been stripped of power to compel swindlers to give up the fruits of their fraudulent schemes, this defense must prevail in this case; but I find that similar constitutional provisions in other states have not been effective to prevent the courts from enforcing obedience to orders requiring bankrupts to give up money which they have at-

tempted to conceal. In *re Purvine*, and other cases above cited. In my opinion, it is a very close question whether imprisonment as a means of compelling a party over whom the court has jurisdiction to surrender the possession of money which he has no legal right to keep is imprisonment for debt, within the meaning of the constitutional provision. The word "debt" is a technical term, and the disposition of the courts has been to give effect to the constitutional provision according to the strict and literal meaning of the words used, and, consistently with sound principles, such a rule of construction should govern in all cases. 8 Am. & Eng. Enc. Law (2d Ed.) 992; *Loveland, Bankr.* p. 546; *Bogart v. Supply Co. (C. C.)* 27 Fed. 722; *Jeffries v. Laurie, Id.* 198. The precise question here involved does not appear to have been decided by the supreme court of this state. The case of *Burrichter v. Cline (Wash.)* 28 Pac. 367, as reported, is a barren decision. No statement of the case is given, and the opinion merely affirms "that by article 1, § 17, of the constitution, imprisonment for debt, except in the case of absconding debtors, was abolished." In the case of *Colby v. Backus, 19 Wash.* 347, 53 Pac. 367, the court held that a statute providing for the taxation of costs against complaining witnesses in criminal cases, and imprisonment as a means of compelling payment thereof, is not repugnant to section 17 of article 1 of the constitution. In *State v. Ditmar, 19 Wash.* 324, 53 Pac. 350, the court decided squarely that the courts of this state have power to compel a defendant in a divorce case, who has the necessary means, to pay alimony, and to imprison for contumacy. In the *Van Alstine Case (Wash.)* 57 Pac. 348, the court, without discussing the question, assumed that a statute of the state enacted since the adoption of our constitution (2 *Ballinger's Ann. Codes & St.* §§ 5312-5329), which authorizes proceedings supplementary to execution, and the imprisonment of judgment debtors who have no property subject to execution, and who, upon examination, may be found to have possession of money which should be applied to satisfy judgments against them, is not repugnant to the constitution. Section 990, Rev. St. U. S., is a general statute relating to the subject of imprisonment for debt. It is controlling in all cases coming within its purview, and not affected by any act of congress of later date; but there is no rule of construction making this statute in any sense superior to a subsequent conflicting law. The bankruptcy law is a later statute, and contains the provisions above quoted, which confer special power upon the court to control the administration of estates of bankrupts, and to imprison bankrupts and other persons for contumacy. If section 990 is to be given a broad construction, so as to make it applicable to such cases as the one now under consideration, and forbids the imprisonment of bankrupts as a means of compelling the surrender of their estates, then there is a conflict; and, as the later is at least equally as specific in so far as it affects the question at issue, as the older law, the court has no right to refuse to exercise the power which it confers.

After giving careful attention to all the defenses presented in behalf of the respondent, it is my opinion that he is guilty of willfully disobeying a lawful order made by this court, and that he does

now, contrary to law, and in defiance of the authority of this court, conceal and withhold the sum of \$3,000 which belongs to the trustee of his bankrupt estate, and it is the duty of the court to cause him to be imprisoned until he shall pay the sum of \$3,000 to said trustee, or until the further order of the court in the premises. An order to this effect will be entered, and the respondent will be committed to the custody of the United States marshal, to be imprisoned in the county jail of Spokane county.

HAYNES et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,251.

1. CRIMINAL LAW—CONSOLIDATION OF INDICTMENTS.

Where two indictments of the same defendants are based on cognate statutes and relate to the same transaction, they may properly be consolidated.

2. SAME—WAIVER OF OBJECTION.

Defendants who interpose no objection to the consolidation of indictments when made cannot object for the first time after judgment.

3. INDICTMENT—DESCRIPTION OF OFFENSE—PREVENTING SETTLEMENT ON PUBLIC LAND.

An indictment under Act Feb. 25, 1885 (23 Stat. 321), charging the defendants with having, by force, threats, and intimidation, prevented and obstructed a person from peaceably entering upon and establishing a settlement upon a tract of public land, which follows the language of the statute, describes the acts of the defendants and the land, charges that it was public land subject to entry under the laws of the United States, and names the person who was prevented from entering and establishing a settlement thereon, is sufficiently specific in describing the offense.

4. SAME—CONSPIRACY.

An indictment under Rev. St. § 5508, charging a conspiracy to prevent a person from entering upon a tract of public land and establishing a settlement thereon, which fails to describe the acts constituting the conspiracy, to describe the land, or to aver that it was public land subject to entry, is insufficient.

5. CRIMINAL LAW—VALIDITY OF SENTENCE.

Where there is a general verdict of guilty on an indictment containing several counts, the fact that some of the counts are bad does not vitiate a sentence which does not exceed that which might properly be imposed on the good counts.

6. SAME—SENTENCE TO HARD LABOR.

A defendant, convicted under a criminal statute of the United States prescribing punishment by "imprisonment," cannot be sentenced to hard labor.

7. SAME—IMPRISONMENT IN PENITENTIARY.

Unless a defendant, convicted of an offense against the United States, is sentenced to a term of imprisonment exceeding one year, so as to come within the provision of Rev. St. § 5541, the court has no power to direct the sentence to be executed by confinement in a penitentiary.

8. SAME—CORRECTION OF SENTENCE ON APPEAL.

Errors in a sentence, in directing the manner or place of its execution, do not necessitate a new trial; but the appellate court may either correct the sentence or remand the case for its correction by the trial court.

In Error to the Supreme Court of New Mexico.

James Haynes, William Johnson, William F. Gilliland, and Wilson Kountz, the plaintiffs in error, and one Nicholas Q. Patterson, since deceased, were in-

dicted by the grand jury of the district court of the Third judicial district of the territory of New Mexico for violation of the provisions of section 5508, Rev. St. U. S., and section 3 of chapter 149 of the act of February 25, 1885 (23 Stat. 321). There were two indictments against the parties, each containing three counts. On motion of the United States the two indictments were consolidated, for the reasons that both related to the same transaction and were based on the same evidence. Upon trial the jury found the plaintiffs in error guilty on all the counts in the two indictments, the verdict being a general verdict of guilty as charged in each indictment. A motion in arrest of judgment was filed and overruled. Thereupon the court sentenced the defendants to pay a fine of \$100 and all costs of the prosecution, and that they be confined in the territorial penitentiary of New Mexico at hard labor for the period of one year. An appeal was taken to the supreme court of the territory of New Mexico. A bill of exceptions had been filed in the district court. In the territorial supreme court a motion was filed on behalf of the United States to strike out the bill of exceptions, because it was signed and sealed after the expiration of the time within which the court had power to do so. This motion was sustained by the supreme court, and the bill of exceptions stricken from the records. The record sent to this court does not contain any bill of exceptions. The final hearing of the supreme court of the territory affirmed the judgment of the court below, and the cause was removed to this court by writ of error.

S. B. Newcomb (J. F. Bonham, on the brief), for plaintiffs in error.
Edward A. Rozier, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

As there is no bill of exceptions before us, we are confined to those questions which appear in the record. There was no error in consolidating the two indictments, as all the counts in each of the indictments were based on cognate statutes and relate to the same transaction. *Logan v. U. S.*, 144 U. S. 297, 12 Sup. Ct. 617, 36 L. Ed. 429; *Porter v. U. S.*, 33 C. C. A. 652, 91 Fed. 494; Rev. St. § 1024. Moreover, the defendants interposed no objection to the consolidation when made. "Having gone to trial without objection on the indictment as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after judgment." *Logan v. U. S.*, 144 U. S. 263, 297, 12 Sup. Ct. 617, 36 L. Ed. 429.

Indictment No. 1,208 is drawn under the provisions of section 3 of the act of congress approved February 25, 1885 (23 Stat. 321). That section reads as follows:

"Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: provided, this section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith."

The first count is based upon that part of the statute prohibiting, by force, threats, and intimidation, any person from peaceably entering upon and establishing a settlement upon a tract of public land.

It follows the language of the statute, and describes the unlawful acts of defendants by charging that the force, threats, and intimidations were by the unlawful use of guns, pistols, blows, ropes, and tar. It describes with particularity the part of land which Gifford was prevented by the unlawful acts of defendants from entering upon and establishing a settlement upon, and also charges that the land was then public land of the United States, subject to entry under the public land laws of the United States. This clearly furnished to the accused full information as to all acts which they are charged to have committed, and enabled them properly to prepare for their defense. The second and third counts of this indictment, while based upon different parts of that section, are equally full and comprehensive, and are not subject to the objections raised by the plaintiffs in error.

The indictment No. 1,209 is drawn under section 5508 of the Revised Statutes of the United States. The first count in that indictment fails to describe any of the acts which constituted the conspiracy. It does not charge what lands Gifford was prevented from entering, nor that they were public lands. This count is therefore clearly bad, and no conviction thereunder can be sustained. But the second and third counts of that indictment set out fully all the acts which the defendants conspired to do to prevent Gifford, who was alleged in the indictment to be a citizen of the United States, from the free exercise and enjoyment of a certain right and privilege secured to him by the laws of the United States; that is to say, the right to then and there peaceably enter upon, prospect for minerals, initiate, locate, establish, and perfect a mining claim upon the public lands of the United States under the public land laws of the United States,—describing the land, and charging that it was public lands of the United States. The third count sets out the facts even more fully than the second count. Both of these counts charge the facts very fully, much more so than they are charged in the information filed in the case of *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673, which was held to be good by the supreme court. The information in that case is set out at large in *U. S. v. Waddell* (C. C.) 16 Fed. 221.

The jury rendered a general verdict of guilty on all the counts in both indictments; but two sentences only were imposed,—one under each indictment,—and under these the sentence of imprisonment was concurrent. The presence of one bad count does not vitiate the verdict. The rule is that where there is a general verdict of guilty on an indictment containing several counts, some of which are good and some bad, and the sentence imposed does not exceed that which might properly have been imposed upon conviction under the counts which are good, the sentence is good, notwithstanding one or more of the counts is bad. *Evans v. U. S.*, 153 U. S. 584, 14 Sup. Ct. 934, 939, 38 L. Ed. 830; *Id.*, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 830; *Claassen v. U. S.*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; *Peters v. U. S.*, 36 C. C. A. 105, 94 Fed. 127; 2 Bish. Cr. Proc. 841.

Neither of the statutes on which the indictments are founded provides for punishment at hard labor, yet the judgment of the court below is that the defendants shall be confined in the penitentiary of

the territory of New Mexico for the period of one year "at hard labor." Section 5508, Rev. St., provides that upon conviction "they shall be fined not more than \$5,000, and imprisoned not more than ten years." The act of February 25, 1885, provides for a fine not exceeding \$1,000 and imprisonment not exceeding one year. The sentence to hard labor, that not being a part of the punishment prescribed for the offense by statute, was erroneous. *Gardes v. U. S.*, 30 C. C. A. 596, 87 Fed. 172; *Harmon v. U. S. (C. C.)* 50 Fed. 921; *In re Christian (C. C.)* 82 Fed. 199.

Section 5541 of the Revised Statutes of the United States provides that, in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period "longer" than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where said court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose. In *Re Mills*, 135 U. S. 263, 270, 10 Sup. Ct. 762, 34 L. Ed. 107, it was held that, where the statute of the United States prescribing a punishment by imprisonment does not require that the accused shall be confined in the penitentiary, a sentence of imprisonment in the penitentiary cannot be imposed unless the sentence is for a period "longer" than one year. In *Re Bonner*, 151 U. S. 252, 14 Sup. Ct. 323, 38 L. Ed. 149, the same rule was recognized. The sentences of imprisonment in this case not being for a period longer than one year, it was error to order them to be executed by confinement in a penitentiary; and, neither of the statutes on which the indictments are founded providing for punishment at hard labor, that part of the sentence is also erroneous.

Errors of this character, in the sentence merely, do not necessitate a new trial. *Gardes v. U. S.*, supra; *Beale v. Com.*, 25 Pa. St. 11; *Murphy v. Massachusetts* (decided April 9, 1900) 20 Sup. Ct. 639, Adv. S. U. S. 639, 44 L. Ed. —. The only question in such case is whether the errors in the sentence shall be corrected by the appellate court, as was done in *Gardes v. U. S.*, supra, or whether the record shall be remitted to the trial court, with instructions to modify the sentence by eliminating therefrom the parts which are in excess of the powers of the court imposing the sentence, as was done in *Beale v. Com.*, and *Murphy v. Massachusetts*, supra. It is competent for the appellate court to pursue either method. We adopt the latter method in this case for the reason that we are not possessed of the requisite information to enable us to designate a suitable jail or other place of imprisonment in lieu of the penitentiary.

The case is therefore remanded to the district court of the Third judicial district of the territory of New Mexico, with instructions to modify the sentences by striking therefrom the words "at hard labor," and the words "the superintendent of the territorial penitentiary," and in lieu of the latter words designate some suitable jail or other place of imprisonment of the defendants which is not a penitentiary. With this modification, the judgment of the supreme court of the territory of New Mexico and the judgments of the district court of the Third judicial district of the territory of New Mexico are affirmed.

MCBRIDE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,201.

1. EMBEZZLEMENT—ASSISTANT POSTMASTER—INDICTMENT.

In an indictment founded on section 1 of the act of March 3, 1875 (1 Supp. Rev. St. c. 144), which alleges that the accused was an assistant in a post office of the United States, and that a certain sum of money belonging to the United States came into his hands in his capacity as such assistant, which he thereafter embezzled, a general description of the money as consisting of so many dollars and cents is sufficient.

2. CRIMINAL LAW—CROSS-EXAMINATION—DISCRETION OF COURT.

The refusal to permit a witness to be cross-examined as to a matter which was not gone into in his direct examination is within the discretion of the trial court, and cannot be assigned as error.

3. SAME—EVIDENCE—REPORTS OF POSTMASTER.

On the trial of an assistant postmaster for embezzlement of money belonging to the United States, quarterly reports of the office, shown to be in the handwriting of the defendant, and to have been prepared by him, although signed by the postmaster, when properly certified as required by Rev. St. § 889, are admissible against the defendant to establish the amount of money with which the office was chargeable.

In Error to the District Court of the United States for the District of Utah.

The writ of error in this case is brought to review a judgment in a criminal case whereby Frank M. McBride, the plaintiff in error, was sentenced by the district court of the United States for the district of Utah to imprisonment for the term of four years in the Utah state prison for the crime of embezzlement. The count of the indictment on which a conviction was had, omitting the caption thereof, as to which no questions are raised, is as follows: "The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire within and for the district aforesaid, upon their oaths do find and present: That Frank M. McBride, at Salt Lake City, in the district aforesaid, and within the jurisdiction of this court, upon the 10th day of January, 1897, and on divers other days before said time, was then and there assistant postmaster of the post office of the United States at Salt Lake City, in the district aforesaid, and as such assistant postmaster received and had in his possession a sum of money, to wit, the sum of three thousand and seventy-two (\$3,072) dollars, lawful money of the United States, and of the value of three thousand and seventy two (\$3,072) dollars, the property of the United States, and unlawfully and feloniously did embezzle and wrongfully convert the same to his own use, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

John R. McBride, for plaintiff in error.

Charles O. Whittemore, U. S. Atty. (Pennel Cherrington, Asst. U. S. Atty., on the brief), for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The sufficiency of the first count of the indictment, under which the accused was convicted, was challenged in the trial court by a motion in arrest of judgment, which is the first question to be noticed. The objections to the count were that it did not sufficiently describe the

property alleged to be embezzled, and did not sufficiently state the relationship of the defendant to the United States, or show that he held any position of trust to the United States in which he could embezzle its moneys. In the case of *Moore v. U. S.*, 160 U. S. 268, 275, 16 Sup. Ct. 294, 40 L. Ed. 422, it was held, in substance, that when an indictment like the one at bar—that is to say, an indictment founded on section 1 of the act of March 3, 1875 (1 Supp. Rev. St. c. 144)—alleges that the accused was an assistant, clerk, or employé in a post office of the United States, and that a certain sum of money belonging to the United States came into his hands in his capacity as such assistant, clerk, or employé, which he thereafter embezzled, a general description of the money as consisting of so many dollars and cents is sufficient, and that greater particularity of description is not essential. It is true that there are decisions in some of the state courts which hold that such a general description of the property embezzled as is contained in the present indictment is not sufficient, but the ruling in the case last cited is controlling authority. The office of assistant postmaster is recognized by law, and appropriations are made by congress for the pay of such officers. 25 Stat. 841, c. 374. In view of this fact, and in view of the allegations in the indictment showing that the accused was assistant postmaster of the post office at Salt Lake City, that he received the money in that capacity, that it was the money of the United States, and that he embezzled it, it must be held that the indictment was good and sufficient to sustain a conviction, and that the motion in arrest of judgment was properly overruled.

Another contention that should be noticed at the outset is the claim that there was no substantial evidence tending to establish the guilt of the accused, and that the court should have directed an acquittal. The bill of exceptions, however, contains testimony to the following effect: The accused was assistant postmaster at the post office at Salt Lake City, Utah, from May 1, 1895, to about January 14, 1897, C. R. Barratt being the postmaster during that period. He had also served as assistant postmaster during the term of office of the previous postmaster, A. H. Nash; that is to say, from December 1, 1892, to May 1, 1895. During the administration of C. R. Barratt as postmaster, the money which was received at the post office by the several employés from the sale of stamps, stamped envelopes, etc., was, as a rule, turned over each night to the accused, and placed in his charge. He, as well as the postmaster, had a key to the inner vault of the safe, in which the moneys of the office and postage stamps and stamped envelopes were kept, and when any of such supplies were needed for sale by other employés they were obtained generally by application to the accused. When postal moneys were deposited in bank, the deposit was made up, and deposit tickets were usually prepared by the accused, and he very frequently made the deposits in person. In short, the testimony shows that the accused, in his capacity as assistant postmaster, had as full access to all the funds of the office as the postmaster himself, and that such funds and stamps were in the joint custody of both of such officers. Of the two officers, however, the accused seems to have exercised a more constant and active

supervision over the funds, supplies, and business transactions of the office. On January 13, 1897, a post-office inspector by the name of Nichols began a careful investigation into the affairs of the post office at Salt Lake City, which resulted on that day or the day following in the ascertainment of a shortage or deficit in the funds of the office to the amount, as at first reported, of \$4,071, which was subsequently reduced, however, to \$3,708. A less rigid examination of the office had been made, as it seems, on or about January 2, 1897, which had not developed any deficit or a deficit to any considerable amount. On the afternoon of January 13, 1897, while the inspection was under way, and after a deficit had been discovered, the accused asked the inspector about the result of the inspection, and, on being told the amount of the shortage, said to the inspector that "he knew he was short," but he indulged in no further explanation. The same witness further testified as follows: "The 16th of January I spoke to him again about the matter. I told him there was no use saying that he did not know what became of the money, and he said he did. I suggested that he notify his folks by wire. I think he said he would." Another witness by the name of Rebentisch, who had been employed in the post office at Salt Lake City for about 10 years, testified that he had a conversation with the accused on the afternoon of January 15, 1897; that in the course of this conversation he said to the accused, "Frank, this is a pretty bad shortage of yours, and he said, 'I know I am short, but not two or three thousand dollars.'" There were some other less important facts and circumstances developed during the progress of the trial, which had a tendency, as we think, to establish the guilt of the accused; but, without referring to them in detail, it will be sufficient to say that the question of the defendant's guilt or innocence was clearly one to be determined by the jury, and that the trial court would have erred if it had directed a verdict in favor of the defendant.

Numerous errors are assigned because of the admission or exclusion of evidence. In a number of instances exceptions appear to have been taken, and error is assigned because of the exclusion of evidence which was offered by the accused, although the record shows that, after the exception was saved, the evidence was in fact admitted. This leads us to infer that the bill of exceptions is not in all respects reliable, and that, owing to a want of proper care in its preparation, it does not correctly state the rulings that were made upon the introduction of testimony. Complaint is made specially that the witness Rebentisch heretofore mentioned was not permitted, on his cross-examination by the defendant's counsel, to answer the following question: "There had been shortages in the department which had been corrected, had there not?" This question appears to have been propounded before the witness had concluded his answer to a previous interrogatory, and, as the record shows that after the question was asked, and the objection thereto sustained, the witness continued his answer to the former interrogatory, we might very well conclude that the objection to this question was sustained by the trial court, and properly sustained, because the question was deemed out of place and premature. But,

in any event, the assignment of error as respects the refusal to permit the witness to answer this question is not tenable. Rebentisch, on his direct examination, had testified to an admission made to him by the accused about the time that he was arrested, to the effect heretofore stated that he knew he was short, but not as much as two or three thousand dollars. On his cross-examination counsel for the accused was allowed to cross-examine the witness as fully as he desired with respect to the circumstances under which the admission had been made. The witness, in his direct examination, had made no statements with respect to any previous shortages that had been discovered and corrected, so that the question propounded introduced a new subject of inquiry, which had not been gone into in chief. We think that it was within the discretion of the trial judge to confine the cross-examination to matters concerning which the witness had testified on his direct examination, and that complaint cannot be made in this court of such action.

It has also been suggested that an error was committed, prejudicial to the accused, in permitting C. L. Nichols, the government inspector, to testify in rebuttal that he did not at any time in the fall of the year 1896 go to the post office in Salt Lake City late at night for the purpose of cashing a slip or order for \$40, or any other sum. The reasons which appear to have prompted the offer of this testimony in rebuttal were the following: The government, in making out its case in chief, proved by a witness named Williams that on one occasion in the fall of the year 1896, about 2 o'clock in the morning, the accused had been seen to go to the inner vault in the post office, after it had been closed for the night, and open it. The accused explained this incident on the trial by saying that he did go to the inner vault of the safe on the occasion in question, but that he went there to get \$40 to cash a slip or order for Capt. Nichols. In rebuttal the government called both Williams and Nichols. By the former it was shown that on the occasion of his going to the vault the accused had then said to Williams, contrary to his testimony on the trial, that he went there to get some shares of mining stock for Capt. Nichols, while by the latter it showed, as before stated, that he had never solicited the accused to cash a slip for him. We perceive no error in the admission of this testimony, and are of opinion that the testimony of both witnesses was properly received in rebuttal.

Complaint is made of the admission in evidence of certain quarterly reports which were made by Barratt as postmaster of the Salt Lake City post office, showing the condition of that office. These reports were objected to by the defendant below on the ground that they were hearsay evidence, so far as he was concerned, the same having been signed by the postmaster. It was shown, however, that these reports were in the handwriting of the accused in so far as they reported the amount of stamps and money with which the office was chargeable, and that they had evidently been prepared by him. Section 889 of the Revised Statutes makes such reports admissible in evidence in the courts of the United States in civil and criminal prosecutions when they are duly certified, as these

reports appear to have been. It cannot be successfully claimed, therefore, that either these reports or any books found in the post office at Salt Lake City which had been kept by the accused as assistant postmaster, or that had been kept under his supervision and control, were improperly admitted in evidence.

There are no other errors respecting the admission and exclusion of proof which are so assigned or of enough importance to deserve special notice.

It is finally suggested, although the point is not specially argued, in the brief, that the trial court erred in refusing to give the following instruction: "If the jury finds that the defendant ceased to be assistant postmaster on the 9th of January, 1897, then this defendant would not be liable for any loss or shortage that might be found to exist on the 14th of January, 1897, unless it is affirmatively shown by the prosecution that the shortage did exist while this defendant was assistant postmaster." This instruction was doubtless asked in view of some testimony which tended to show that the accused ceased to be assistant postmaster on January 9, 1897. While there was a little testimony to this effect, yet there was other testimony that he continued to act as assistant postmaster until his arrest, on January 14, 1897, and if he had in fact severed his connection with the post office before the latter date the fact does not seem to have been known to any of the employés of the office. The truth would seem to be that he may have been absent from the post office between January 9 and 14, 1897, a little more than usual, owing to sickness in his family, or some other cause, but the evidence would not justify the conclusion that he severed his connection with the office until his arrest. Much less would it justify the conclusion that the deficit occurred between January 9 and 14, 1897. But, even if there had been sufficient evidence on which to base the instruction, we think that the instruction, if given, might have operated to the prejudice of the defendant by leading the jury to infer that, if the shortage existed on January 9, 1897, that fact alone would warrant a conviction. The trial court submitted the case to the jury on a theory which was more favorable to the accused, telling them, in substance, that while an unexplained deficit of money in the hands of a trusted agent is strong proof of embezzlement, yet as in the case which they had to determine there was evidence which tended to show that the postmaster and the assistant postmaster had joint possession of the funds of the office, and equal access thereto, they could not say that the mere existence of a deficit threw on the accused the burden of explaining it, or as establishing his guilt of the crime of embezzlement, if the deficit was unexplained, provided they found that the postmaster and the assistant postmaster did have such joint possession and equal access to the funds of the office. The charge in other respects required the jury to be satisfied beyond a reasonable doubt that while the accused was acting in the capacity of assistant postmaster he did convert the money which had disappeared, or a part of the money, to his own use, with the intent to deprive the United States thereof permanently. They were further instructed that, if the proof did not satisfy

them of all these facts, it would be necessary to return a verdict of not guilty. Upon the whole we conclude that the case was tried without error, so far as the admission and exclusion of testimony is concerned, that the charge was substantially correct, and covered all material questions of law concerning which the jury needed advice, and that there was abundant evidence to sustain the verdict. Under these circumstances the judgment below must be affirmed, with a direction to the accused to surrender himself to the United States marshal for the district of Utah in execution of the sentence heretofore imposed by the trial court, and it is so ordered.

FRESNO HOME-PACKING CO. et al. v. FRUIT-CLEANING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 558.

1. PATENTS—VALIDITY—ISSUANCE TO PARTNERSHIP AS ASSIGNEE.

Under Rev. St. § 4895, which provides that letters patent may be issued to the assignee of the inventor, a partnership may, in its firm name, become the assignee of an inventor's inchoate right to a patent; and, upon a compliance with the requirements of the statute, a patent issued to it as such assignee is valid, although the partnership name is purely artificial, and does not contain the name of any partner.

2. SAME—INFRINGEMENT—FRUIT-SEEDING MACHINE.

The La Due patent, No. 543,834, issued to the Fruit-Cleaning Company, assignee, for improvements in mechanism for seeding fruit, construed, and held infringed as to claims 2, 3, 4, and 5, and not infringed as to claim 1.

Appeal from the Circuit Court of the United States for the Northern District of California.

Wheaton & Kalloch, for appellants.

Tracy, Boardman & Platt (John H. Miller and Timothy D. Merwin, of counsel), for appellee.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

DE HAVEN, District Judge. This is an appeal from a decree of the circuit court for the Northern district of California. The action was brought by the appellee, the Fruit-Cleaning Company, for infringement of letters patent No. 543,834, for "improvements in mechanism for seeding fruit," issued to the appellee, as assignee of George C. La Due. The decree adjudged the patent valid, and that appellants had infringed the first five claims thereof, and also perpetually enjoined them from further infringing said claims. 94 Fed. 845. It is alleged in the bill of complaint that one George C. La Due was the original and first inventor of the invention described in the letters patent, and that he filed in due form in the patent office of the United States his application praying for the granting and issuing of letters patent of the United States for such invention; that, prior to the granting of the patent, La Due assigned and transferred to the complainant the Fruit-Cleaning Company his "right, title, and interest in and to the said invention," and in the assignment

requested the commissioner of patents to issue to the said Fruit-Cleaning Company such patent as might be granted; and it is further alleged that said assignment was in writing, and "filed in the patent office of the United States prior to the granting and issuance of any patent for said invention." The bill also alleges that on July 30, 1895, letters patent numbered 543,834 were issued in due form of law to the Fruit-Cleaning Company for the invention referred to, and that said company was at the date of filing the bill of complaint the owner and holder of said letters patent; that the respondents, who are appellants here, were infringing upon the exclusive rights secured to that company by such letters patent; and that the Fruit-Cleaning Company is, and was at all of the times referred to in the bill, a co-partnership, of which Alfred Nicholls, George E. Lewis, and Charles F. Allen were and are the members. The bill was not demurred to. The answer denies the alleged infringement, but admits that La Due filed in the patent office of the United States his application for letters patent for the invention claimed by him, as set forth in the bill of complaint, and that prior to the issuance of such letters patent he duly assigned to the Fruit-Cleaning Company all his right, title, and interest in and to said invention, and further admits "that after proceedings had and taken in the matter of said application, and on the 30th day of July, 1895, letters patent of the United States thereunder, dated on that day, and numbered 543,834, were granted, issued, and delivered by the government of the United States to said complainant the Fruit-Cleaning Company. * * *"

The answer also contains the further admission that prior to the issuance of the patent "all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions." The grounds upon which the appellants rely for a reversal of the decree are: First, that the patent alleged to have been infringed by them is void, for the reason that the Fruit-Cleaning Company, named as grantee therein, is a co-partnership doing business under a name wholly fanciful, and not a natural or artificial person having the legal capacity to receive the grant contained in such letters patent; and, second, that the evidence is not sufficient to show that the appellants infringed any of the claims of such patent.

1. We think it must be conceded that appellants are not estopped by their failure to demur to the bill of complaint, nor by the admissions contained in the answer, from insisting upon the invalidity of the patent in suit, if in fact the patent is void because issued to a co-partnership under its firm name and style, without mention of the name of one or more of the persons composing such firm. It is alleged in the bill of complaint that the Fruit-Cleaning Company is a co-partnership, and the answer does no more than admit that the facts in relation to La Due's assignment of his invention to it, and the subsequent issuance of the patent to that company, are as stated in the bill; and the contention of appellants that upon such admitted facts the patent issued to the Fruit-Cleaning Company is absolutely void, for the reason above stated, is one of law which is open for consideration upon this appeal, and must be decided upon

its merits. The argument of appellants in support of their position is, in substance, this: Starting with the general proposition that the exclusive right to make, use, and sell an invention is one that can only be created or granted by letters patent, they next insist that the patent in suit is without a grantee, and therefore void. This latter contention is based upon the fact that the Fruit-Cleaning Company, named as grantee in the patent, is not a person or corporation, but only the name and style under which certain persons are carrying on business as co-partners; and it is claimed that a co-partnership, as such, and more particularly when its firm name is wholly fanciful, cannot take as grantee in any conveyance which the law requires to be in writing, and consequently that a grant, conveyance, or transfer of real estate, or of rights secured by letters patent, when made to a co-partnership in its firm name, is ineffectual to convey legal title to the firm, or to any individual member thereof whose name is not part of the firm name and style under which the business of the partnership is transacted. The cases of *Arthur v. Weston*, 22 Mo. 378; *Winter v. Stock*, 29 Cal. 407; *Moreau v. Saffarans*, 3 Sneed, 599, 67 Am. Dec. 582; *Percifull v. Platt*, 36 Ark. 456; *Association v. Scholler*, 10 Minn. 331 (Gil. 260); *Gille v. Hunt*, 35 Minn. 357, 29 N. W. 2,—are cited to sustain this conclusion. In *Arthur v. Weston*, 22 Mo. 378, the question was whether a deed to *W. W. Phelps & Co.* could be allowed to take effect as a legal conveyance of the land therein described to Phelps, Whitmore, and Cowdry, upon parol proof of the fact that they were the persons composing the firm of *W. W. Phelps & Co.*; and the court held that it could not, and that the legal title to the land conveyed by the deed was vested in *W. W. Phelps* alone. The doctrine of this case (and the same may be said of the other cases cited) undoubtedly is that a partnership, as such, is not regarded as a distinct entity, capable of taking the legal title to real estate. But, in our opinion, this rule is not applicable to the present case. The right created or granted by letters patent is, in the language of the supreme court, "plainly an instance of an incorporeal kind of personal property." *Machine Co. v. Featherstone*, 147 U. S. 209, 13 Sup. Ct. 283, 37 L. Ed. 138. See, also, *Shaw Relief-Valve Co. v. City of New Bedford* (C. C.) 19 Fed. 753. Now, it is certainly settled that partners may acquire the legal title to personal property under a purchase made in the firm name; and it is not material whether such firm name is wholly fanciful, or whether it contains the names of one or more of the members of the firm. This was expressly so decided in *Maugham v. Sharpe*, 17 C. B. (N. S.) 443. That was an action at law, and the question involved was whether a certain mortgage or deed of personal property was invalid because made to a partnership in its firm name. The decision of the court was in favor of its validity, and in delivering his opinion in that case it was said by Williams, J.:

"The first question is as to the validity of the deed whereby Dolby assigned the goods in question to the City Investment & Advance Company. It has been objected on the part of the plaintiff that the conveyance is inoperative because it is necessary in a grant that the grantees should be named; otherwise, the grant can, in law, have no operation. I apprehend, however, it is

fully settled that a grant may be good, though the grantee be not named by his Christian or sur name. In *Shep. Touch.* p. 236, the learned author, after discussing the consequences of a mistake in the Christian name or surname of the grantee, goes on to say: 'And yet, if the grant do not intend to describe the grantee by his own name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism;' for, he adds, 'Id certum est quod certum reddi potest.' In this case, I apprehend, the meaning of the grant is plain. The deed purports and intends to convey the goods to those persons who use the style and firm of the City Investment & Advance Company. They may or may not be a corporation, but, when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them."

This, we think, is a proper statement of the rule of law which should be applied in the present case. Section 4895 of the Revised Statutes provides that letters patent may be issued to the "assignee of the inventor" upon compliance with the conditions therein named, one of which is that the assignment must first be entered of record in the patent office. We have no doubt that under this section a partnership may, in its firm name, become the assignee of an inventor's inchoate right to letters patent, and a patent issued to it as such assignee is valid, and vests in the persons composing the firm the legal title to the rights and privileges thereby granted.

2. Upon the question of infringement little need be said, as its decision really turns upon the construction of the particular claims in relation to which infringement was found by the circuit court. These claims are as follows:

"(1) In combination in a machine for seeding fruit, a carrier for conveying the fruit, which is provided with a series of points or teeth spaced to engage the seed of the fruit; a pressure mechanism, the surface of which moves to and from the carrier, and acts to partially impale the fruit upon the carrier; and a puncturing mechanism, the surface of which moves to and from said impaling surface, and acts subsequently to the action of said impaling mechanism, to perforate the skin over the seeds of the impaled fruit for the purpose of uncovering the seed of the fruit. (2) In combination in a machine for seeding fruit, a carrier for conveying the fruit, which is provided with a series of points or teeth spaced to engage the seed of the fruit; pressure mechanism having motion angularly with relation to the carrier, and acting to partially impale the fruit upon the carrier, and by further action to puncture or rupture the skin over the seeds of the impaled fruit, to free the seed preliminarily to removing the same from the body of the fruit. (3) In combination in a machine for seeding fruit, a roll for receiving and conveying the fruit, the surface of which is provided with a series of points or teeth spaced to exclude the seeds of fruit impaled thereon; a pressure roll acting to partially impale the fruit on the carrier teeth, so that they engage the seed preliminarily to removing the same from the pulp; and a brush roll acting to rupture the skin of the fruit lying on, and to force the same off, the seed,—substantially as set forth. (4) In combination in a machine for seeding fruit, a carrier roll provided with a series of points or teeth spaced to exclude the seed of the fruit; a roll acting to partially impale the fruit on the carrier, so that its teeth engage the seed; a roll acting to puncture or rupture the skin of the fruit lying on the seed, and a roll acting to force the punctured skin and pulp of the fruit from around the exposed seed,—substantially as set forth. (5) In combination in a machine for seeding fruit, a carrier roll provided with a series of teeth spaced to engage and exclude the seeds of fruit impaled thereon, and a series of two or more rolls adjusted at different distances from said carrier, and successively acting to partially impale the fruit on the carrier teeth, and rupture and displace the skin of the fruit lying over the seed, preparatory to removing the seed, substantially as set forth."

The specifications and drawings accompanying the patent show that the pressure mechanism referred to in these claims consists of three rolls, designated in the drawings by the figures 12, 13, and 14. These rolls co-act with a central or carrier roll, upon which the fruit is impaled. After describing this central or carrier roll, and its function, the specifications describe the operation and function of rolls 12, 13, and 14 in this language:

"12 is a removable brush roll, journaled in brackets or other like supports fixed to the machine, and which roll is the impaling roll, or the one which forces the fruit upon the teeth of the carrier; the roll being so adjusted relatively to the fruit-carrier surface and the character of its surface, of fiber, bristles, or other yielding substance, being such that the fruit is impaled upon the teeth without being (at least, to any essential extent) ruptured by the action of the roll. 13 is a similar roll, similarly mounted, but adjusted somewhat nearer to the carrier surface; and the bristles or operative surface of this roll may be stiffer or less yielding than that of the roll, 12. The function of this roll is to perforate the skin of the fruit lying over the seeds of the impaled fruit, preliminary to the unimpaled portion of the fruit being pushed from off the seeds. 14 is a similar roll, similarly supported on the frame, the brush or yielding surface of which is adapted to engage the perforated skin of the fruit, and press the same down upon the main body of the fruit; thus leaving the seeds upon the points of the carrier surface, but stripped of the skin and pulp of the fruit."

The machine used by appellants contains a central carrier roll and three laminated rubber rolls. These latter rolls are pressure rolls arranged and adjusted with reference to each other and to the central carrier roll in the same manner as the carrier and pressure rolls are arranged and adjusted in the invention described in the patent in suit. In the machine used by appellants the raisin is impaled upon the central or carrier roll by the first pressure roll, and is then forced further on to the teeth of such carrier roll by pressure successively applied by the other rolls, until the seed is pushed upward through the skin of the raisin; that is, by reason of the successive pressure applied by the different rolls, the seed is made to itself puncture the skin of the raisin. The claim is made by the appellants that the machine used by them does not constitute an infringement of the patent in suit, because it contains no mechanism which punctures the skin of the raisin, and it is insisted by them that such a puncturing mechanism is an essential element of the combination covered by the claims above set out. The question presented is one of construction of these claims, and we are clearly of opinion that a puncturing mechanism, as distinguished from pressure rolls acting in conjunction with the carrier roll, is not an essential element of claims 2, 3, 4, and 5 of the patent in suit, and that the machine used by the appellants infringes upon these claims. We agree with the appellants that claim 1 of the patent calls for a puncturing mechanism. The language of the claim is:

"A pressure mechanism, the surface of which moves to and from the carrier, and acts to partially impale the fruit upon the carrier, and a puncturing mechanism, the surface of which moves to and from said impaling surface, and acts subsequently to the action of said impaling mechanism, to perforate the skin," etc.

The words "puncturing mechanism," as here used, were evidently intended to describe some device or thing different from the pressure

mechanism previously mentioned in the same sentence. The decree will be modified by striking therefrom so much as adjudges that appellants have infringed claim 1 of the patent in suit, and enjoins them from further infringement of said claim 1, and as thus modified the decree is affirmed.

EDISON ELECTRIC LIGHT CO. et al. v. PENINSULAR LIGHT, POWER & HEAT CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 754.

1. PATENTS—CONTRIBUTORY INFRINGEMENT.

A company which generates electricity, and furnishes it to a second company engaged in supplying the same to its customers for lighting or other purposes, cannot be held as a contributory infringer because one of such customers uses a distributing system which infringes a patent; the article so furnished being as well adapted for use by one mode of distribution as another.

2. SAME—IMPLIED LICENSE—SALE OF ELECTRIC LIGHTING APPARATUS.

An electric light company, having the exclusive right and license to use apparatus involving the Edison system of distribution in a city, installed a permanent system of wires in a hotel building being erected in such city, under contract with the owners, who paid it therefor. The apparatus so installed was adapted for use according to the system of distribution covered by an Edison patent. Some years later the owners of the hotel discontinued the taking of lights from such company, and subsequently had the building connected with the wires of another company. *Held*, that the sale of such apparatus without reservation carried with it an implied license to use the system of distribution in accordance with which it was constructed, without regard to the source from which the current was obtained; it appearing that it could not be effectively used, with safety to the building, in connection with any other system, and that such license extended to the construction and use outside the building where the connection was made of a tension-reducing device which, in connection with such system of distribution, was made an element of another Edison patent, but which was necessary to the use of the house apparatus according to the plan for which it was constructed.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This is a suit to restrain infringement of two patents relating to systems of electrical distribution granted to Thomas A. Edison. The complainants are two corporations, one of which is the owner of the patents, and the other a licensee under the first for the city of Grand Rapids, Mich. The defendants are two corporations,—the Peninsular Light, Power & Heat Company and the Lowell Water & Light Company. The last named generates electrical current at its station near Lowell by water power, and transmits the current to its transforming station at the city of Grand Rapids, and there delivers it to the first-named company, which distributes it to its customers in the city over its own wires. In 1888 the Livingston Hotel, at Grand Rapids, was in process of construction, and the owners applied to the Edison Light Company of Grand Rapids to wire the building for lighting by electricity. This was done; the wires being put in in a permanent way before the building was plastered, so that they have become in every sense a fixture. The Grand Rapids Company had at that time in the city of Grand Rapids a fully-equipped electrical generating plant, and was engaged in the business of supplying electrical current to all who desired to use same for illuminating or other purposes; employing in the distribution of its current for lighting purposes an arrangement of wires

covered by the Edison patent No. 274,290, and known generally as the "Edison Three-Wire System," and an improvement thereon which included said three-wire system of distribution with a "tension-reducing device," as shown by the second claim of Edison's patent No. 287,516. The local company, operating under the general company owning said patents, does not seem to have included the installation of house wires as a part of its regular business; but, because there were then no construction companies carrying on the business of suitably wiring buildings, it did, as a means of introducing electricity, wire buildings when its services were desired, charging only the cost of material and labor. The owners of the Livingston Hotel paid to the said local company the sum of \$544, as the cost of material and labor. The system adopted in wiring the hotel was that covered by the Edison patents. From the completion of the wiring, the hotel was supplied with the current generated by the said Grand Rapids Company until the fall of 1894, when, for economical reasons, it ceased to take its supply from said company, and set up a dynamo of its own, with a steam engine to operate it. This dynamo was connected with the house-wiring apparatus installed by the Grand Rapids Company, and from that time until February, 1896, the proprietors of the hotel supplied and used their own current. In February, 1896, the hotel proprietors discontinued the generation of their own current, and since that date have been supplied with current by the appellee the Peninsular Company, which, as before stated, takes its supply from its co-appellee, the Lowell Company. The Edison three-wire system, installed by the Edison Grand Rapids Company, and paid for by the Livingston Hotel people, terminated at the "service cut-out," or "fuse block," just inside, at the top of the rear door of the hotel. When the hotel, in February, 1896, determined to obtain its supply of current from the Peninsular Company, that company installed outside this rear door two of its transformers or tension-reducing devices, and connected them with its conductors and by wires to the hotel "service cut-off," using the cut-off and distributing wires originally installed. The connection between the Peninsular Company's main conducting wires and the hotel company's house wires was originally made by a system called the "Stanley Two-Phase, Three-Wire System." This was found to be dangerous, as greatly overheating the middle wire of the house-wiring system. On this account the connection between the house wiring and the outside wires of the Peninsular Company was changed to the connection proper under the Edison three-wire system. This the appellants charge to be an infringement of their patent rights. The hotel company is not, however, sued; but the Peninsular Company, as the company directly dealing with it, and directly furnishing the current in the manner stated, is sued, as contributing to the hotel's infringement, and the Lowell Company, as vendor of the current distributed by the Peninsular Company, is joined as a co-contributor to such infringement. The court below dismissed the bill, holding that the installation by the local electrical company of a permanent system of wires, arranged according to the system of the Edison patents, operated as a license to utilize that system in connection with any source of supply of current and a tension-reducing device adapted to the proper use of the Edison method of distribution. The opinion of the court may be found in 95 Fed. 669.

Richard N. Dyer, for appellants.

John E. More, for appellees.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The decree dismissing the bill as against the Lowell Light & Power Company was clearly right. It sold the current which it generated to the Peninsular Company. That current was as well adapted for use in one mode of distribution as another, and was adapted equally as well for furnishing power as for illuminating purposes.

Being suitable for a great variety of methods of use, it does not come within the rule applied when the article furnished is adapted only to the infringing use. Neither is there any evidence that it supplied current to the distributing company with any intent that it should be supplied to the hotel company, or, if so, that it was to be used in an infringing way, or in contributing to the infringement of any of the patented methods of distribution for house lighting covered by the patents of the appellants. In the case of *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, 77 Fed. 297, the fasteners made and sold were not only peculiarly adapted to the infringing use, but they were made and sold with the definite intent that they should be so used.

2. This brings us to the serious controversy in the case. The Grand Rapids Company constructed and sold to the proprietors of the hotel the apparatus constructed, according to the arrangement of the Edison patent, for the electrical lighting of said building. After some years it ceased to take current from that company, and is now supplied by the appellee the Peninsular Company. Between the outside overhead wire of the Peninsular Company and the service cut-off or fuse block of the hotel apparatus, it has placed two transformers or tension-reducing devices, each of which is connected with the house fuse block by two wires. Appellants say that, by this combination of the house apparatus with the generators of the Peninsular Company and tension-reducing devices or transformers, the hotel is enabled to use its wiring system in a way which infringes the Edison patents, and that the Peninsular Company is a contributor to such infringement, and must respond in damages. When the Peninsular Company first began to deliver current to the hotel, the connection between the two transformers and the service cut-off was made by three wires, being the system known as the "Stanley Two-Phase, Three-Wire System." That method of delivering current overloaded the middle wire of the house apparatus to such an extent as that it became dangerously heated, and could not carry the current with safety to the building. That method of delivering the current, appellants say, was a noninfringing way, and is not the subject of complaint. To obviate the danger incident to the overheating of the middle wire of the house apparatus, the three wires between the transformers were changed to four wires; that is, two wires between each transformer and the service cut-off of the house apparatus. By this change of the method of connecting the transformer with the hotel wires, the current delivered by the Peninsular Company is distributed over the house wires in a way to avoid dangerous overheating of the house middle wire, and in accordance with the method called the "Edison Three-Wire System," which is the method of the patents owned by appellant. The wiring of the hotel was done by the Edison Light Company, and was according to the method covered by the Edison patents. That part of the apparatus wholly within the house, and which begins with the service cut-off, just inside an outer wall of the building, is the part of the apparatus constructed by, and sold to, the hotel proprietors. It is valuable only as so many pounds of copper wire, unless it can be utilized for illuminating purposes. It

cannot be utilized as a fixture except in combination with some source of electrical current. If it be connected with the main conductors carrying the powerful current generated by the appellee companies, it will be necessary that there shall be interposed some tension-reducing devices to diminish the voltage passing over the house distributing wires. To deliver this reduced voltage to the house apparatus in such a way as that the current carried by the middle wire shall not exceed that carried by the outside wires, it is essential that the connection with the transformers shall be made by two wires from each transformer, in accordance with the system upon which the wires are arranged. A system of electrical distribution is a complete machine, composed of a series of co-ordinating parts. Thus, the first claim of Edison's patent covering his three-wire system is as follows:

"In a system of electrical distribution having translating devices arranged in multiple series, the compensating conductor or conductors connecting the translation circuits with the source of energy, substantially as and for the purpose set forth."

This patent covers Mr. Edison's basic invention, and it is so described by Mr. Jenks, the expert of appellants. The essence of the system consists in—

"The employment in the house-wiring apparatus of a compensating conductor, running between two outer wires connected with the positive and negative poles of the generators, respectively; the compensating conductor having offsets running from each side to the side wires, respectively, on each of which offsets an arc is formed at the location of a lamp." "The advantage of the arrangement consisted in equalizing and relieving the tension of the current on the wire."

The later Edison patent simply covers an improvement upon the first, by including as an element two transformers at a point in advance of the beginning of the house wires proper, by means of which the voltage or tension on the lines leading to them, which is often many times too great for safe use for lighting purposes, may be reduced and safely employed. But, if the current generated is of low voltage, transformers would not be needed. It is only when the current is to be taken from wires carrying a current of high voltage that they are needed. That they were needed and in use when the hotel took its current from the conductors of the Edison Light Company is evident, though the record contains no positive statement to that effect. Tension-reducing devices were not new. Their employment was necessary if current was to be taken from the high-voltage conductors of the Peninsular Company. Those used are not the specific transformers described in the later patent, and made an element in its first and third claims. The second claim of the second patent includes any tension-reducing device in combination with the compensating conductor system of the first patent. But if the sale and construction, as fixtures in the building, of the apparatus embodying the essence of Edison's system of electrical distribution, imply a license to employ that apparatus as it was intended to be employed, the right must carry with it the right to also use the co-ordinate and subordinate element for reducing the voltage of the current intended for illuminating purposes. The Edison Light Company constructed and

sold to the hotel proprietors the very expensive and permanent fixtures which constitute the very essence of the Edison invention. It did so without any limitation upon the use of the apparatus sold, or any requirement that it should be used only in connection with current obtained from it. That it made no profit on the apparatus is of no moment. It then had no rival. It expected its profit from the sale of current, and was not disappointed in this. But the time came when its current was displaced by a current generated by the hotel proprietors, and finally by the current sold by a rival company. The property in and right to use the apparatus for illuminating purposes is not denied. The contention is that the plant is capable of use for that purpose in a noninfringing way, and therefore no license to use it according to the Edison system is to be implied. The evidence does show that, for something over a year after discontinuing the current furnished by the Edison Light Company, the hotel generated its own current. It is inferable that that current so generated was delivered and used in a way which was not the method of the Edison system. But the record is silent as to the safety of the apparatus when so utilized. What we do know is that for some reason the proprietors ceased to generate current, and applied to the Peninsular Company for a supply. That company made a connection between its own main conductors and the house apparatus by a method which is called the "Stanley Two-Phase System." This was not the system for which the house system was adapted. The middle wire was too light, and became dangerously overheated. That plan, however, involved the use of two Stanley transformers. The dangerous overheating of the middle wire necessitated the changing of the connection between those transformers and the ends of the house-wiring system so as to equalize the current, and utilize the house apparatus according to the plan for which it was constructed. The facts satisfy us that the house apparatus is not capable of use for illuminating purposes, without danger to the safety of the building, when the current is delivered otherwise than in accordance with the Edison system. Under such a state of facts, what is the character of the license to be inferred from the construction and sale of the house apparatus by the Edison Light Company of Grand Rapids? In *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, 77 Fed. 288, 290, this court, discussing the effect of the sale by a patentee of a machine made upon the plans protected by the patent, said:

"Undoubtedly, the general rule is that if a patentee make a structure embodying his invention, and unconditionally make a sale of it, the buyer acquires the right to use the machine without restrictions, and, when such machine is lawfully made and unconditionally sold, no restriction upon its use will be implied in favor of the patentee. By such unconditional sale the machine passes without the limit of the monopoly."

In *Adams v. Burke*, 17 Wall. 453, 456, 21 L. Ed. 703, the supreme court said:

"But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use, and he parts with the right to restrict that use. The article, in the language of the courts, passes without the limit of the monopoly; that is to say, the patentee or his assignee having

in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees."

To restrict the right of a purchaser of an apparatus embodying a patented invention to use it for the purposes for which it is peculiarly adapted, there must appear some express or implied agreement by which the mode or time or place of use has been limited; and this was the principle upon which the Button-Fastener Case, cited above, was decided. But there may be circumstances under which the sale by a patentee of one patented article will carry with it the right to use another in co-operation with the first, although the thing be covered by a second patent. Thus, if the article sold be of such peculiar construction as that it is of no practical use unless it be used in combination with some subordinate part covered by another patent of the vendor, the right to use the latter in co-operation with the former might be implied from circumstances. It is a general principle of law that a grant necessarily carries with it that without which the thing granted cannot be enjoyed. The limitation upon this is that the things which pass by implication only must be incident to the grant, and directly necessary to the enjoyment of the thing granted. The foundation of the maxim lies in the presumption that the grantor intended to make his grant enjoyable. This presumption has been employed in the construction of licenses granted by patentees, as well as in other branches of the law. Thus, in *Cutter Co. v. Sheldon*, 10 Blatchf. 1, Fed. Cas. No. 13,331, Woodruff, Circuit Judge, said:

"If a party engaged exclusively in the construction of machines of various kinds, for sale to others, were to receive a license to manufacture a patented machine, for a consideration presently paid to the patentee, a construction which would deny him all opportunity to make the privilege of any value, forbidding his sale of the machines when manufactured, should be very clearly imported by the license, or the court would hold that the parties meant that he should derive some benefit from the license, and not be left thereafter wholly dependent on the will of the patentee."

It is evident that the extent of an implied license must depend upon the peculiar facts of each case. The question in each case is whether or not the circumstances are such as to estop the vendor from asserting infringement. The cases of *Roosevelt v. Electric Co.* (C. C.) 20 Fed. 724; *United Nickel Co. v. California Electrical Works* (C. C.) 25 Fed. 475, 479; *American Graphophone Co. v. Amet* (C. C.) 74 Fed. 789,—are instances in which the court held that no license was implied under the facts. *Stonecutter Co. v. Shortsleeves*, 16 Blatchf. 381, Fed. Cas. No. 13,334, and *Illingsworth v. Spaulding* (C. C.) 43 Fed. 831, are illustrations of the application of the presumption arising upon the particular facts of those cases. The general principle is well stated by Judge Wallace in *Roosevelt v. Electric Co.*, cited above, and by Rob. Pat. § 825 et seq. The circumstances in this record plainly indicate that the vendors of the house apparatus installed in the Livingston Hotel intended that the vendees should enjoy the advantages of the Edison system of electrical distribution. The machine it constructed was peculiarly adapted for the use of Edison's in-

ventions, and, as we interpret the facts and circumstances of the record, is not capable of safe use under any other plan or system. If it was intended that so expensive an apparatus could be utilized according to the methods of the patents under which the vendor was operating only so long as the vendor should supply the current, good faith required that the vendees should be plainly so informed. It cannot be doubted but that the vendees understood they were securing a permanent wiring system, which might be used in combination with a current obtained from any source, delivered to the house wires in such manner as to utilize them to the best advantage. It would be most unreasonable to suppose that in order to continue the use of this, the very essence of the Edison inventions, they must continue to take current from a particular source.

3. But the appellants say that the Edison Light Company of Grand Rapids was itself a limited licensee, and could not license the use of the Edison distribution system by other than customers while taking current from it. It is unnecessary to go into a consideration of this question upon its merits. It is enough to say that the averments of the bill are that the Edison Light Company of Grand Rapids "had the exclusive right and license to use apparatus involving the Edison system of distribution within the corporate limits of Grand Rapids." Evidence in conflict with this broad statement as to the exclusive rights of the Grand Rapids Company is not admissible. The bill should have been amended, if it was intended to show that in fact complainant had only the restricted right which is now claimed. The bill was properly dismissed, and the decree must be affirmed.

COMPUTING SCALE CO. v. KEYSTONE STORE-SERVICE CO. et al.

(Circuit Court of Appeals, Third Circuit. May 9, 1900.)

1. PATENTS—INFRINGEMENT—COMPUTING SCALES.

The Pitrat patent, No. 385,005, for improvements in weighing and price scales, claim 12, construed, and *held* not infringed.

2. SAME.

The Culmer patent, No. 486,663, for improvements in computing scales, claim 1, *held* not infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Melville Church, for appellant.

H. H. Bliss and John R. Bennett, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The bill in this case was brought by the Computing Scale Company against the Keystone Store-Service Company and J. W. Culmer, and was based upon the alleged infringement of three letters patent, namely: No. 385,005, granted on June 26, 1888, to Julius E. Pitrat, for improvements in weighing and price scales; No. 486,663, granted on November 22, 1892, to John W.

Culmer, for improvements in computing scales; and No. 490,518, granted on January 24, 1893, to John H. Swihart, for an improved computing scale. Before the final hearing in the court below the complainant withdrew the charge of infringement as to the Swihart patent, and thereafter pressed for a decree upon the twelfth claim only of the Pitrat, and upon the first claim only of the Culmer, patent. The court held that no infringement of either of these claims was shown, and dismissed the bill. 88 Fed. 788.

The Pitrat patent has no less than 15 claims, but this appeal concerns only the twelfth, which reads thus:

"(12) The combination with the price beam, having its left branch slotted, of the head block having the rod, e, pivotally connected therewith, and mounted in said slot, whereby the pivotal supports of the beam and rod, e, may be brought into alignment, as and for the purpose described."

The parties and their respective experts differ as to the meaning of this claim, with particular reference to the words, "whereby the pivotal supports of the beam and rod, e, may be brought into alignment, as and for the purpose described."

On behalf of the complainant, it was contended in the court below, and it is urged here by the appellant, that the alignment contemplated in and by this twelfth claim is the horizontal alignment of three knife-edged bearings, namely, the knife-edged pivot by which the rod, e, is connected to the head block, the knife edge on which the beam is fulcrumed, and the knife edge from which the poise is hung at the outer or goose-neck end of the beam. But such alignment was very old, and was universally recognized as a necessity in all scales. It seems quite improbable, therefore, that the inventor in framing this specific claim had in his mind this horizontal alignment. Indeed, there was no reason for his mentioning a result which was usual and obvious. Moreover, the alignment named in the claim does not embrace the poise pivot at the outer end of the beam, but is confined to the pivotal supports of the beam and rod, e. Again, the language, "may be brought into alignment," implies the manipulation of the parts when the scale is in actual use, rather than a permanent feature of construction. Still further, the specification is altogether silent as to the suggested horizontal alignment. In this connection reference may be made to a significant passage in the appellant's brief, which sets forth that the twelfth claim "is for a combination of mechanism for effecting a certain result, which is stated in the claim itself, but nowhere else in the specification of the patent."

The appellees, however, confidently point to a paragraph in the specification of the patent which they insist relates to the invention intended to be covered by the twelfth claim. That paragraph is as follows:

"While in some cases it may be advantageous to have the main and supplemental beams in different vertical planes, as shown most clearly by Figs. 1 and 3, yet for general use, simplicity, and economy of construction, and compactness of arrangement, it has been found expedient to devise the construction and arrangement shown in Figs. 14 and 15, which show the main and supplemental beams in the same vertical plane, and the one above the other.

By this construction the two beams can be readily made integral, and the weight is equally distributed on the two pivotal supports, and the tendency of the beam to tip sidewise is obviated. The pivotal support, O, is bow-shaped, thereby allowing the head block to reach the center of the beam or come in line with the pivotal supports, which permits computation to be made at the lowest desired rate per pound,—a thing not attainable by the construction first described."

Now, the form of scale illustrated by Figs. 14 and 15, and described in the clause of the specification just quoted, contains a bow-shaped beam fulcrum, which permits the head block to come into transverse alignment with the fulcrum pivots. The descriptive language of the specification here is: "The pivotal support, O, is bow-shaped, thereby allowing the head block to reach the center of the beam, or come in line with the pivotal supports." The appellees maintain, with great force of argument, that the transverse alignment thus shown and described is what is meant by the language of the twelfth claim, namely, "whereby the pivotal supports of the beam and rod, e, may be brought into alignment, as and for the purpose described." The court below gave this construction to the claim. Our own investigations have led us to the same conclusion. Certainly there are very great difficulties, as we have already seen, in adopting the construction of horizontal alignment which the appellant urges upon us. On the other hand, the rendering which makes the claim refer to a transverse alignment of the pivotal supports of the beam and rod, e, not only perfectly accords with the terms employed in the claim, but is sustained by the only appropriate descriptive matter to be found in the specification of the patent.

We have but to add that, upon this construction of the claim, it is not contended that there was any infringement of it by the appellees.

The claim of the Culmer patent here involved is as follows:

"(1) The combination, with the computing beam and the weight beam, of a rod connecting said beams, having a flexible joint between such connections, whereby said rod will adapt itself to the variations in the vibrations of the said beams in the efficient working of the scale, substantially as described."

It is very certain that the relation of this patent to the scale-making art is not such as to entitle the claim in question to a construction covering devices which do not come within its specific terms. The improvements disclosed by the patent have no primary characteristics. The elements of the combination of the first claim are the computing beam, the weight beam, and an intervening rod having a flexible joint, and connecting the two beams. The construction and function of this flexible or jointed coupling for the two beams are set forth in the specification thus:

"The upper portion of the rod, 18, is provided with a suitable bearing, 19, and above this bearing the rod terminates with the jointed connection, which in Fig. 4 is made by a slot standing in the line of the beam, and a pin, 20, which pivots the lower tongued end of the coupler rod, 28, in said slot, so that said rod may rock upon said pin, 20, sufficiently to permit of the difference between the greater and the less arcs described by the value beam and the fixed arc described by the weighing beam. For this purpose an alternative form of joint is shown in Fig. 12. In this joint the pivots, 49, pass through

the stirrup bearings in a link, 192, which forms the upper end of the rod, 13. The top of this link is bored out vertically for the reception of the coupler rod, 28, the lower end of which has its bearings in the convex nuts, 70, 70, and the motion in this case is a limited one in any direction."

Now, it is plain, as well by the description contained in the specification as from the explicit terms of the claim itself, that this invention resides in the employment of a single flexible or jointed rod interposed between the two beams, and connecting them.

The appellees do not use this device or its equivalent. Their devices are substantially different. In their scales the two beams are independently connected with the platform levers. The appellees employ two entirely separate connecting devices, one extending from the platform system to the weight beam, and the other extending from the platform system to the computing beam. The court below rightly held that infringement of the first claim of the Culmer patent was not shown. The decree of the circuit court is affirmed.

ELMSLIE et al. v HAGAR et al.

(District Court, E. D. Pennsylvania. May 14, 1900.)

1. SHIPPING—CONSTRUCTION OF CHARTER—LAY DAYS.

A charter party, as modified by further agreements between the parties, construed with reference to the number of lay days allowed for loading and discharging cargo.

2. SAME—DEMURRAGE—DELAY DUE TO NEGLIGENCE OF CHARTERER.

Where charterers neglected to advise their agents at the port of destination of their agreement to attend to the entering of the ship at the custom house upon her arrival, by reason of which such agents refused to act, and a delay of three days was caused in having the ship entered, the owners were entitled to include such days in the lay days allowed by the charter for discharging.

In Admiralty.

Biddle & Ward and J. Rodman Paul, for libelants.

John F. Lewis and Horace L. Cheyney, for respondents.

McPHERSON, District Judge. In January, 1895 (the charter party bearing the date of December 28, 1894), the libelants, who were the owners of the British bark Banklands, chartered the vessel to the respondents for a voyage from Philadelphia and New York to Rio de Janeiro; the respondent agreeing to furnish a cargo of merchandise, including lumber on deck, locomotives, and car materials. The provisions relevant to the present dispute are the following:

"It is agreed that the lay days shall be as follows (if not sooner dispatched), commencing from the time vessel is ready to receive cargo; '65 running days, Sundays excepted, for loading and discharging, * * * and that for each and every day's detention by default of the said [charterers] or agent, \$86.85 United States gold dollars per day, day by day, shall be paid by said [charterers] or agent. * * * The cargo to be received and delivered alongside within reach of the vessel's tackle, free of lighterage to vessel."

"Vessel to be consigned to charterers' agents at Rio, free of commission for doing the vessel's inward business."

The libelants' claim embraces items for lighterage and broker's commissions at Rio, and for demurrage. The charge for lighterage is admitted, and need not be further considered. A credit, however, must be allowed thereon for the money received by the master as a present from the owner of the lighters. The item for commissions is too large. The sum paid to the broker by the master was for doing all the ship's business at Rio, and not merely for doing her inward business. The respondents are only liable for one-half of this item.

The principal dispute is over the charge for demurrage. Upon this point it is necessary to take into account not only the clause concerning lay days, already quoted from the charter party, but also three supplemental agreements, one made when the charter was signed, and the other two made on February 18th and 19th, respectively.

These agreements are as follows: When the charter party was executed on January 5th, the respondents addressed a letter to the libelants' agent stating:

"We sign inclosed c/p with understanding * * *. Also for discharging at Rio as agreed by captain regarding the days for car material and locomotives, viz. he to serve notice on each lot, and lay days to count as one lot.

"Viz. 35 days locos,

"6 to 10 days cars,—to count as 35."

On February 18th, when the vessel had nearly finished taking her cargo on board, a second agreement was made, containing, *inter alia*, the following provision:

"We refer to your charter party dated December 28, 1894, in which it is stipulated that your vessel is to be loaded and discharged in 65 running days, Sundays excepted, and in consideration of your having indorsed on the bills of lading a clause allowing the consignees 30 running days, Sundays excepted, with a letter allowing 5 more, if required, for discharging the locomotives, and 6 like days for discharging car material, in all 41 days for these two lots of goods, I agree that if the number of lay days left after the completion of loading, over and above the 41, be not sufficient to discharge the other cargo, I will pay demurrage here as per charter for any and all days used over and above the 65 stipulated in charter."

The loading was finished on February 19th, and upon that day it was further agreed "that 23 running days have been used in loading the British bark *Banklands* under charter dated December 28, 1894, leaving 42 running days, Sundays excepted, for discharging the vessel at Rio de Janeiro."

Taking all the agreements together, I think the plain and natural meaning would be this: The lay days for loading and discharging the cargo were 65 running days, Sundays excepted. Of these 23 days had been consumed in loading. Of the 42 days remaining, 41 were to be allowed to the consignees of the locomotives and the car material in Rio, leaving to the ship, for unloading the general cargo, 1 day only, if the consignees took the full time permitted. If one day should prove insufficient, the respondents expressly agreed to pay demurrage "for any and all days used over and above the 65 stipulated in the charter." Of course, the consignees of the loco-

motives and of the car material were not obliged to use the full period allowed, and, if they unloaded this part of the cargo in less than 41 days, the ship would have at her disposal so much additional time for unloading the general cargo.

This, as I have said, seems to be the literal meaning of the various contracts. But the parties have treated the agreement of January 5th concerning notice as modifying the apparently contradictory agreement of February 18th, so as to allow for discharge of the locomotives and car material 35 days instead of 41. Accepting this construction, the final result appears to be that the ship would have at least 7 days to unload the general cargo, and might have more. In fact, she had 5 days more, making 12 in all; for the consignees of the locomotives, who were themselves to unload this part of the cargo, used only 30 days in so doing. The single question, therefore, to be considered is whether the libelants' claim for an additional 13 days should be allowed. Only 8 of these days were actually occupied in unloading cargo, the charge for the remaining 5 arising under the following circumstances: The ship arrived at Rio on Saturday, March 23d, and on the morning of that day the master called upon the respondents' agents in order to have his inward customs business attended to. This visit was in accordance with instructions received from the respondents before the ship sailed from New York, but by some oversight the agents had not been notified of the instructions, and declined to act. They recommended the captain to apply to another firm of brokers, to whom he had also received a letter of introduction from the respondents. At the office of this firm he found that the principal was absent, and could not be seen before Tuesday, Monday being a holiday, when no business would be done. On Tuesday the firm refused to enter the vessel, and the captain thereupon employed another broker, who finally undertook the ship's business. The vessel was entered at the custom house on the same day, and the next two days were employed by the master in making arrangements to unload the vessel by lighters, this course being necessary owing to the regulations of the port that were then in force. On Wednesday the consignees of the general cargo were notified that the ship was prepared to deliver, but, as such consignees are allowed from one to two days' notice by the custom of the port, actual delivery could not be begun before March 29th. These five days—March 23 to 28 inclusive, Sunday excepted—form part of the libelants' claim. I think three of them should be allowed. The respondents were at fault for failing to notify their agents at Rio of the instructions communicated to the captain at New York. If such instructions had been given, no reason is apparent why the ship could not have been entered on Saturday, and every arrangement made to begin discharging on Tuesday. The lay days would then have begun on Tuesday, March 26th, and I think they should now be counted from that date. Whether the eight additional days should be allowed, is the remaining question. Upon this point I think the respondents are required to prove that these days were not reasonably necessary to discharge the general cargo, taking into

account the conditions of the port, the facilities for doing the work, the quality of labor available, the manner in which the cargo was stowed, and the difficulties in getting at the merchandise in the hold. Without reviewing the facts, it is enough to say that I have come to the conclusion that the time occupied by the ship was not unreasonable, and that these eight days also constitute a proper claim. A decree may be drawn in accordance with this opinion, awarding costs also to the libellant.

SQUIRES v. PARKER et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 728.

1. COLLISION—STEAM AND SAIL VESSELS—PRESUMPTION OF FAULT.

Under navigation rules 20 and 23 (Rev. St. § 4233), which make it the duty of a steam vessel to keep out of the way of a sail vessel, when they are proceeding in such directions as to involve risk of collision, and the duty of the latter to keep her course, where a collision occurs between a steam and a sail vessel, and it is shown that the latter kept her course, the presumption arises that the steam vessel was in fault, and such presumption must form the basis of the judgment in a suit for the collision, unless it is made clearly to appear that the accident was inevitable.

2. SAME—RIGHT TO DISREGARD RULES.

While a steamship may disregard the statutory rules for the prevention of collision, where she cannot obey them without placing herself in serious peril she is bound to resort to all other practicable means before she is justified in doing so.

3. SAME.

A steamer has no right to call upon a sail vessel to change her course, where she can, by herself taking the proper course, avoid collision, and the failure of the sail vessel to obey such signal cannot be imputed to her as a fault, especially where it does not appear that it would have lessened the danger of collision.

Appeal from the District Court of the United States for the Eastern District of Michigan.

The libel in this case was filed for the purpose of recovering damages ensuing upon a collision which took place in the early morning of the 20th of September, 1888, between the libellant's schooner, the *Owasco*, and the claimant's steamship, the *Minneapolis*, just below the mouth of the Detroit river, where it opens into the lake. The *Owasco* had, during the night before, been brought down in a tow, of which she was the rearward vessel, by a tug. At the time when the tow passed out of the river into the waters below it encountered a heavy wind from the southwest, and the *Georgia*, a vessel ahead of the *Owasco*, grounded. The line from the *Owasco* was thrown off, and she thereupon set about getting her sails up, with the intention of proceeding on her voyage to Toledo, to which port she was bound. This was about 3 o'clock in the morning. The weather was clear, though it was yet dark. The schooner was well over to the east of the course ordinarily taken by vessels of deep draught in coming down out of the river, but was in water navigable for vessels of her class. She had started on her course on a port tack, and was heading W. by N., $\frac{1}{2}$ N., close to the wind. Her foresail, staysail, jib, and flying jib were set, and the crew were endeavoring to get up the mainsail. As she was moving across she saw, coming down the river, the steamer *Minneapolis*, with a barge in tow. The steamer was then on the easterly side of the channel, heading

nearly in the direction of the position of the Owasco, and about one-half mile distant from her. At about the same time the green light of the latter was seen from the steamer. The course and conduct of the vessels from this time on, as was gathered from the proof by this court on the appeal, were substantially as follows: The Owasco kept her course, though she was carried a little to leeward by the strong wind from the southwest. The captain of the steamer testified that he saw no change in the schooner's course. The steamer, intending to pass under the stern of the schooner, kept along down on the easterly side of the channel until about halfway to the point where she would cross the Owasco's course, and then touched bottom. Thereupon the steamer made a sharp turn to the westward, and went across the channel, a distance of about 550 yards, to the west side, blowing three passing signals of one blast on her way. On reaching the western bank, she grounded, and almost immediately after that the Owasco struck her at an angle of about 45 deg., the schooner having been turned a little to the right, just before the collision, to ease the blow. The schooner and the steamer were in sight of each other continuously after they were first sighted, respectively. Those on the Minneapolis assumed that the Owasco was bound up the river. Damage resulted from the collision to the schooner, and the libel is filed to recover therefor. Upon the hearing in the district court on pleadings and proofs, the libel was dismissed.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

The learned district judge did not file an opinion in disposing of this case, and we have not, therefore, the advantage of knowing on what grounds he rested his decision. Upon an attentive review of the record, we are constrained to a different conclusion. By rule 20, prescribed by section 4233 of the Revised Statutes, it is declared that "if two vessels, one of which is a sail vessel and the other a steam vessel, are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel"; and by rule 23 that, when one of two vessels is required to "keep out of her way, the other shall keep her course, subject to the qualifications of rule 24." Where, as here, a collision has occurred in the condition stated, between a sail vessel and a steam vessel, and the sail vessel is shown to have kept her course, a presumption at once arises that it resulted from the failure of the steamship to keep out of the way of the other. And this presumption must form the basis of the judgment, unless it shall be made clearly to appear that the accident was inevitable. The following among many other cases will show how constantly this presumption has been upheld and enforced: *The Carroll*, 8 Wall. 302, 19 L. Ed. 392; *The Fannie*, 11 Wall. 238, 20 L. Ed. 114; *The Scotia*, 14 Wall. 170, 20 L. Ed. 822; *Farr v. The Farnley* (D. C.) 1 Fed. 631; *The Hercules*, Id. 925; *The Badger State* (D. C.) 8 Fed. 526; *The Pennland* (D. C.) 23 Fed. 551; *The Seneca* (D. C.) 47 Fed. 87.

There does not appear to have been any fault on the part of the steamer directly contributing to the collision until the time when she touched bottom on the eastern side of the channel. Up to that time her purpose was to pass the schooner on her starboard hand, and her course, barring that she kept too near the edge of the channel, seems to have been correct, and according to her duty, and, if there

had been no radical departure from it, she would have passed fairly behind the schooner, and the accident would not have occurred. But at this time she took a sudden and inexplicable turn to starboard, and went directly across the bow of the schooner, and so brought on the collision, which was the probable result of her course. We say that the course of the steamer was inexplicable; for it was an unreasonable proceeding upon her own assumption that the schooner was intending to go up the river. She knew the duty of the schooner, and she saw that the latter was pursuing it, and there was fair opportunity for both to get on safely by proceeding in faithful observance of the rules. The water way was ample to the westward of the steamer's course, even if the schooner had been intending to do what the steamer assumed. The blowing of the signal to pass the steamer by the port side was an invitation to danger. Besides, as was said in the case of *MaGuire v. The Sylvan Glen* (D. C.) 2 Fed. 905, 910, where there was a similar situation, "the steamer had no right to call on the sailing vessel to give way or to change her course." It seems to us entirely clear that there was nothing in the circumstances approaching the character of an inevitable accident to relieve the steamer from blame. We concede that, as urged by counsel for the respondent, the governing rule is modified when the steamer cannot obey it without getting into serious peril and there is no other way to avoid it but to disregard the rule. *The Marguerite* (D. C.) 87 Fed. 953. But in such case it is obvious that the steamer is bound to resort to all other practicable means before she can be justified in violating the statutory regulation.

There is a suggestion in the brief of counsel for the appellees that the steamer was in a "crippled condition," and that on that account there was a duty on the part of the schooner to accommodate herself to the condition of the steamer. But there is nothing in the proofs to lead one to the conclusion that the steamer was not entirely manageable, and certainly there is nothing to show that it was easier for her to run her erratic course than it would have been to have followed on down the channel under the stern of the schooner. We have referred to the fact that those on the steamer supposed the schooner was going up the river, and have considered how the case would stand if it were admitted that the steamer had the right to take that for granted. But it would not be permissible to concede that the steamer had the right to assume as a certain fact that such was the intention of the schooner. Such was not, in fact, her intention. She was endeavoring to get on her way in the other direction, and was taking appropriate measures to do so. That which she was intending to do was equally as consistent with her conduct as that which was imputed to her, and in such a situation it was the duty of the steamer to delay final action until a clear understanding of the intention of the schooner could be had. *The Falcon*, 19 Wall. 75, 22 L. Ed. 98; *The Iron Chief*, 22 U. S. App. 473, 11 C. C. A. 196, 63 Fed. 289.

It is further urged that, if the proposition made by the signal blast of the steamer was not acceptable to the schooner, she "should have

displayed a danger signal (a torch)." But, as we have said, there was nothing in the circumstances to give the right to call the schooner from her course and duty, and it is more than doubtful if the acceptance of the proposition would not have been as full of danger as the adhering of the schooner to her course. Besides, all the conditions were evident, and the indications of peril, not only of the existing situation, but also of the course proposed, were as manifest as if the schooner had expressly declared it. Nor do we think that the giving of such a signal would have affected the conduct of the steamer. And in such circumstances there is no fault in omitting the super-serviceable act. *The Hercules* (D. C.) 1 Fed. 925; *The Pennland* (D. C.) 23 Fed. 551. These views lead to the conclusion that the decree of the district court should be reversed, with costs, and the case remanded, with directions to enter a decree for the libellant and an assessment of damages. It is so ordered.

THE WM. M. HOAG.

(District Court, D. Oregon. May 12, 1900.)

No. 4,474.

1. COLLISION—MOVING AND MOORED VESSEL.

A moving vessel must be held liable for the damages caused by collision with one moored, unless she overcomes the presumption of fault arising from the fact of such collision; and she cannot be exonerated although it appears that the negligence on her part was slight, and that the collision was more the result of accident than such fault.

2. SAME—STEAMER OVERLAPPING DOCK.

Where, by the prevailing custom, and as a matter of necessity, a steamer moored overlaps her own dock, she cannot be charged with fault on that account contributing to a collision.

3. SAME—DAMAGES RECOVERABLE—DEMURRAGE.

Demurrage is not recoverable in a suit for collision where the vessel, when injured, was at her dock, undergoing repairs, and her place had been taken by another, belonging to the same owners, and it does not appear that their business was in fact interrupted.

In Admiralty. This was a suit against the steamer Wm. M. Hoag to recover damages for collision.

C. A. Dolph, for libellant.

J. K. Weatherford, for defendant.

BELLINGER, District Judge. This is an action for damages to the steamer Lurline, resulting from a collision with the steamer Hoag while the former was lying at her dock at the foot of Taylor street, in this city. The accident occurred on the 8th of June of last year, upon the arrival of the Hoag from the upper Willamette river, a little after 5 o'clock in the afternoon. The Hoag's landing place is just below that of the Lurline, and it is claimed on behalf of the former that the Lurline extended past her own dock some distance along the space at which the Hoag was accustomed to land. In mak-

ing her own landing, the pilot on the Hoag undertook to pull his bell to give the signal for backing, and the bell pull broke in his hand. The captain of the Hoag testifies that after the break he caught the wire which was attached to the bell's stem, and gave a pull, but the latter was jammed in some way so that he could not pull it, and it slipped through his hand. Charles Kamm testifies to a conversation with the captain of the Hoag after the accident. In his testimony he says that Capt. Zumwalt, after the Hoag landed, came over to where Kamm was, and wished him to go on board the Hoag, and look at his broken bell pull in explanation of the manner in which the accident occurred. Kamm says: "Well, I went right over with him, and took a look at it. I saw the pull, that was broken about four inches below the handle. This pull is about seven inches in length, and I think it is about $\frac{3}{8}$ x $\frac{5}{8}$ in thickness and width. There was about three inches remaining still attached to the bell wire, which was standing from the face of the wheel. * * * As I went in there, why I reached over—I asked the captain—I says: 'What is the matter? Wouldn't your bell work?' And he says, 'The pull broke.' And I reached over, and grabbed the pull, like this, and pulled up twice. Then I pulled the third time, and rang three bells with it. 'Well,' I says, 'didn't you try it?' He says: 'My God, no. I never thought of it.'" Capt. Zumwalt, of the Hoag, was interrogated concerning this admission, and the question was asked him whether he said, "My God, I never thought of that." To this question Capt. Zumwalt answered, "I never did such a thing in my life, as I know of, anyway." The impression left upon my mind by this testimony, and by the manner of the witnesses on the stand, is that Capt. Zumwalt, in the excitement of the moment, did not think of attempting to pull the bell by the remaining stem and wire attached, and that the accident was due to this failure on his part. The singular qualification which he makes in his answer, "I never did such a thing in my life, as I know of, anyway," is suggestive of a hesitancy on his part to contradict the positive statement of Kamm, and it is not denied that when Kamm went on board the Hoag he was able to and did ring the Hoag's gong in the manner described by him. I am not disposed to attribute very great negligence to Capt. Zumwalt under the circumstances, situated as he was. In the excitement of the moment he did, probably, what many other men would have done in his situation. Nevertheless, in so far as there was negligence, the negligence was his. The rule is that, if the fact of a collision between a moored vessel and one moving be shown, the burden of proof is upon the one moving to show that it was free from fault, and it must repel the presumption of its negligence, or suffer the damages incurred. In its general features the case somewhat resembles those cases where neither party is in fault, and where, according to an ancient rule, sometimes formerly applied in some of the courts of this country, damages were divided between the two colliding vessels. Nevertheless, the case is not one where the cause of the collision is inscrutable. It is clear enough that this collision resulted from the failure of Capt. Zumwalt to ring his gong,

as I am satisfied he might have done if it had occurred to him that there was enough of the broken stem of his pull remaining—as there in fact was—to have enabled him to do so. I am of the opinion that the Lurline was not a trespasser upon the dock of the steamer Hoag. By the prevailing custom, and as a matter of necessity in these cases, steamers overlap their own docks.

The damages claimed by the Lurline amount to \$1,058.78. This includes \$325 demurrage. But demurrage cannot be allowed. The steamer Undine had taken the place of the Lurline upon the latter's route prior to the accident, and while the Lurline was undergoing repairs. The only effect of the accident, so far as the question of demurrage is concerned, was to continue the Undine where she was until the repairs upon the Lurline were completed; it being the intention, upon the return of the Lurline to her route, to place the Undine upon the dock for repairs. So that there was no interruption of the business of the Vancouver Transportation Company, and no appreciable loss from this cause, so far as appears. Joseph Paquet, by profession a boat builder, testifies that he could have repaired the Lurline for \$450, but that in doing so he would not have taken her out upon the ways, the expense of which in this case amounted to \$350. Without this item, the estimate of cost placed upon the repairs by Paquet is somewhat higher than the cost actually incurred in making the repairs by the Vancouver Transportation Company. Jacob Kamm testifies that the bill paid the Oregon Railway & Navigation Company in this behalf was a pretty stiff price, and I am doubtful as to whether the Hoag should be charged with this item, or at least with the whole of it. I have concluded to adopt Paquet's estimate, rather than award the amount actually paid by the transportation company, and I therefore find for the libellant in the sum of \$450 and costs.

FOREST OIL CO. v. CRAWFORD.

(Circuit Court of Appeals, Third Circuit. May 21, 1900.)

No. 32.

1. FEDERAL COURTS—JURISDICTION—INTERVENTION.

In a suit in equity in a federal court by one who has established his title in an action at law to an undivided interest in a tract of land, brought in his own behalf alone to recover his share of the value of oil alleged to have been unlawfully taken from the land by defendant, where the only ground of federal jurisdiction is diversity of citizenship, tenants in common with complainant, who are citizens of the same state as defendant, are not entitled to intervene as complainants for the recovery of their shares of such profits made by defendant on the ground that there is a fund in court in which they are interested; nor are they given the right to intervene for such purpose by the fact that a receiver has been appointed, on application of the complainant, to take charge of and operate oil wells on the land pending the suit.

2. SAME.

Where the complainant in such suit voluntarily assents to the unauthorized intervention of his co-tenants, and to the rendition of a joint judgment in favor of himself and such interveners, he cannot be relieved from the consequences of such association, and the entire suit fails for want of jurisdiction.

3. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—SUIT TO RECOVER MESNE PROFITS.

In the absence of allegation and proof that the defendant is causing or threatening injury to the property, a successful plaintiff in ejectment cannot maintain a suit in equity for the recovery of mesne profits; the remedy at law being adequate.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

J. McF. Carpenter, for appellant.

J. H. Beal, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a final decree of a circuit court sitting in equity, which was made on February 2, 1900. The only parties to the bill, which was filed on January 2, 1897, were Oliver P. Crawford, "a citizen of the state of Nevada," plaintiff, and the Forest Oil Company, "a corporation organized and existing under the laws of the state of Pennsylvania," defendant. It suggested no ground of jurisdiction in the circuit court, other than the diverse citizenship of the parties, and, without pausing to consider whether that fact (of which there is no question) was sufficiently pleaded, we may assume that it was. We have, then, a suit which originated in a bill filed by a citizen of one state against a citizen of another state, and respecting which the jurisdiction of the court was dependent solely upon this diversity of citizenship. After answer and replication, and the appointment of an examiner, viz. on April 27, 1897, the petition of several persons was presented, wherein it was prayed that the court would permit them to intervene in and become parties to the suit, and to appear therein as plaintiffs, in the same manner and with the like effect as if they had been named in the original bill,

and that upon the hearing there should be granted to them such relief as might be just, equitable, and proper. Thereafter two additional like petitions were presented by other petitioners. The filing of these petitions was allowed, but before any action was taken upon them, viz. on July 30, 1897, a receiver was appointed to take charge of, and operate for oil and gas purposes, the farm described in the bill. The original plaintiff never interposed any objection to the intervention petitions, and, so far as appears, he seems to have been content that the petitioners should all be joined with him as parties plaintiff; but on January 17, 1898, the defendant, the Forest Oil Company, answering these petitions, set up that several of the petitioners were residents of the state of Pennsylvania, and therefore had not the requisite citizenship to give the circuit court jurisdiction, and, as to others of them, that they were unknown to the defendant, and proof of their citizenship was demanded. This answer also alleged that five of the petitioners had, at the time their petition was filed, each brought a separate action of ejectment against the defendant for the recovery of an undivided one-thirteenth part of the land to which the controversy related, but that, although judgment had since been entered against the defendant in each of the said actions, no writ of habere facias possessionem had been issued on said judgments, nor had the plaintiffs in said actions in any other way obtained possession of the premises, or any part thereof, against the defendant. It further alleged that none of the petitioners were in possession of the land, and that the defendant was in possession thereof, except the one-thirteenth part thereof, which was in the possession of Oliver P. Crawford, the plaintiff named in the bill, by virtue of a writ of habere facias possessionem; and it further averred that the petitioners had a complete and adequate remedy at law, and that their purpose in seeking to be joined as plaintiffs was to recover from the defendant certain mesne profits to which they claimed they were entitled, but for recovery of which, the defendant was advised, the bill could not be maintained. After hearing upon these petitions and this answer, it was on March 12, 1898, ordered:

"That the said petitioners, and each of them, have leave, and leave is hereby granted to them, to interpose in this suit for their own interests and for the interests of those whom they represent, and to that end to appear in the suit in the same manner and with like effect as if they were named in the original bill as plaintiffs having, or claiming to have, an interest in the matter therein in controversy; this order to be without prejudice to the proceedings already had."

In making this order the court below said:

"A court having assumed jurisdiction, we are of opinion that the citizenship of parties interested in the subject-matter and seeking to intervene is not material. *Osborne v. Barge* (C. C.) 30 Fed. 806, and cases cited therein. Waiving for present purposes the question of the prior determination of their title being necessary, it is clear that all these petitioners have an interest in the fund in the possession of the court, and which forms part of the subject-matter of the bill. Their right to intervene, therefore, cannot be denied them. Moreover, Eliza Erskine, William Crawford, Nancy Reed, Matthew A. Crawford, and Mary A. Davis have established title to the real estate. The rule to intervene granted January 7, 1898, is made absolute."

We are unable to concur in this statement, or to sustain the order which was made in pursuance of it. We cannot agree that there was a fund in the possession of the court in which the petitioners had an interest, and which gave them a right to appear in the suit in the same manner and with like effect as if they had been named in the original bill as plaintiffs. The original bill had not been, and did not in any manner purport to have been, filed on their behalf. It contained nothing to suggest that they, or any of them, might become parties to it. It was in no sense a class bill, but was exclusively the bill of the plaintiff named. It prayed, it is true, that a receiver might be appointed to take charge of certain oil wells, and the oil produced therefrom, and also that an account should be taken of the value of the oil which it was alleged had been unlawfully taken by the defendant, and of the damage done by the defendant to the property; but nothing whatever was suggested with respect to the disposition to be ultimately made of the property passing into the hands of the receiver, or of the proceeds thereof, and, as to the accounting, what was asked for was that the defendant should be required to pay over to the complainant the amount found to be due to him,—not that there should be an accounting and distribution with and among all parties who might claim and be adjudged to be entitled. Waiving the question as to whether the receivership was rightfully instituted, we turn to the final decree of February 3, 1900, which confirmed the report of a master who had been appointed on April 28, 1898, to state an account in accordance with the interlocutory decree then made, which adjudged:

“That the plaintiff, Oliver P. Crawford, and the interveners are entitled to an accounting from the said defendant, the Forest Oil Company, for the value of the oil heretofore taken from the said farm by the Forest Oil Company, down to the date of the appointment of the receiver in this case, and also for the damage, if any, done to the said farm by the said defendant during the time of its occupation thereof, for the purposes of operating for and producing oil therefrom.”

Now, the report of the master upon which the decree appealed from was based did not state nor in any manner deal with a receiver's account, but purported to exhibit (as the order appointing the master had directed) “an accounting from the said defendant” (the Forest Oil Company itself) to Oliver P. Crawford and the interveners; and by the account reported it was made to appear that there was due by that company to them, and for distribution among them, the aggregate sum of \$39,372.27. Upon the coming in of this report the decree under review was made. The report was in all things confirmed, and the Forest Oil Company, defendant, was ordered to pay to the plaintiff and to the interveners the said sum of \$39,372.27, in conformity with a schedule of distribution which the master had prepared. Thus it appears that the interveners were awarded, not an interest in any fund which was in the possession of the court, but a money decree against the defendant. There was no fund, and consequently the assumed foundation of the supposed right of intervention did not exist, and the theory upon which it had been allowed, and upon which alone the final decree in favor of the interveners

could possibly have been warranted, was unsupported in point of fact.

We need not further discuss the case of the interveners, and that of the original plaintiff may be briefly disposed of. We cannot shut our eyes to the quite apparent fact that he voluntarily assented to the irregular proceedings by which his bill, even if otherwise maintainable, was made fatally defective by the misjoinder therein of others as his co-plaintiffs. He seems to have been entirely satisfied to have the interposing parties united with himself, to assert with them a joint claim, and to recover with them a joint judgment; and he should not, we think, be now relieved from the consequences of this association. *Railroad Co. v. Bell* (Sup. Ct.; Feb. 26, 1900; not yet officially reported) 20 Sup. Ct. 399, Adv. S. U. S. 399, 44 L. Ed. —. But, apart from this, and in view of the report of the master, as confirmed by the court, that there was not sufficient evidence to support a finding that the defendant improperly or negligently operated the property, and also that the farm in question appeared to be reasonably protected from being drained of its oil through wells from adjoining property, we are of opinion that, even as to the original plaintiff, there was no ground for maintaining the bill, inasmuch as, but for its allegations that such injuries to the property were occurring or threatened, it was simply a bill (as was the decree) for the recovery of mesne profits, and for the recovery of mesne profits the remedy at law is adequate.

It is not necessary to further consider the errors alleged, nor to refer to the several specifications with particularity. From what has been said it results that the decree of the circuit court must be reversed, and the case be remanded to that court, with direction to dismiss the bill, with costs to the defendant below, and against all the parties plaintiff, including the interveners; and it is so ordered.

MAXWELL v. WILMINGTON DENTAL MFG. CO.

(Circuit Court, D. Delaware. February 17, 1900.)

No. 145.

RECEIVERS—ADVANCES—PRIORITIES.

Where some of the creditors of a corporation in the hands of a receiver advance money for the purpose of compromising a demand against the company and take the notes of the company for the money so advanced without an order of court authorizing the borrowing of money for such purpose, and without any undertaking on the part of the receiver that they shall be preferred creditors to the extent of the amount advanced, they are not entitled by reason of such advance to any priority of payment out of the assets.

(Syllabus by the Court.)

In Equity.

Wm. S. Hilles, for petitioner.

Robert D. Maxwell and Jas. H. Hoffecker, for receiver.

BRADFORD, District Judge. The matter now for determination by the court is presented by exceptions to the master's report disallow-

ing the petition of Abram E. Frantz filed in the case of Robert D. Maxwell v. The Wilmington Dental Manufacturing Company, September 8, 1898. The dental company is a corporation of Delaware organized under the general incorporation act in 1882 for the manufacture of artificial teeth and dental goods and supplies. Its authorized capital stock amounted July 25, 1893, to \$500,000, divided into shares of the par value of \$100 each. A majority of the total capital stock had been issued for value and was outstanding at that time. On that day this court by virtue of proceedings had in the suit above mentioned adjudged the dental company insolvent and appointed as its receiver The Girard Life Insurance, Annuity and Trust Company of Philadelphia, a corporation of Pennsylvania. The trust company forthwith accepted the office of receiver, duly qualified July 27, 1893, and has from that time continued and now is such receiver. The decree appointing the receiver contains, among other things, the following clauses:

"Second. Said receiver shall forthwith enter upon and take possession of all and singular the said property, interests, things in action, effects, money, receipts, and earnings, privileges, franchises and immunities, and have and hold, use, operate, exercise, and enjoy the same, and operate and manage the manufactories of the defendant corporation with their appurtenances until further order of the court, obeying in all things the order of this court.

* * * * *

Sixth. The said receiver shall have power, until further order of the court, to enter into contracts for the product of the said manufactories of the corporation defendant, to manufacture such product, to make sales thereof, to make the necessary purchases, and to continue the operations until otherwise directed to the contrary."

On the petition of the receiver the late Judge Wales made a decretal order August 7, 1893, providing, among other things, that the receiver should have authority as follows:

"1. To co-operate with The Wilmington Dental Manufacturing Company, its president and directors, in securing renewals of the negotiable paper, promissory notes, bills of exchange, &c., on which said company is liable as maker or endorser, when and as the same shall mature, to the extent of paying interest thereon, in the form of discount on the renewals thereof, which said interest the said receivers shall pay out of their current earnings after providing for the payment of wages, supplies, purchases of goods, rent, taxes and interest on the mortgage bonds of the company.

2. To take up in whole or in part, as shall be deemed most advisable, such obligations of The Wilmington Dental Manufacturing Company as are secured by collateral of the said company, and thus redeem and possess themselves of such collateral, or as much as shall seem desirable, provided, however, that in such taking up and redemption the said receivers shall always obtain and get absolute and unincumbered possession of such collateral security to the full market value of the amount or amounts they shall pay for or on account of such securities and obligations.

3. To continue all branches of the business carried on by The Wilmington Dental Manufacturing Company at the time of the appointment of the receivers, as well the mercantile branch as the manufacturing branch, and for that purpose to pay the rents, as they shall become due, of the various premises used and that shall be used as branch stores or depots, to purchase all necessary supplies and goods for sale and re-sale, and to sell all goods, including those of its own manufacture and those that shall be bought for sale and re-sale, as well as all products and goods on hand, for cash or on such

credit, in no case to exceed six months, as to said receivers shall seem most advisable, and to allow such discount on the sale of all goods as has been the habit and custom of The Wilmington Dental Manufacturing Company in dealing with its creditors, so far as the same shall be deemed advisable by said receivers."

The petition on which the above order was made contained, among other things, the following:

"V. The assets of The Wilmington Dental Manufacturing Company, including bills and accounts receivable, amount to the best information and belief of your petitioners, at a very conservative appraisement made by The Wilmington Dental Manufacturing Company prior to the receivership to over six hundred thousand dollars (\$600,000), while the total liabilities, including the bonded indebtedness of forty one thousand six hundred dollars (\$41,600) secured by a mortgage, amounts to less than two hundred and twenty five thousand dollars (\$225,000), and your petitioners fully believe that there is no reasonable probability that every debt of The Wilmington Dental Manufacturing Company will not ultimately be paid in full if the business can be carried on in the usual way."

The dental company November 10, 1891, being then indebted to H. M. B. Bary in the sum of \$10,000 or more, made and delivered to him a promissory note for said sum bearing date that day and payable on demand to him or order. At the same time it caused to be delivered to Bary as collateral security for the payment of the note or other indebtedness of the dental company to him a certificate for 1,000 shares of its capital stock. This certificate had on the same day been issued without value to Henry C. Robinson, who was the treasurer of the dental company, in order that it should be used as such collateral, and was accordingly forthwith delivered to Bary together with a blank power of attorney for its transfer signed by Robinson. The note recited that the dental company had deposited with Bary "as collateral security for payment of this or any other liability or liabilities of ours to said H. M. B. Bary, due or to become due, or that may be hereafter contracted, the following property, viz.: one thousand shares of the capital stock of The Wilmington Dental Mfg. Co., the market value of which is now \$100,000, with the right on the part of H. M. B. Bary to repledge the securities above mentioned, or to substitute and exchange for the same other certificates of like tenor and amount," &c., and authorized sale of the same in case of default. The dental company paid Bary March 26, 1892, \$4,000 in reduction of the amount due on the note. At the time of the appointment of the receiver there was an indebtedness on the part of the dental company to Bary for platinum furnished by him to it for use in its business aggregating about \$40,000. This indebtedness was represented by sundry promissory notes of the dental company held by him including the note of November 10, 1891, above mentioned. As collateral security for the payment of this indebtedness, or of certain parts of it, Bary held at the time of the appointment of the receiver the stock certificate for 1,000 shares and certain platinum and bills receivable of the dental company. At that time the Union National Bank of Wilmington, another creditor of the dental company, also held certain platinum belonging to the latter company as collateral security. After

er the appointment of the receiver and before the making of the order of August 7, 1893, Bary brought suit in Philadelphia against the dental company to recover the amount of his claim and also threatened to sell the shares of stock for which he held the certificate as collateral. The petitioner, who owned 100 shares of the capital stock of the dental company, and sundry other of its stockholders, including Henry Tatnall, vice president of the receiver, desiring and contemplating a reorganization or rehabilitation of the company and an early termination of the receivership, and being apprehensive that continued litigation with Bary would defeat the end in view and prove detrimental to the interests of the stockholders and possibly of creditors, promptly sought to effect some compromise with Bary and thus remove what then seemed the principal, if not only, obstacle to the realization of their aim and expectation. With this end in view Tatnall and Bary during August and September, 1893, had a number of interviews in which an amicable adjustment of Bary's suit was discussed, with the result that Bary finally consented that on the receipt by him of a sum of money slightly in excess of \$10,000 on account of his claim he would discontinue his suit and surrender to the dental company the stock certificate for 1,000 shares with the power of attorney accompanying it. The receiver, not having the requisite amount of cash on hand, and no specific order having been made by the court directing or authorizing the receiver to borrow money or pledge the assets of the dental company for the purpose of raising money to pay to Bary the sum demanded by him as the condition on which he offered to discontinue his suit and surrender the stock certificate and power of attorney, the petitioner and several other stockholders raised the requisite amount, of which the petitioner advanced or contributed \$6,100. The money thus raised was deposited with The Girard Life Insurance, Annuity and Trust Company of Philadelphia and was by it through Tatnall paid to Bary, who surrendered the stock certificate and power of attorney to the dental company for cancellation, the same being canceled September 28, 1893, and subsequently discontinued his suit. For the moneys so received by the trust company it gave receipts to the several stockholders who had raised it, including the petitioner, according to the following form:

"Philadelphia, September 23, 1893.

Received from his check No. on for Dollars, to the order of The Girard Life Insurance, Annuity and Trust Company of Philadelphia, Trustee, to be held by the company as a contribution towards settlement with H. M. B. Bary in the purchase from him of notes of The Wilmington Dental Manufacturing Company to the amount of about ten thousand dollars and return by him of certificate for one thousand shares of stock of the said Wilmington Dental Manufacturing Company held by him with said notes, management of the transaction to be in the hands of Henry Tatnall, the notes purchased from the said H. M. B. Bary to be held for the benefit pro rata of the persons contributing to this fund.

The Girard Life Ins. Annuity & Trust Co.
of Philadelphia,

J. A. Harris, Jr.,
Asst. Treas."

On or about November 1, 1893, promissory notes of the dental company were made and delivered to the stockholders who had co-operated as above mentioned for the amounts they respectively had contributed or advanced. The note delivered to the petitioner bore date on that day and was for \$6,100 payable in three months. Tatnall sent it to the petitioner, together with a letter, as follows:

"November 1, 1893.

Dr. Abram E. Frantz,
Wilmington, Delaware.

Dear Sir,

I am glad to be able to inform you that the notes aggregating a trifle over \$10,000 of the Wilmington Dental Manufacturing Company which I purchased from Mr. H. M. B. Bary representing the syndicate which supplied the money for this purpose, have been withdrawn from his suit against the company. In fact I have negotiated with Mr. Bary for the withdrawal of his entire proceedings and his suit against the company was discontinued yesterday, he having entered into an amicable arrangement for the renewal of all his notes. I therefore am in position to send to you the note of the Dental Company for the amount you contributed to the syndicate and herewith enclose note No. 216, dated this date for three months, to your order for \$6100 and also the receiver's check to your order for \$131.14 being interest on the \$6100 from September 28 (the date I purchased the notes from Mr. Bary) to date and discount on the three months note.

Respectfully,
Henry Tatnall."

The notes thus given were renewed from time to time by the dental company. It having become evident that the assets of that company were insufficient to pay its creditors in full and the larger portion of the assets having been reduced to cash, the court, July 28, 1897, ordered that a dividend of 44 per cent. be made among the creditors. The receiver, treating the petitioner as a general or unsecured creditor, sent its check to him for his pro rata share of the dividend as follows:

First Distribution to creditors of The Wilmington Dental Manufactg Co. Payable in current bankable funds.	"No. 101	Philadelphia, 7/31 1897.
	The Girard Life Insurance, Annuity and Trust Company of Philadelphia.	
	Pay to the order of A. E. Frantz,	
	Twenty eight hundred and ten..... ⁰⁷ / ₁₀₀ Dollars.	
	The Girard Life Insurance, Annuity and Trust Company of Philadelphia, Receiver of the Wilmington Dental Manufacturing Company.	Distribution Account.
	A. A. Jackson, Treasurer for Receiver."	
	\$2810. ⁰⁷ / ₁₀₀	

The petitioner receipted for the amount of the check as follows:

"Received July 31st, 1897, from The Girard Life Insurance, Annuity and Trust Company of Philadelphia, Receiver of the Wilmington Dental Manufacturing Company, twenty eight hundred & ten ⁰⁷/₁₀₀ dollars in accordance with a decree of the Circuit Court of the United States for the District of Delaware, and being a dividend of 44 per cent. of my claim of \$6100 against said The Wilmington Dental Manufacturing Company together with interest upon the full amount of claim to January 1, 1897.

\$2684.00 Dividend
126.07 Interest.

\$2810.07

"A. E. Frantz."

No protest or objection was made by the petitioner to the form or contents of the above dividend check or receipt. The petitioner wrote to the trust company July 8, 1898, as follows:

"Wilmington, Del., July 8, 1898.

Girard Life Ins. An. & Tr. Co.

Gentlemen,

I hold a \$6100 (originally) note of the Wil. Dental Mfg. Co. Said note was sold to me by you with the guarantee of your company that it was & would be a preferred claim. I hold you liable for any deficiency which may occur in this transaction.

Very truly,
A. E. Frantz."

To this letter the petitioner received in August, 1898, the following reply from the counsel of the trust company:

"In re Wilmington Dental Mfg. Co. Receivership.

Philadelphia, August 23, 1898.

Dr. A. E. Frantz,
504 Delaware Avenue,
Wilmington, Del.

Dear Sir:

On my return to Phila. I have been consulted by Mr. Tatnall, the Vice President of The Girard Life Ins. Annuity & Trust Co. of Phila. as to your letter to the company of July 8th last, which letter he has handed to me. I am informed by Mr. Tatnall that neither he nor the Girard company, nor anyone on its behalf, gave you any guarantee or assurance, written or verbal, of any sort or kind, that the note of \$6100 mentioned in your letter was or would be a preferred claim. I have advised the company, therefore, that it is under no liability whatsoever to you in respect of said note and beg to notify you to that effect.

Truly yours,
Geo. Tucker Bispham."

The petitioner filed his petition September 8, 1898, averring in substance, among other things, that shortly after the making of the decretal order of August 7, 1893, the receiver through its vice president informed the petitioner together with certain other persons that it had obtained such order and that an arrangement could be made with Bary "upon the payment to him of the sum of ten thousand dollars to secure a surrender from him of the said stock so held as collateral," and requested the petitioner and such other persons to furnish to the receiver the said sum of ten thousand dollars for that purpose assuring him that "as this was to pay a claim against the company which the said receiver was authorized to pay by the order of the said court, any sum paid by your petitioner, together with said other persons, would be a preferred claim against the assets of the said receivership, and be paid by it out of the assets coming into its hands at the time of the winding up of the said receivership"; that the petitioner, "relying upon said statements of the said receiver in connection with the order of the said court paid to the said receiver the sum of sixty one hundred dollars"; and that the receiver sent to the petitioner notes of the dental company representing the moneys so paid by him. The prayers of the petition are as follows:

"1. That the said receiver may be directed to pay to your petitioner in full the balance due him as aforesaid before payments are made to the general creditors of the said receivership, or

2. That your petitioner may be authorized to institute suit in this court upon the bond of the said receiver to recover the said balance."

The receiver in its answer denies that it, its vice president, or any person by its authority in any manner at any time directly or indirectly stated to or agreed with the petitioner or any other person that "any sum contributed by the petitioner or any other person to pay a claim against the defendant company, or to purchase any of the Bary notes or to effect a settlement with said Bary, would be a preferred claim against the assets of the defendant company, or would be paid in full out of the assets coming into the hands of the respondent at the time of the winding up of the receivership." It is averred in the answer, on the contrary, among other things, that shortly after the appointment of the receiver it was advised by counsel that the stock certificate for 1,000 shares which had been delivered to Bary as collateral, as above mentioned, had been irregularly issued; that the receiver represented to the petitioner, to his brother J. F. Frantz, the president of the dental company, and to other stockholders, the advisability of effecting such a settlement with Bary as would secure the surrender by him of the certificate of stock and the discontinuance of his suit against the dental company for the reason that the further prosecution of the suit would be detrimental to the business of the dental company as authorized to be carried on by the order of August 7, 1893, and for the further reason that should Bary transfer the stock to an innocent purchaser for value great injury would result to the dental company and its stockholders; "it being then believed by the respondent and many of the stockholders of the defendant company that the assets of the defendant company were more than sufficient to pay its debts"; that the petitioner and others "formed themselves into a syndicate or pool for the purpose of raising by their individual subscriptions the sum necessary to settle with said Bary and release said stock, and constituted Henry Tatnall their agent to manage said transaction"; that "it was agreed by the members of said syndicate that The Girard Life Insurance, Annuity and Trust Company of Philadelphia should act as an individual trustee to receive the subscriptions for this purpose, and that the management of the transaction with said Bary looking to the payment of said notes and the return by said Bary of the said stock should be in the hands of Henry Tatnall individually"; that in accordance with this agreement the money which was contributed or advanced for the above purpose was paid to the trust company as trustee and not as receiver; that the money so paid to the trust company as trustee was by Tatnall paid to Bary; that Tatnall, having notified the several persons, including the petitioner, who had raised the requisite sum, of the settlement with Bary, sent to them notes of the dental company in the several amounts they had respectively contributed; and that a condition of the settlement with Bary was that the several persons who had raised the money paid to him should not have a preference out of the

assets in the hands of the receiver, but were to be in the position of general or unsecured creditors of the dental company. The petition and answer having been referred to the master, voluminous evidence was adduced before him, and he has filed his report recommending that the petition be dismissed without costs. The petitioner has filed numerous exceptions to the report, some relating to findings of fact and others to conclusions of law. It is unnecessary to consider them in detail. The receiver also has excepted to the report on the ground that the master erred in not awarding all the costs against the petitioner. The master has found that the receiver did not in fact agree with the petitioner that he should have a preference on account of his contribution or advance of \$6100 or in any manner undertake to create a preference therefor or authorize the president of the dental company or any other person to so agree or undertake. On this point a direct conflict is disclosed in the oral evidence. But the evidence taken as a whole sustains the conclusion of the master. The documentary as well as circumstantial evidence strongly corroborates Tatnall's testimony in this connection. He was and is the vice president of the receiver and its principal and controlling representative and agent in conducting the affairs of the receivership. He personally negotiated with Bary for his surrender of the certificate of stock and the discontinuance of his suit. His testimony is in full accord with the case as made in the answer of the receiver. He was in a position to know whether the receiver had in fact agreed or undertaken that the petitioner should have a preference. Some of the important facts tending to confirm his testimony may here be briefly adverted to. At and for many months after the date of the appointment of the receiver it was the general belief of those directly interested in the welfare of the dental company, shared as well by the petitioner as by the receiver, that the embarrassment of that company was only temporary; that its assets were far in excess of its liabilities; that the receivership was merely an expedient by which the company could be tided over its difficulties, and that no loss would result to its creditors or, indeed, to its stockholders or its business. The order of August 7, 1893, provided for co-operation by the receiver with the dental company in securing the renewal of negotiable paper on which the latter company was liable and for payment of discount on such renewal. The money contributed or advanced by the petitioner toward the settlement with Bary was paid to and receipted for by the trust company, not as receiver, but as trustee. The petitioner did not demand from the receiver a receiver's certificate or other obligation on its part for the repayment to him of the amount so paid to the trust company, but accepted without objection the promissory note of the dental company. This note was renewed from time to time, the last renewal note bearing date May 27, 1896. During the spring of that year, if not earlier, it became apparent that the affairs of the dental company were in such condition as to necessitate the winding up of its business and a distribution of its assets. An order was made June 6, 1896, that the receiver "shall within ninety days from the date hereof wind up the business of the said The Wilmington Dental Manufacturing Com-

pany and liquidate the claims of all the creditors of said company." An order had previously been made May 16, 1896, that the creditors of the dental company should be notified to prove and file their claims within sixty days. Pursuant to notice under the last mentioned order the petitioner filed his proof of claim July 3, 1896, but did not state or intimate in such proof that he was entitled to a preference. Prior to the order of July 28, 1897, for the dividend of forty four per cent., it was manifest that the assets of the dental company would prove insufficient to pay the claims of creditors in full. The petitioner receipted for his pro rata share without objection or suggestion that he was entitled to a preference or to be viewed in any other light than as a general or unsecured creditor. It was not until nearly a year thereafter, on July 8, 1898, that he claimed a preference over the unsecured creditors in his letter of that date to the trust company, which asserted preference was thereupon denied by that company. It is difficult, if not impossible, to reconcile the conduct of the petitioner with the existence of any original understanding on his part that he had or was to have a preference for the amount contributed or advanced by him. It is much more reasonable to conclude that believing in the sufficiency of the assets of the dental company to meet all its liabilities and anticipating an early termination of the receivership, after which the rehabilitated company would continue its extensive business, he, together with the other stockholders with whom he was co-operating to effect a compromise with Bary, relied, not on any preference out of the assets in the hands of the receiver, but on the supposed sufficiency of those assets to fully discharge all the liabilities of the company. Strongly corroborative of this view is the fact that the counsel of the receiver wrote September 20, 1893, to J. F. Frantz, brother of the petitioner, and president of the dental company, who took an active part in raising the money subsequently paid to Bary, as follows:

"In view of the present situation and after considering the subject thoroughly I would earnestly recommend the propriety of your going at once to Lancaster to see if your father cannot be induced to advance \$5,000. If the Bary notes are assigned to him and the pool, in consideration of \$10,000 being so raised, they will hold the obligations of the company, and are sure of being reimbursed their money with interest, unless it should transpire that the company's assets are not what they have been all along represented by its officials to be. I think it would be well to have Mr. Tatnall go with you if that can be so arranged."

The petitioner denies that he had knowledge of the contents of this letter and his brother states that he has no recollection of having received it. The fact, however, remains that the letter clearly disclosed an understanding on the part of the receiver in entire accord with its present position, and at variance with the contention of the petitioner. It is unnecessary further to pursue this branch of the case. I am satisfied with the finding of the master that the receiver did not in fact directly or indirectly agree or undertake that the petitioner should have a preference. But, if it be assumed that there was in fact such an agreement or understanding, the question arises whether it would have been operative to create a preference.

There are only two provisions in the orders of the court which can be conceived to lend any color to the contention by the petitioner that the receiver was authorized to prefer the former. One is to the effect that the receiver should have authority to continue the business of the dental company including the entering into contracts incident thereto, and the other to the effect that it should have authority to take up obligations of that company secured by collateral, thereby redeeming such collateral, provided the market value of the collateral so redeemed should at least be equal to the amount paid for or on account of such obligations. It is not necessary to go into the inquiry whether it would or would not have been competent for the court to authorize the receiver to borrow money or issue certificates or other obligations for the adjustment of the Bary suit and the surrender of the stock certificate. Assuming that the court had such power, the authority conferred on the receiver to continue the business of the dental company did not include the borrowing of money to secure the discontinuance of the Bary suit and the surrender of the stock certificate. The accomplishment of these ends was not included in the carrying on of the business as contemplated by the order. It was not involved in the purchase of supplies or materials for the purposes of the business nor within the implied powers of the receiver. The petitioner relies on the case of *Cake v. Mohun*, 164 U. S. 311, 17 Sup. Ct. 100, 41 L. Ed. 447, to support his contention. That case, however, is clearly distinguishable from this. There, it appeared that the receiver of "the furniture, equipments and other personal property" of a certain hotel had been expressly authorized by an order of court to "carry on and manage the business of keeping said hotel in substantially the same manner in which it has heretofore been carried on," and by a further order of court to "borrow, not to exceed \$8000, for the purpose of paying the rent and other necessary and urgent debts incurred or to be incurred on account of the running expenses of the hotel." The court said:

"Admitting to its fullest extent the general proposition laid down by this court in *Cowdrey v. Galveston, Houston, &c., Railroad*, 93 U. S. 352, that a receiver has no authority, as such, to continue and carry on the business of which he is appointed receiver, there is a discretion on the part of the court to permit this to be done temporarily when the interests of the parties seem to require it. Under such circumstances, the power of the receiver to incur obligations for supplies and materials incidental to the business follows as a necessary incident to the receivership. * * * In view of the fact that the closing of the hotel, even temporarily, would have soon become known to its patrons, and would probably have been attended by a serious loss to the good-will of the business, we think the court did not exceed its authority in directing the receiver to keep it open during the pendency of the suit."

But *Cake v. Mohun* differs from this case in that there was an express order for the borrowing of money and the money so borrowed was to be used in defraying the ordinary expenses of the business. That case is not an authority for the petitioner. The provision authorizing the redemption of collateral by the receiver must be read in the light of the settled doctrine touching the borrowing of money by receivers. While the order provides for the re-

redemption of collateral, it does not expressly authorize the borrowing of money for that purpose, and certainly did not by implication confer that power for the purpose of securing the surrender of stock of doubtful validity. But, as before stated, there was no undertaking in fact by the receiver to create a preference. It was nowhere provided in any order of the court that the payment of money by stockholders or others to secure the redemption of collateral should operate, without any agreement or undertaking on the part of the receiver to that effect, to create a preferred claim against the assets in the hands of the receiver, and especially if such payment should be made with the understanding that the persons making the same should rely, not on a preference, but on an unsecured claim. The facts of the case are such as to exclude any theory of a preference created or arising by or under implied contract or the equities disclosed. The petitioner as a stockholder had a substantial stake in the future welfare of the dental company and with others in like position believed that its welfare and entire solvency and an early termination of the receivership would be assured by an amicable adjustment with Bary. Entertaining this belief and having knowledge of the order of August 7, 1893, providing for the renewal of the notes of the dental company, he voluntarily paid \$6100 and virtually succeeded to that extent to the rights of Bary, aside from collateral. But the petitioner has been disappointed in his expectations. The stock of the dental company is practically valueless, and its unsecured creditors on payment of the final dividend will not in any event have received more than fifty five or sixty per cent. of their claims. The loss incurred by the petitioner through his mistaken confidence was not in any manner caused by the other creditors and cannot equitably be visited on them. Nor should leave be granted to the petitioner to bring suit on the receiver's bond. The receiver did not undertake or consent that the petitioner should be preferred. While receiving the same treatment as other unsecured creditors the petitioner has no just cause of complaint. The report of the master, so far as it recommends the dismissal of the petition, must be confirmed. The court, however, is unable to adopt the recommendation of the master as to costs. The petitioner has failed to sustain his contention. His petition should have been filed, if at all, much earlier than it was. The proceedings thereon have delayed the making of a final dividend and the termination of the receivership, whereby considerable loss has resulted to creditors. A decree will be made dismissing the petition with costs, save as to the master's fee; one half of such fee to be taxed as costs against the petitioner and the other against the receiver.

WITHROW LUMBER CO. v. GLASGOW INV. CO. et al.

BREED v. SAME.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1900.)

No. 310.

1. MECHANIC'S LIEN—PROCEEDINGS TO PERFECT—SUFFICIENCY OF STATEMENT FILED.

Under Code Va. § 2476, which requires a general contractor, in order to be entitled to a mechanic's lien, to file with the clerk "an account showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due," a statement merely claiming a lump sum for "labor performed and materials furnished" in the erection of certain buildings, "as per contract," is insufficient, and does not entitle the claimant to a lien, where the statement does not show that the work charged for was done as an entirety under a contract calling for the specific amount claimed.

2. SAME.

A mechanic's lien, being purely statutory, can only arise where all the requirements of the statute have been substantially complied with, and a provision requiring the filing of an itemized account of the work or materials for which the lien is claimed is a substantial one, which must be observed.

3. SAME—EFFECT OF APPOINTMENT OF RECEIVER.

The appointment of a receiver by a court for property upon which buildings are being erected under contract with the owner does not relieve the contractor from the necessity of complying with the statutory requirements in order to entitle him to a mechanic's lien thereon.

4. SAME—RIGHT TO LIEN IN EQUITY.

No lien for labor performed or materials furnished under a contract in the erection of buildings is given by the common law or in equity, and such lien can only be acquired by virtue of a statute.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

See 92 Fed. 760.

William Leigh, Wingfield Liggett, and Henry C. Riley, for appellant.

John Selden and Greenlee D. Letcher, for appellees.

Before SIMONTON, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

WADDILL, District Judge. This is an appeal from a decree of the circuit court of the United States for the Western district of Virginia, rendered on the 14th day of June, 1898, in the cause in equity pending in said court, wherein J. W. Breed, suing in his own behalf and that of other creditors of the Glasgow Investment Company, was complainant, and the said Glasgow Company and others were defendants. The appellant, the A. F. Withrow Lumber Company, filed its petition in said cause, setting up a mechanic's lien on two hotels, the Forest Inn and the Appledore, belonging to the defendant company, and the real controversy involved in this appeal is between the bondholders of the Glasgow Investment Company and the A. F. Withrow Lumber Company as to the validity of the said mechanic's lien. The lower court adjudged the mechanic's lien to be invalid by the decree

appealed from, and it is as to the correctness of this determination that we are to decide. The assignments of error present this question in various phases, and incidentally raise others, some of which are unnecessary to be decided and passed upon in the view we take of the case.

One of the questions presented is whether the land covered by the Forest Inn Hotel was as a matter of fact covered by the lien of the mortgage. Counsel admit that, if the mortgage covered the land on which the hotel was built, the lien of the bondholders would be ahead of the mechanic's lien as to the ground; but they insist that the grounds were excepted by a clause in the mortgage to the following effect:

"It is further to be understood that there are to be reserved from the operation of this deed all the drives, streets, and alleys on said land now laid off, or that may hereafter be indicated on any plot for the improvement of said property, and such lands as may be occupied by and used in connection with such hotel as may be built thereon, together with all approaches thereto."

The lower court held, and we think correctly, that the clause in the mortgage referred to the grounds to be covered by a new and more expensive hotel, the erection of which was in contemplation at the time of the execution of the mortgage, and had no reference to the hotel in controversy, which was being rebuilt by reason of the destruction by fire of one of the then-existing hotels. This seems to be manifest from the fair interpretation of the language of the exception, and it is quite apparent, from a consideration of all the facts and circumstances of the transaction, that the building against which the lien here is sought to be enforced was not in contemplation when the exception in the mortgage was made.

The validity of the mechanic's lien is specially assailed on the ground that the account filed as the basis of the lien is insufficient under the Virginia statute to create a lien. The account is as follows:

Millboro Depot, Va., August 25, 1892.

Glasgow Investment Company,

To A. F. Withrow Lumber Co.,

Contractors and Wholesale Lumber Dealers.

Terms.	To labor performed and materials furnished in the construction of a new hotel building at Natural Bridge, Va., May 15th, and labor performed and material furnished in repair-1892, to ing and improving the building known as "Appledore Hotel," as per contract.....	\$12,000 00
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The Virginia statute giving the mechanic's lien, declaring how it shall be perfected, and what defects shall not avail to defeat the lien, will be found in sections 2475, 2476, and 2478 of the Code of Virginia (Edition 1887, as amended). The appellants were general contractors and lumber dealers, and as such entitled to the benefit of the lien given by the statute, if properly claimed. To be entitled to secure the lien, they were required to follow the statute in perfecting the same, and any material departure therefrom was at their peril. It was a pure statutory right, and at least a substantial compliance with the statute was essential. Code, § 2476, *supra*, requires a general contractor, etc., in order to perfect his lien, to file in the clerk's office of

the county court of the county in which the property whereon the lien is sought is located—

"An account showing the amount and character of the work done, or materials furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant, or his agent, with a statement attached declaring his intention to claim the benefit of said lien, and giving a brief description of the property on which he claims the lien."

The terms of the statute are plain and unequivocal, so much so that no one need have doubt in knowing what to do to secure the benefits of the act. The words, "an account showing the amount and character of the work done, or materials furnished," were manifestly intended to make plain what it was the lien was claimed for; and the words following, "the prices charged therefor, the payments made, if any, and the balance due," were intended to get at the exact price charged for the particular item or items of work, and what had been paid on account thereof, together with the balance remaining due. This statute seems so plain, and its purpose so manifest, that we should, without the aid of authority bearing thereon, find but little difficulty in arriving at a conclusion as to its meaning; but, when considered in the light of the decisions of the supreme court of appeals of Virginia, the highest court of the state, we are doubly convinced as to the correctness of our views.

In *Shackleford v. Beck*, 80 Va. 573-577, Fauntleroy, J., speaking for the court, said:

"The language of the statute is clear, simple, and unambiguous, and whatever may have been the reason for requiring the contractor to file his account for recordation, it has prescribed in express, plain, and unmistakable language, the way—and the only way—in which the purpose it had in view can be effected. There was no such lien as that provided for by this statute known to the common law or to the courts of equity. It is purely a creation of the statute, and it must be availed of, if at all, upon the terms and conditions which the statute prescribes. The appellant, in his petition for a supersedeas, says: 'The statute requires a "true" account,—not an "itemized" account; and an account may be true, though it be not itemized.' It is difficult to conceive how, without items, there can be an account, which is an itemized or detailed statement of the transactions to which it relates. But the difficulty in this case is not alone that it is not an itemized account, but that it is not an account of the things required by the statute,—of work done and material furnished."

In the recent case of *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875, the decision, as in *Shackleford v. Beck*, supra, turned solely upon the sufficiency of the account. Three separate accounts were involved, each quite as full and comprehensive as the one filed in this case. Indeed, there is a striking similarity between the accounts. In that case *Gilman & Son's* account read, "To materials furnished and work done in plastering the following houses," etc.; *Thompson's* account read, "To materials furnished and work done on granolithic work at the following houses," etc.; and *Billings' account* was, "To furnishing and hauling sand and hauling brick for the construction and building of houses Nos.," etc. In this case the account reads, "To labor performed and materials furnished in the construction of a new hotel at * * *, and labor performed and materials furnished in repairing and improving the building known as the 'Appledore Hotel,' as per contract."

Judge Buchanan, speaking for the supreme court in the Gilman-Ryan Case (page 497, 95 Va., and page 876, 28 S. E.), said:

"No one of the three accounts filed conforms to the provisions of the statute. In each of them there is an omission or failure to state the amount of work done and materials furnished and the prices charged therefor. This defect is not an inaccuracy in the account, which the statute declares shall not invalidate the lien, but an entire failure to state in the account what the statute, for wise reasons it must be presumed, requires shall be stated."

And at page 499, 95 Va., and page 877, 28 S. E., the learned judge further said:

"The petition of Billings, agent, who was a subcontractor, does not show that there was anything in his contract which relieved him from the necessity of filing an account which showed the amount of sand furnished and hauled by him, and the prices charged therefor, or which tends in any way to show that his contract brought him within the ruling of Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888. The accounts filed not being such as the law requires, the appellants did not acquire liens upon the houses and lots for the price of the materials furnished and the work done by them. The demurrers were therefore properly sustained, and the proceedings dismissed."

The appellant insists that the account here is sufficient, and relies in support of its position upon the case of Taylor v. Netherwood, supra. This was precisely the contention made in the case of Gilman v. Ryan, supra, and in considering that question, referring to the Taylor-Netherwood Case, Judge Buchanan said:

"It was held in that case, in accordance with the current of authority, that where the contractor undertook to furnish materials and do the work as an entirety for a specific amount, and this is so set out in the account filed, it is sufficient. But in none of these accounts does it appear that the materials furnished and the work done were contracted for as an entirety for a specific amount."

The same condition exists as to this account. It cannot be seriously contended that the face of the account shows that the work charged for was done as an entirety under a contract for a specific amount. Indeed, had the account been so made out, it would not have been true as a matter of fact. The contract in this case was to do certain specific work at the fixed price of \$17,945.42, to be paid for as follows: \$5,981.80 when the house is all inclosed, \$5,981.80 when the house is all lathed, and \$5,981.82 when the building is completed and the work accepted,—payments of each installment to be made upon the certificate of the architects in charge of the work that the work was done in strict accordance with the drawings and specifications, and that they considered the payment properly due. It is needless to say that a charge of a lump sum of \$12,000 for work done on account of this contract of \$17,945.42, without items showing either the amount and character of the work done, or of the materials furnished, or the prices charged, or what payments, if any, had been made on account of the work done, and the balance due on account thereof, is a compliance with neither the letter nor spirit of the act giving the lien. Every reason for properly itemizing an account generally exists in a case where the lien is claimed, not for the specific work contracted for at the price named, but for a part of the work done on account of and under such contract. The necessity for a substantial compliance

with the statute creating the lien is everywhere maintained, as it is purely a creation of the statute, and can only be availed of in the manner and upon the conditions specified in the act giving the lien, and the reason for requiring a particularization of the account is manifest, as it affects the rights of innocent persons, and the imposition upon the claimant of the lien is reasonable, as it makes him furnish information peculiarly within his own possession. *Phil. Mech. Liens* (3d Ed.) § 342; *Boisot, Mech. Liens*, §§ 37, 440; *Trustees v. Davis*, 85 Va. 193, 194, 7 S. E. 245; *Gilman v. Ryan*, 95 Va. 497, 28 S. E. 875; *Davis v. Alvard*, 94 U. S. 545, 547, 549, 24 L. Ed. 283.

This court, in the case of *Liberty Perpetual Building & Loan Co. v. M. A. Furbush & Son Mach. Co.*, 26 C. C. A. 38, 80 Fed. 631, had under consideration the question of the sufficiency of the memorandum filed in the clerk's office seeking to claim a labor lien under sections 2485, 2486, of the same chapter of the Code of Virginia, and in that case a strict compliance with the terms of the statute was held necessary. Judge Goff, in speaking for the court, said:

"A party desiring to comply with the requirements of the sections of the Virginia Code that we have been considering can easily do it, as the information called for is peculiarly within the knowledge of him who is seeking thereby to create a lien on the property of another, and, if he fails to do so, it is likely for the reason that the full statement of the facts would injure his claim, or because of either ignorance or inadvertence, neither of which will be received as an excuse, especially in cases where the rights of others are affected. The suggestion that the record, as it was made in the clerk's office, was sufficient to put any one who examined it on his guard, and that it was such notice as would induce a prudent business man to make full inquiry, is, we think, without force. No one is required to go outside of the clerk's office for the information he is told by the law he can find therein, nor expected to control his conduct by the conflicting statements made by the parties to the record; the one assenting and the other denying, as their respective interests may suggest. The only question in such cases is, has the party claiming the lien observed the commands of the law, and been obedient to its requirements?"

The assignments of error present two other questions necessary for the determination of the court: First, that the appointment by the court of a receiver of the property of the Glasgow Investment Company, with whom appellant contracted to build one and improve the other of the two hotels in question, during the pendency of the work, made it unnecessary to file a mechanic's lien in order to secure the benefits of the statute; and, secondly, that appellant was entitled to an equitable lien on the buildings in question for the labor performed by it, and the materials furnished in the construction of the work, and, therefore, need not have availed itself of the statutory lien.

We are not furnished with any adjudicated case or referred to any text writer favoring the first contention, and do not believe that it can be supported by either reason or authority. The appointment of a receiver does not alter or affect the rights of parties to property, or give to or take from them any liens they have acquired or are entitled to. *High, Rec.* § 5; *Ellis v. Railroad Co.*, 107 Mass. 1; *Beverley v. Brooke*, 4 Grat. 187; *Kneeland v. Trust Co.*, 136 U. S. 89-97, 10 Sup. Ct. 950, 34 L. Ed. 379; *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223-236, 10 Sup. Ct. 1013, 34 L. Ed. 341; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

Authority to support the contention for an equitable lien is equally lacking. The contract to do the work and furnish the materials created within itself no lien (Phil. Mech. Liens [2d Ed.] § 223), and the only authority found for the lien is contained in the sections of the Code of Virginia supra; and, in order to entitle one to the lien at all, the same must be perfected according to the statute. *Shackleford v. Beck*, 80 Va. 577; *Canal Co. v. Gordon*, 6 Wall. 561, 571, 18 L. Ed. 894. Mr. Justice Swayne at page 571, 6 Wall., and page 896, 18 L. Ed., said:

"Liens of this kind were unknown to the common-law and equity jurisdiction both of England and of this country. They were clearly defined and regulated in the civil law. Dom. Civil Law, §§ 1742, 1744. Where they exist in this country, they are the creatures of local legislation. They are governed in everything by the statutes under which they arise."

In *Van Stone v. Manufacturing Co.*, 142 U. S. 128-136, 12 Sup. Ct. 181, 35 L. Ed. 961, the supreme court, speaking through Mr. Justice Lamar (page 136, 142 U. S., page 183, 12 Sup. Ct., and page 964, 35 L. Ed.), said:

"This lien is a creature of the statute, and was not recognized at common law."

Continuing, the court says:

"It may be defined to be a claim created by law for the purpose of insuring a priority of payment of the price and value of the work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon. 15 Am. & Eng. Enc. Law, 5. Now it is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man or laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of or with reference to the statute."

Reference is made in support of the latter contention by appellant to the case of *Bank v. Dashiell*, 25 Grat. 616. A careful analysis of that decision will reveal nothing inconsistent with the views herein expressed. It was decided upon the then-existing statute, and, we think, has no practical bearing upon the vital question at issue here. In a subsequent case in the supreme court of appeals of Virginia (*Boston v. Railroad Co.*, 76 Va. 180, 186), the question of the existence of an equitable lien was raised, but not passed upon, and it is worthy of mention that the case of *Bank v. Dashiell*, supra, though fresh in the memory of the court, was neither relied upon nor referred to as maintaining the doctrine here claimed for it.

The other questions raised by counsel for the appellant have been examined and considered, but we have not thought it necessary to comment on others than those above reviewed. Upon the whole case we are of the opinion that the decree of the lower court must be affirmed.

MACK v. CONSOLIDATED WATER-POWER CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 16, 1900.)

No. 609.

CANCELLATION OF DEED—FAILURE OF CONSIDERATION—AGREEMENT TO FORM CORPORATION.

Complainant and others, owners of lands, riparian rights, and interests in the water power at two points on the Wisconsin river, joined in an agreement for the express purpose of consolidating all interests in such water power, and improving the same upon "one general plan, with reference to the value of the whole water power," by a corporation to be formed for that purpose, to which each subscriber agreed to convey his property, receiving stock in the corporation therefor in accordance with the value fixed upon the property by arbitrators. The corporation was formed, but certain of the signers refused to accept the award of the arbitrators, or to convey their property. Complainant and others made conveyances, and a suit was brought by the corporation to compel conveyance by the remaining subscribers, which, however, was dismissed, and not renewed, and no further steps were taken towards carrying out the purpose for which the agreement was made. *Held*, that a bill alleging such facts,—that the original agreement was made in the mistaken belief that all interests in the water power were owned by the subscribers; that the conveyance by complainant was made in the hope that it might induce similar conveyances by others, and with the understanding that it should not vest the corporation with ownership of the property until such other conveyances were obtained; and that the original purpose of the corporation could not be carried out, and had practically been abandoned,—stated facts which entitled the complainant in equity to a cancellation of his conveyance.

Jenkins, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

The appellant, W. E. Mack, sought by this suit to obtain a decree for the cancellation of a deed of conveyance of real estate executed jointly by himself and C. A. Spencer on February 28, 1895, to the Consolidated Water-Power Company, one of the appellees. The deed was executed in pursuance of the following contract, entered into at the time it bears date by the parties whose names are subscribed thereto, of which a copy is set out in the body of the bill:

"The undersigned, owners of lands and riparian rights and water powers at Grand Rapids and Centralia, Wood county, Wisconsin, feeling that the water power at said cities would be of more value if consolidated and improved upon one general plan with reference to the value of the whole water power, do hereby, for the purpose of consolidation, agree with each other, and each in consideration of the agreement of the other, that we will convey all our interest in the said lands, riparian rights, and water power, including the dams and mills, mill flumes, mill machinery, and personal property now in use in connection with said mills and said mill machinery, except merchant stock, teams, sleighs, and wagons, to a corporation to be formed and to be called Consolidated Water-Power Company, and to take in consideration of such conveyance and for the same such share in the stock of said corporation as shall be apportioned to each of us by a board of arbitrators on account of our respective interests and ownership in said lands, riparian rights, and water power, and other property above specified. The lands, riparian rights, and water power, mills, machinery, and property claimed to be held by each of the undersigned, and to which properties this agreement has reference, are particularly described in a schedule, marked 'A,' against the names of the respective claimants, together with all the incumbrances to which same is subject; and this agreement has no reference to any other

property owned by the subscribers hereto than such as is referred to as the property of such subscribers in such schedule. Such board of arbitrators shall consist of three (3) arbitrators, Peter R. Thom, T. W. Orbison, of Appleton, Wisconsin, and Frank T. Russell, of Neenah, Wisconsin. We agree to abide by the decision of said board of arbitrators, and to take such amount of stock in said corporation as such board shall award to each of us on account of our conveyance of our interest in said properties. It is further understood and agreed that each of us shall use his respective property free of rent, by paying taxes on the same from the date of this agreement until thirty (30) days after notice that the corporation so to be formed wishes to take possession of said property for the purpose of improving the same, but not exceeding twelve (12) months from date of the award of the arbitrators. Each of the parties hereto hereby agrees that all of his stock in said corporation to be formed shall be pledged to said corporation to be formed, and that such corporation shall have a lien upon the same as security for the payment and discharge of all liens, mortgages, and incumbrances of any kind upon the property of such party subscribing hereto, if any. The conveyance to be made in execution of this agreement shall be made when called for by the company to be formed, and shall be by deeds of warranty, except as to incumbrances therein specified, with abstract of title thereto; and the arbitrators shall determine what liens or incumbrances or mortgages exist against property of any of the parties to this agreement, to secure the satisfaction and discharge of which the stock of the respective owners shall be pledged to the company. The said board of arbitrators shall place a separate valuation upon the water wheels, shafting, machinery, and mill buildings and personal property of each of the undersigned, not including the foundation. Upon giving twenty (20) days' notice of his option after the publication of the award of the arbitrators herein, each of the undersigned who has, upon his land or estate sold, personal property or water wheels, shafting, machinery, or mill buildings shall have the option to keep such personal property, water wheels, shafting, machinery, and mill buildings in the aggregate, and to remove the same from the land sold, providing the same be removed upon sixty (60) days' notice from the company, unless otherwise agreed upon with said company; the same to be kept by him at the valuation fixed upon the same by the board of arbitrators. Said board of arbitrators shall place a separate valuation upon the water wheels, shafting, and machinery appurtenant to and forming part of the electric light plant of the Wisconsin Wood-Pulp Company, and also upon the water wheels, shafting, and machinery appurtenant to and forming part of the electric light plant of Nash Brothers; and the said Wisconsin Wood-Pulp Company and the said Nash Brothers, or either of them, shall have the right to exercise their option to retain or remove their electric light plant, machinery, wheels, shafting, and buildings, independently of their other movable property. The business of the corporation to be formed and to be called Consolidated Water-Power Company shall be limited and confined to the purchase and improvement of water power and lands, the renting and sale of the same, and the sale of the personal property which it may receive under this agreement, and not for the purpose of manufacturing in any of its branches. The expense of the arbitration, making of surveys, and all other expenses incidental to the consolidation of said water power, including fees of attorneys employed by them, shall be paid by the said Consolidated Water-Power Company, except that the respective parties hereto shall, at their own expense, furnish to said arbitrators abstracts of title to their respective properties, and shall also furnish them, free of charge, all such maps and surveys of their respective properties as they now have. Such arbitrators are hereby authorized to cause such other or further surveys to be made as, in their judgment, may be proper or necessary, and to employ hydraulic engineers and such other experts as they may deem advisable, and also to employ attorneys, and procure their opinion on any question that may arise in the course of said arbitration, and to do any and all other things necessary or proper to fully and fairly carry out the purposes of such arbitration. This agreement shall not be binding upon either or any of the parties thereto until it is signed and executed by the following named persons and corporations, to wit, W. E. Mack and C. A. Spencer, Thomas T. Nash and

John L. Nash, B. G. Chandos and B. G. Chandos as administrator of the estate of Marion L. Bensley, deceased, the Wisconsin Wood-Pulp Company, the Grand Rapids Water-Power Company, the Pioneer Wood-Pulp Company, F. MacKinnon, and C. A. Spencer, and when so signed and executed the same shall be binding upon each and every of said parties, and their respective legal representatives, heirs, successors, and assigns. In witness whereof said parties have hereunto set their hands and seals, and said corporations have each caused these presents to be signed by their respective presidents and secretaries thereunto duly authorized, and affixed their respective corporate seals hereto, this 16th day of July, A. D. 1894.

"W. E. Mack. C. A. Spencer. T. E. Nash. John L. Nash. B. G. Chandos. B. G. Chandos, as Administrator M. L. Bensley Estate. The Wisconsin Wood-Pulp Company. Attest: W. E. Mack, Sec'y. C. A. Spencer, Pres. Grand Rapids Water-Power Company. Attest: C. A. Spencer, Sec'y. F. MacKinnon, Pres. Pioneer Wood-Pulp Co., by Geo. E. Hoskinson, Pres. F. MacKinnon. C. A. Spencer."

Opposite each signature is a scroll seal. A notary's certificate of acknowledgment is attached. The Consolidated Water-Power Company, which will be called here the "Power Company," and J. D. Witter, who had succeeded to the interest of Spencer, each demurred to the bill for want of merits, for lack of parties, and for failure to show a compliance with equity rule 94. The other defendants F. MacKinnon, the Pioneer Wood-Pulp Company, and the Grand Rapids Water-Power Company each answered, admitting the allegations of the bill, conceding the complainant's right to the relief prayed for, and disavowing fault or blame for the wrongs alleged. The court sustained the demurrer, and, the time allowed for amendment having passed, entered a decree that the bill be dismissed. Besides formal facts, the citizenship and residence of the parties, the lawful organization of the corporations named, the essential averments of the bill, in substance, are: That the agreement set out was executed, as it bears date, on July 16, 1894. That the purpose of the subscribers was to consolidate under one management all the water power of the Wisconsin river at the two cities named. That during the negotiations which led to the execution of the agreement by reason of the mutual representations of the subscribers it became their mutual understanding and belief that they severally owned all of the shores, riparian rights, and privileges necessary to the carrying out of the project, and under that belief signed the agreement, each accepting the statement of every other that he owned the property scheduled in his name. That they signed the proposition under a mutual mistake of fact, and would not have signed if they had known the truth. That the complainant would not have signed had he known that the signers did not own in the aggregate the riparian rights and privileges necessary to the carrying out of the scheme. That in truth the scheme proposed could not be accomplished without the co-operation of other owners of lands abutting on the rapids, and of islands in the river, and of riparian rights and privileges in such lands and islands, and in the waters and water power of the river; yet, trusting that something would happen to remove difficulties, they improvidently, carelessly, and under gross mistake of fact, signed the open offer, assuming that, if the project should turn out to be impracticable, no harm to themselves could result from the signing. That before signing it was understood and agreed that the consolidation of the ownership of all the riparian rights, water powers, and privileges within certain limits on both sides of the river and of all its channels was absolutely essential to the carrying out of the design of the parties, and that whatever they should afterwards do they would do with such design in view; and that when they signed the agreement it should be upon consideration that all the rights and powers necessary to the scheme were owned by the parties to the agreement. That the agreement was signed because of other mistakes of fact, in that many of the subscribers inserted in their schedules descriptions of property which was indispensable to the project, but which they did not own, a list of which is set out. That on July 28, 1894, six individuals named, five of whom, including Thomas E. and John L. Nash, were subscribers to the agreement, and the sixth a signer thereof only as representing a corporate subscriber, entered into articles which two days later were duly recorded, and a certified copy thereof filed in the office of the

secretary of state of Wisconsin, for the formation of a corporation, called the Consolidated Water-Power Company, and designed to carry out the scheme of the agreement; but nothing further was done to complete the organization before February 20, 1895. That meanwhile the Power Company, so far organized, never considered, acted upon, or had submitted to it the agreement of the parties. That nevertheless the arbitrators named, without having been agreed upon by the Water-Power Company, and without giving notice of time and place, without taking evidence, and without hearing any of the parties interested, proceeded arbitrarily and without jurisdiction to make, and on February 13, 1895, to promulgate, an award, a copy of which is set out in the bill. That the award was inequitable, unjust, and also unlawful and void for reasons stated. That at a meeting of the signers of the articles of incorporation on February 20, 1895, Thomas E. and John L. Nash, signers also of the agreement, gave notice to those present that they were dissatisfied with and would not accept the award, and would not take part in any meeting of the signers of the articles of incorporation. That thereupon, after the withdrawal of the two named from the meeting, the other signers of the articles of incorporation held a meeting, and attempted to ratify the award, and to accept the original contract, by passing a resolution to that effect. That at that time no stock of the power company had been subscribed for or issued, and none was subscribed for until the 2d day of March following. That the complainant was willing to accept the award, provided all the others would do likewise, and on February 28, 1895, joined with C. A. Spencer in executing to the power company the deed, which is made an exhibit, "with the exception that, if the other parties, or some of them, should refuse or be unable to convey as proposed by them in said open offer, or if for any other reason it should transpire that the defendant the Consolidated Water-Power Company should be unable to carry out said project of consolidation, his property would be reconveyed." The deed as set out purports to be made "in consideration of the sum of two hundred and fifty-six shares of the stock of the Consolidated Water-Power Company," receipt whereof is acknowledged, and covenants against all incumbrances "except such liens and incumbrances as are mentioned in the award of the arbitrators dated February 13, 1895, pursuant to which this deed is made, and which liens and incumbrances said first party (the grantor) agrees to pay and discharge." That the award was never ratified by the Nashes, or by Chandos as administrator of the estate of Bensley, nor did they or either of them ever subscribe for stock, or convey to the Power Company any of the property scheduled in their respective names; and that the conveyances and subscriptions for stock purporting to be made by the Wisconsin Wood-Pulp Company, Grand Rapids Water-Power Company, and Pioneer Wood-Pulp Company, were each executed by officers of the company without authority, unless merely as officers they had such authority. That on March 2, 1895, the complainant, C. A. Spencer, B. G. Chandos, and F. MacKinnon, for themselves and the estate or corporations which they respectively represented, subscribed for stock of the Power Company to the number of 1,560 shares. That the subscriptions were entered on the records of the company without condition, but in fact each and all were made on condition that they were to take effect and be in force only from the time when all the persons and corporations whose names were signed to the open offer should subscribe for their shares of stock, as provided for in that offer, and on the further conditions that the subscriptions should not be binding upon any of the parties until all the subscribers to the offer should have conveyed their property to the Power Company as proposed in that offer, and that the stock subscribed should be considered as paid for by such conveyances, if validly executed according to the terms of the offer, but not unless they were all so made, and not until they were all made. That the conveyances executed to the company by the complainant and others, copies of which are made exhibits, though signed, sealed, and acknowledged on February 28, 1895, were not delivered before March 16, 1895, when they were placed on record by the grantors, or by some one assuming to act for the Power Company. That before the execution of the conveyance in which he joined the complainant was the owner of the undivided one-half of the property therein described, and, as he believes, is still the equitable owner thereof. That the Power Company has never had authority or right to accept the title

purporting to be conveyed by any of said deeds except in trust until all the signers of the agreement should make conveyances as proposed; and that, being unable to procure conveyances from all the parties, as well as on the other grounds set forth, the company now has no duty to perform in connection with the trust except to reconvey the title to the grantors upon their request. That on June 16, 1895, an action was brought in the name of the Power Company as plaintiff against the Nashes to compel conveyances by them. That at the trial, on issues duly joined, the plaintiff admitted its inability to prove that it had obtained or could obtain the title to such property as was necessary to carry out the design and purpose of the parties to the agreement, and admitted that without such proof it could not obtain the relief sought in the action, and thereupon, on October 30, 1895, judgment of nonsuit was entered against it; and it has not since brought any action against the Nashes, or either of them, for the same cause. That the plaintiff's belief is that it does not intend to bring any such action. That the Nashes do not intend to convey their properties; and that none of the defendants intend to bring such action, but, on the contrary, all concede that such an action could not be maintained. That it is yet a fact that the design of the parties, of the incorporation, and of all that has been done, including the execution of the deeds, would totally fail of accomplishment on account of the inability of the company to obtain the Nash properties. That Nels Johnson and J. D. Witter have acquired control of a majority of the stock of the Power Company, and are endeavoring to force the complainant and others, who have conveyed their property, to abandon the same, or accept an inadequate consideration therefor. That the complainant has demanded of the Power Company a reconveyance to him of his property so conveyed, but the company, under the control of Johnson and Witter, has always refused to reconvey.

T. C. Ryan, for appellant.

George L. Williams and Burr W. Jones, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The substance of the case is that the appellant and others, who subscribed the agreement of July 16, 1894, entered into a scheme for the consolidation of the water power of the Wisconsin river at the cities of Grand Rapids and Centralia under the single ownership and control of a corporation, to be created for the purpose, to which the individual owners should convey their respective titles and interests; that to that end they executed the agreement mentioned, believing that the several signers each owned the properties described as his in the schedule appended to the agreement, and that, taken together, those properties included all the shore lands, riparian rights, and water power intended to be included in and necessary to the accomplishment of the scheme; that the corporation was formed, and the complainant and three others of the signers executed conveyances, as stipulated, but that the two Nashes, objecting to the award of the arbitrators, had refused to take further part with the signers of the articles of incorporation of the proposed company; that a suit against them to compel conveyance according to the agreement had failed, and would not be renewed; that the names of corporate subscribers were signed to the agreement, and the conveyances of their respective properties to the company were made without authority except such as the officers had by virtue of their offices without direct corporate action on the subject; that one who sub-

scribed as administrator of an estate had in that capacity no authority to sign or convey, and had never conveyed; that some of the subscribers did not own and could not convey the properties or some of the properties scheduled in their names; that all the properties scheduled did not include all the lands, riparian rights, and privileges, and all the water power necessary to the accomplishment of the scheme; that the agreement was signed by all the parties under mistakes of fact, as stated; that the conveyance by the complainant was executed only for the purpose, if possible, of carrying out the scheme, in the hope that other subscribers would voluntarily proceed, and that, if necessary, others would be persuaded to join therein; but that the corporation had done nothing to that end.

Much discussion has been expended upon the nature of the writing of July 16, 1894, the appellant calling it an open offer or proposition, to be submitted to a corporation thereafter to be organized, while, on the other hand, it is insisted that it was from the date of signing a binding agreement that required no further ratification or acceptance. The question is not of such importance that the discussion need be followed: As between the signers, the document constituted an agreement according to the terms and conditions expressed, while in respect to the contemplated corporation it was only an offer or proposition which the corporation, when organized, might accept or reject, and by which, without acceptance, it could not be bound. The signers of the agreement did not thereby bind themselves to organize a corporation, but did contract, each with the others, in fulfillment of the project defined in the preamble of the agreement, to convey his property to the corporation which should be formed under the name and for the purpose stated, and to accept in payment therefor his proportionate share of the capital stock as determined by the arbitrators named. Stated more briefly, the case is that, if the scheme from the beginning was not impossible without the co-operation of others, nothing has been done or now can be expected to be done in its accomplishment according to the original and unchanged design. The averments of the bill are explicit, and the agreement itself declares with equal clearness, that the purpose was to consolidate and improve the water power of the two cities "upon the one general plan with reference to the value of the whole water power"; and, on the facts as alleged, an express provision in the agreement that it should be enforced against none unless against all would afford no better basis for an appeal to a court of equity. That intention is not less clear than if explicitly stated in the agreement. It is not a question of consideration. There was sufficient consideration for the signing of the agreement by each in the signing thereof by the others, and the relief sought is to be granted not for a technical failure, in whole or in part, of the consideration on which the contract was signed, but for the impossibility of the scheme which it was proposed to inaugurate. The rule that parol evidence may not be admitted to vary a written agreement is not applicable. The facts alleged accord with the agreement. The acceptance by the corporation of the proposition embodied in the agreement bound the subscribers only on condition that the declared purpose of the agreement could

and should be accomplished, and, once the corporation proved unable, or failed for an unreasonable time, to proceed as contemplated, the subscriber, in the absence of an estoppel or dominating equity to the contrary, had a right to withdraw.

Something is sought to be made of the averment of the bill to the effect that the parties conducted their preliminary negotiations negligently, and entered into the agreement without careful inquiry into the facts of the situation and the feasibility of the scheme; but, from the very nature and purpose of the agreement and the relation of the signers to each other, it is evident that the rules against laches or negligence in the execution of ordinary contracts by parties standing in all respects at arm's length do not apply. The bill shows the failure and inability of the corporation to enter upon the execution of the scheme proposed, and it hardly need be said that relief is not sought or to be granted because the project, after inauguration and trial, had not proved successful or profitable; nor on the theory that a stockholder can withdraw from a corporation once established because it has ceased to be successful. It appears from the bill that with a knowledge of the refusal of the Nash brothers to co-operate further with the incorporators, the complainant and others executed conveyances of their respective properties to the corporation, and it is urged that "by taking these steps they bound themselves irrevocably to join this corporation." What reason is there for the assertion? If true, then for what purpose, and under what new agreement, and with whom, was it proposed to proceed? It was, of course, competent for the other parties, or any of them, after the refusal of the Nashes to go on, to proceed independently; but did they? It is not so averred, and the contrary could not be alleged more distinctly or unequivocally. It would have required a new agreement, or at least a modification of the existing one, neither of which is left to possible inference. On the contrary, immediately after the announcement by the Nashes of their position, the other signers of the articles of incorporation, with an evident purpose to abide by and to enforce the original contract in its integrity, passed the resolution to accept the contract and to ratify the award, and promptly instituted suit to compel the Nashes to convey. It was after the adoption of that resolution that the complainant and others executed the conveyances of their respective properties; and, even if the bill were silent on the point, the inference of fact, if not the legal presumption, would be clear that they executed their deeds with a purpose to perform the contract, in the expectation that the other signers would do or be compelled to do likewise, and not in pursuance of any modified agreement or scheme, which, it is shown, could not accomplish the original design, or be in itself successful without the Nash properties.

The action is not, in substance, one for dissolving and winding up the corporation. The complainant was not an original corporator, and his recovery of the legal title to his property does not involve a termination of the corporate life, or of the prosecution of the business defined in the articles of incorporation. Other parties, it seems, desire to keep the corporation going, and with that desire the court need not interfere; but there is no good reason for allowing it to re-

tain the title to the complainant's property when the purpose for which it was obtained has been abandoned or cannot be accomplished. The cancellation of the complainant's deed and the reconveyance of the property to him will, of course, extinguish whatever right to stock in the corporation he might have or assert. If there has been expense incurred which ought to be a charge against the complainant or his land, the decree may require payment. Equity rule 94, it is clear, has no application to the case. The decree of the circuit court is reversed, with direction to overrule the demurrer to the bill, and to proceed in accordance with this opinion.

JENKINS, Circuit Judge (dissenting). I have greatly doubted, and still doubt, whether the bill exhibits a case which requires the defendants to answer. It has seemed to me that the action of the complainant in subscribing to the stock of the corporation and in conveying the land in pursuance of the agreement and in acceptance of the award, after the Nashes, to his knowledge, had refused to accept the award, or to participate further in the organization of the corporation, at least in the absence of a proper and an excusing explanation, amounted to an election to proceed with the others in the scheme without the participation of the Nashes. I have been unable to find in the pleading any explanation of the complainant's action that is satisfactory to my mind, but, as my brethren think otherwise, and the question is merely one of pleading, and the matter may come before us upon proofs, and possibly in a more satisfactory manner, I deem it unnecessary at this time to give further expression of my views.

WILLIAMS v. HEDRICK et al.

(Circuit Court of Appeals, Seventh Circuit. May 16, 1900.)

No. 483.

1. TAX LIEN—FORECLOSURE—ESTATE PASSING BY SALE.

While a tax lien attaches to the land itself, without regard to individual ownership, a part only of such land, or an interest therein less than the entire estate, may pass, by legal intendment, under a foreclosure of such lien; and under the statute of Indiana (3 Burns' Rev. St. 1894, § 8640) which authorizes the foreclosure of an invalid tax deed by a suit to which all persons having interests in the land of record shall be made parties, and provides that the equity of redemption of all the defendants shall be foreclosed by the decree therein, where the owner of a life estate was made a defendant in such a suit, but the remainder-man was not, and the land was sold under the decree therein for the full amount of such decree, the purchaser acquired, and acquired only, the life estate, and the lien upon the interest of the remainder-man was discharged, although both the decree and the deed executed thereunder purported to deal with the entire estate.

2. SAME—RIGHT OF REDEMPTION—INDIANA STATUTE.

Under 3 Burns' Rev. St. Ind. 1894, § 8640, providing for the foreclosure of tax deeds found invalid in suits brought by the holders to quiet title, and that "the proceedings in such cases shall be conducted in the same manner, as near as may be, in conformity with the practice in the case of foreclosure of mortgages," the statutes of the state giving the right

of redemption within one year from all sales "on execution or decretal order" apply to sales made under decrees in such suits, and the right of the purchaser to a deed does not mature until one year after the sale.

On petition for rehearing. For former opinion, see 37 C. C. A. 552, 96 Fed. 657.

S. N. Chambers, for appellant.

John R. Wilson and Otto Gresham, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge. A rehearing is sought chiefly on the ground that it was error to hold that the foreclosure of the tax lien and the deed made in consummation of the sale under the decree were sufficient to pass to the purchaser the life estate of Joseph Hedrick. The argument is that a tax lien is statutory only; that the laws of Indiana make the lien one against the land,—against the rem; that the owner of the remainder in fee, Lawrence H. Hedrick, was not a party to the foreclosure; that there is no law authorizing the assessment or valuation of a life estate for taxes, nor giving a lien on a life estate for taxes, nor authorizing the sale of a life estate under a foreclosure of a tax lien, nor the sale of a life estate at a tax sale; that the proceedings to foreclose were not against a life estate, no offer to sell a life estate was made, no advertisement of such sale was made, no one had an opportunity to bid at a tax sale or foreclosure sale of such an estate, and the deed executed did not purport to convey such an estate.

It is not questioned that a tax lien "attaches to the res, without regard to individual ownership." It was so said in *Osterberg v. Trust Co.*, 93 U. S. 424, 23 L. Ed. 964. But it does not follow that there may not be a foreclosure, either expressly or by legal intendment, against a part of the land covered by the lien, or against an interest therein less than the fee simple or entire estate. The statute under which the foreclosure was had (3 Rev. St. Ind. 1894; Burns' Rev. St. Ind. § 8640) authorizes the holder of a tax deed to bring suit in the circuit court of the county where the lands or lots lie to quiet his title thereto, without taking possession; "and all parties who have or claim to have, or appear of record in any public office of the county where such land or lot is situated to have, any interest in, or lien upon, such lands or lots," it is required, "shall be made defendants to such suit, and no outstanding unrecorded deed, mortgage or claim shall be of any effect as against the title or right of the complainant as fixed and declared by the decree made in such case"; and if at the hearing it appears that the complainant's title is invalid, for any cause, "such suit shall not be dismissed," but the court shall "ascertain the amount due the complainant for principal and interest to be computed at twenty per cent. per annum," shall decree the payment thereof within a reasonable time, and in default thereof "shall direct that such land or lot be sold therefor, and that the equity of redemption of all the defendants in such suit, and all persons claiming under them shall be forever foreclosed: provided, that proceedings in such cases shall be conducted in the same manner, as near as may be, in conformity

with the practice in the case of foreclosure of mortgages." The requirement in respect to parties doubtless was intended to conform to the general rule of practice declared by the Civil Code of Indiana (section 268), that "any person may be made defendant who * * * is a necessary party to a complete determination or settlement of the questions involved." It certainly means, and was intended to mean, that a foreclosure of a tax lien shall not affect any one known or shown by the record to be interested in the land, who is not made a party to the suit; but it does not mean that a valid decree may not be rendered against parties served with process because others interested have not been joined as defendants, or have not appeared or been served with process. We have no doubt that in such a suit the court, in the exercise of its equity powers, as in suits for the foreclosure of mortgages or other liens, may so frame its decree as to require that the title or interest of one defendant in the land shall be offered for sale before the title or interest of another, if it be made to appear that in good conscience it ought to be so ordered. All we need say, however, and all that is decided or implied in the opinion handed down, is that a foreclosure of a tax lien may be taken against one of two or more who have, or claim or appear of record to have, an interest in or lien upon the land covered by the tax lien; and if, by virtue of the decree, the land is sold for the full amount of the decree, the purchaser acquires, and acquires only, the title or interest of the one against whom the decree was taken, however described in the proceedings and deed, and all other interests are thereby discharged of the tax lien. The purchaser under such a decree, as under any other foreclosure, is bound to know who was made defendant, and what title or interest he had which could be affected by the decree.

It is urged, and, on reflection, we think justly, that the opinion handed down leads necessarily to a consideration of the respective rights of the appellant and the cross complainants English and Kent, and particularly of the question of the effect of Williams' attempt to redeem from the sale on mortgage foreclosure to English, trustee, and of English's attempt, as trustee, to redeem from the sale to Voris, under which Williams asserts title.

The contention of Williams is that he had acquired the title of Joseph Hedrick, and, as owner of the land, was entitled to redeem from, or to pay off and discharge, any lien or incumbrance on the title. On the other hand, it is insisted that for various reasons the sale and conveyance to Voris were void, and that, having acquired no title thereby, Williams, under his tax deed, conceded to be invalid as a conveyance, had only a lien, derived from the state, for the taxes which he had paid, with penalties and interest, and that his lien, being paramount, gave him no right to redeem from junior liens. Whether the sale to Voris was irregular for any of the reasons urged, it is not necessary to inquire. If irregular, it was not void, but, at most, subject to be set aside at the instance of Joseph Hedrick, or any other in a position to raise the question; but if, as contended, the sale was subject to a right of redemption within a year, like ordinary sales "on execution or decretal order," then the sheriff's

deed to Voris was premature, and, if not absolutely void, probably was effective only as a certificate of purchase, showing the holder's right to a deed at the end of the year if meanwhile there should have been no redemption from the sale. If the sale under Williams' decree was subject to redemption, then on November 30, 1894, when he deposited with the clerk of the Warren circuit court the money necessary to redeem from the sale made on December 9, 1893, under the decree foreclosing the mortgage to English, trustee, he had no right to redeem therefrom, because he was himself only a lienholder, and his lien superior to that from which he sought to redeem. On the contrary, English had the right to redeem from him, as the grantee or assignee of Voris, as the record shows he made a proper and timely offer to do, but was denied the privilege. The sale to English antedated that to Voris by fourteen days, and, no redemption therefrom having been effected, his right to a conveyance was the first to ripen. It does not appear, however, that he ever received a deed from the sheriff in consummation of his purchase. On the same theory it follows that the title of Joseph Hedrick was not divested until January 10, 1895, when he conveyed to Kent, who later conveyed to English, trustee. English not having been a party to the proceedings, his right to redeem from the lien acquired by Williams by virtue of the invalid tax sale was not affected by the foreclosure of that lien, or by the sale made under the decree. He was therefore under no necessity of pursuing the method prescribed by the statute regulating redemption from sales made upon executions or decretal order. His right was to redeem from the original lien for taxes which became vested in Williams as the holder of the invalid tax deed, and that he could do by tendering the proper sum to the owner of the lien.

Is there, under the Indiana statute (section 8640, Burns' Rev. St. 1894), a right of redemption from a sale of real estate on a decree of foreclosure obtained by the holder of a tax deed, found to be invalid, in an action to quiet his title? The right to redeem "any real estate or interest therein * * * sold by the sheriff on execution or decretal order" was given by the act of June 4, 1861 (Sess. Laws Ind. 1861, Sp. Sess., p. 79), and remains essentially unmodified (Rev. St. 1881, § 766; Burns' Rev. St. 1894, § 778). The right of a purchaser of land at a tax sale, in case of the invalidity of the deed made to him by the county auditor, to be subrogated to the lien of the state, and to obtain a foreclosure thereof by proceedings in court, is of later origin, and from the beginning has been allowed in two distinct forms of action or modes of procedure, but, except for a short while, on different conditions. Laws 1881, pp. 684, 685, §§ 227, 228 (Rev. St. 1881, §§ 6496, 6497). Amendatory acts have been passed, to which reference will be made; but the original sections mentioned, in so far as they bear on the question of redemption after sale, were the same as sections 8640, 8641, Burns' Rev. St., now in force. The difference between the provisos in the two sections is to be observed. By the original section 227, corresponding to the present section 8640, the holder of a tax deed, who had not taken possession, was authorized to bring suit to quiet his title; and if, for any cause, his

title proved invalid, the court, it was provided, should ascertain the amount due, decree the payment thereof within a reasonable time, and in default thereof should "direct that such land or lot be sold therefor, and that the equity and right of redemption of all defendants in such suit, and all persons claiming under them, shall be forever foreclosed: provided, that the proceedings in such cases shall be conducted in the same manner, as near as may be, in conformity with the practice in the case of foreclosure of mortgages." Original section 228, corresponding to present section 8641, relates to suits by landowners against the holders of tax deeds, and provides that, in case of judgment against the person holding possession under a tax deed for the recovery of the land, the court shall ascertain the amount due the party holding the tax deed, and for all improvements made by him, "and shall decree the payment thereof within such reasonable time as may be determined by the court, and in default of such payment shall decree that such lands be sold therefor, or sufficient thereof," etc.: "provided, that there shall be no right of redemption of such property after the date of sale, and that the sale shall be without the benefit of appraisalment laws."

The controlling reason for denying in this section a time for redemption after sale was, it may be presumed, that by the very theory of the action the bringer of the suit was bound to anticipate a decree requiring him to pay whatever sum should be found due to his adversary, and, being under no necessity, outside of the statute of limitations, to move in the matter, would not bring suit until ready to pay whatever in that respect should be adjudged against him; while, in an action under section 227 and its amendments, his right and burden of redemption have always been with the defendant, who, of course, could not choose the time of being sued. The inference, therefore, is cogent, if not conclusive, that the proviso in section 8640 for conformity with the practice in the foreclosure of mortgages was intended to include the right of redemption within one year after the sale. That purpose is put beyond doubt by subsequent legislation. By an act which took effect on March 5, 1883 (Laws 1883, p. 95), section 227 of the act of 1881 was amended by adding to the proviso the following:

"And the sale shall be without the benefit of appraisalment laws, and the sheriff shall, upon receipt of the purchase money, execute to the purchaser a deed in fee simple therefor."

Under this provision for the immediate execution of a deed by the sheriff, it was inevitable that it should be held, as it was in *Hall v. Craig*, 125 Ind. 523, 25 N. E. 538,—decided at the May term, 1890,—that after sale there could be no redemption. Influenced, presumably, by that decision, the legislature of the state at its next session, in 1891, enacted the present law; restoring in the proviso of section 227, as it appears in section 8640, Burns' Rev. St., the original and unqualified requirement for conformity with the practice in the foreclosure of mortgages, but leaving the other section (228 or 8641) without such requirement and with an explicit proviso that in cases governed thereby there should be no appraisalment before, and no redemption after, sale. In the case of *Insurance Co. v. Kroh*, 102 Ind.

515, 2 N. E. 733, the general principle was declared that tax laws, so far as they relate to redemption, should be liberally construed in favor of the landowner; and accordingly the right of redemption seems to have been conceded in practice, even in cases of sales under decrees in favor of the state, foreclosing the lien of the state for taxes under sections 8635 and 8636, enacted at the same time with sections 8640 and 8641. See *Beard v. Allen*, 141 Ind. 243, 39 N. E. 665, 40 N. E. 654. It is clear that once the amount of any tax has been paid to the state, and the lien of the state has passed to the holder of a tax-sale deed, there can be no longer any good reason, deducible from a supposed intention manifested in the revenue statutes of the state "to make the system of assessing and collecting taxes a distinct and independent one," for holding that the foreclosure of the lien in favor of the individual owner of it should not be conducted to the end, in respect at least to redemption, in conformity to the rules which govern ordinary cases of sales "on execution or decretal order"; and, in view of the course of legislation on the subject, the only proper and reasonable conclusion seems to be that from a sale made by virtue of a decree of foreclosure under section 8640 there is the same right of redemption as from an ordinary sale in pursuance of a decree for the foreclosure of a mortgage. It follows that the status of Williams in the case, as against English and Kent, was that of the holder of the senior or paramount lien. The right to redeem, therefore, belonged to them, and not to him.

In determining the amount due to Williams the master followed the ruling in *Ristine v. Johnson*, 143 Ind. 44, 41 N. E. 538, 42 N. E. 310, that, when redemption from a tax sale is by or in behalf of an infant or person of unsound mind, interest on the delinquent taxes and penalties is not chargeable. But Lawrence H. Hedrick, the infant appellee, being eliminated, as he must be, from the question, that rule does not apply; and in computing the amount due to Williams, as well as to English, trustee, and to Kent, if he has not transferred his rights to English, interest should be allowed to the date of the decree as it shall be corrected and finally entered. Before the master the cross complainants each declared himself ready to convey whatever interest he had in the land to Lawrence H. Hedrick, on being reimbursed for such outlays as entitled him to a lien on the land or on the fund in court. The decree was framed accordingly. That part of it is not here questioned, and is affirmed. The amount due to Williams on October 18, 1893, was determined by the decree of that date; and it is only just that, to begin with, he be allowed the sum of \$577.94, the amount of the bid at the sale made on December 23, 1893, under that decree. To that should be added what he subsequently paid on taxes, for insurance, and on the McCabe judgment, if that was a lien on the property. He is, of course, to be charged with the amount of rents received. The amounts due to the cross complainants should be determined in the same way, computing interest to the date of the final decree. There should be no recovery of costs in this court or in the court below. Out of the fund in or to come into the registry of the court, arising from the rents of the property pending the litigation, the court will order the payment—

First, of all costs in the case in both courts; second, the amount found due to the appellant Williams; third, the amounts found due to English, trustee, and to Kent, if anything; and, fourth, the remainder to the complainant Lawrence H. Hedrick, or to his attorneys of record for his use, less a just compensation for their services in the litigation. Each of the parties shall be authorized to reclaim and withdraw any sum deposited by him for the purpose of redeeming from any of the liens in question. Let the mandate so go. The petition for a rehearing is denied.

GREEN v. VALLEY et al.

(Circuit Court, N. D. Iowa, W. D. June 1, 1900.)

1. REMOVAL OF CAUSES—ACTION INVOLVING CONSTRUCTION OF SURVEYS OF LAND UNDER ACTS OF CONGRESS.

Where, by the averments of plaintiff's petition in an action begun in a state court to quiet the title to certain real estate, it appears that plaintiff acquired title under an act of congress, and that the real question in controversy is the proper construction of surveys of land made under the authority of acts of congress, and that the amount in controversy exceeds the sum of \$2,000, exclusive of interest and costs, a federal question is shown to be involved, within the meaning of the act providing for the removal of causes to the federal courts.

2. SAME—TIME FOR APPLICATION—RIGHT OF NEW DEFENDANTS.

After the expiration of the time for the original defendant to plead, in an action to quiet title in the state court, plaintiff amended his petition, making other parties defendants, and alleging that they claimed some right, title, or interest in the land in controversy adverse to the plaintiff, but not averring that such interest was acquired under the original defendant. *Held*, that since the case involved a federal question, which would have entitled the original defendant to remove the case to the federal courts, the parties made defendants by the amendment were not precluded from obtaining a removal because the time had elapsed within which the original defendant could apply therefor.

Submitted on Motion of Plaintiff to Remand the Case to the State Court.

Buck & Kirkpatrick and Carr & Parker, for plaintiff.

Evans & Adams, W. W. Cornwall, and R. M. Bush, for defendants.

SHIRAS, District Judge. This suit was brought in the district court of Clay county, Iowa, for the purpose of quieting the title to certain realty abutting on Lost Island Lake, in Clay county. To the suit as originally brought to the May term, 1899, James Valley was the sole defendant. Subsequently the complainant filed an amendment to the petition, averring therein that Clay county, E. P. Barringer, E. B. Evans, and W. W. Cornwall have or claim a right, title, or interest in and to the land in controversy adverse to the complainant. It is not averred that the last-named parties claimed their title or interest in the land under James Valley. Notice of the amendment was given to the parties named therein, requiring them to plead on or before the 6th day of December, 1899. On the 3d day of October the defendants, including James Valley, filed a petition asking a removal of the suit into this court on the ground

that the suit presented a federal question, in that complainant de-raigned title from an act of congress, and that the real question in controversy was the construction to be placed on the surveys of the land made under the authority of the acts of congress. The state court granted an order of removal, and, the transcript having been filed in this court, the complainant now moves that the suit be re-manded for the reason that the suit does not present a controversy arising under the constitution or laws of the United States, and for the further reason that the application for removal was filed too late.

In the case of *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74, the supreme court entertained a writ of error to review the ruling and decree of the supreme court of Minnesota over substantially the same question as is presented in this case, thus showing that the supreme court was of the opinion that questions of this nature in fact arise under the statutes of the United States; for, unless this were true, the federal supreme court would have had no right to review the action of the state court. Under the doctrine of this case, it must be held that complainant's petition shows on its face that the controversy arises under the laws of the United States, and as the amount in controversy exceeds \$2,000, exclusive of interest and costs, it is a controversy removable to this court, irrespective of the citizenship of the parties.

Upon the question whether the petition for removal was filed within the time fixed by the statute, it is clear that so far as the original defendant, James Valley, is concerned, he had lost the right of removal, in that he had not filed an application at or before the time he was required to plead, which was on the second day of the May term, 1899. If the other defendants had been brought into the case as substitutes for, or as holding rights under, James Valley, it might well be contended that they came into the case subject to the position occupied by the principal defendant. It is not, however, averred in the amended petition that the parties brought into the suit in September, 1899, hold under James Valley; but, on the contrary, it is averred that these parties claim a title or interest adverse to that of complainant, and the complainant could now dismiss the suit, as against James Valley, without affecting the same as it is now presented against the other defendants. Under these circumstances, it cannot be held that the parties who were made defendants in September, 1899, not upon their own application, nor as substitutes for, or as tenants under, the original defendant, but who are brought in by the complainant, and are now called upon to defend their rights in the realty in dispute, are deprived of the right of removal through the neglect of the original defendant to apply therefor at the May term of the state court. The case is not of the class wherein one of the defendants never possessed the right of removal, and wherein, the case not involving a separable controversy, all of the defendants must possess the right of removal in order to sustain the application. When this suit was brought, the defendant James Valley had the right to remove the case to this court. When the other parties were made defendants, the case, as to them, was in its nature a removable one, and of course they

could not remove the same until they were made parties defendant. In *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, it was held that:

"The reasonable construction of the act of congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provisions as to time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right, and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."

If it should be held that a plaintiff may bring an action against one defendant only, and, after the time for pleading on behalf of this defendant has elapsed, then, by amendment, bring in others, and perhaps the real parties in interest, and then defeat the right of removal on the ground that the original defendant had failed to apply for a removal within the statutory time, it is clear that an easy method would thereby be created for defeating the principal purpose of the removal act. I think the facts of the case bring it within the spirit of the doctrine laid down by the supreme court in the case just cited, and that the right to remove the case could be exercised by the defendants without regard to the question of whether the suit involved a separable controversy. The motion to remand is therefore overruled.

CHARLES WARNER CO. v. UNITED STATES.

(Circuit Court, D. Delaware. February 20, 1900.)

No. 5.

1. ACTION AGAINST UNITED STATES—ANSWER.

In a suit against the United States under the act of March 3, 1887 (24 Stat. 505), a failure to file answer and notice within the period prescribed by section 6 of that act is not a jurisdictional defect, but only an irregularity which may be waived.

2. CONTRACTS—CONSTRUCTION.

Where the United States charters a steam-tug for attendance on other vessels, not possessing the power of self-propulsion, engaged in government work at Cross Ledge Light in Delaware Bay, in order to remove them to a place of safety in case of stress of weather or accident, not furnishing the crew or pilot of such steam-tug, competent knowledge is required on the part of those having the tug in charge of the waters of that portion of the bay including the depth of water and channels between Cross Ledge Light and Morris River which is the most convenient and accessible haven of refuge, and the United States in engaging the services of the steam-tug had a right to assume that her master or pilot possessed such knowledge or at least that she was provided with a suitable chart of the bay from which such knowledge might be derived.

3. SAME—SUFFICIENCY OF APPLIANCES.

The owner of a barge, not self-propelling, in contracting with the United States for the chartering or hiring of such barge by the latter, undertook that she should be "in first-class condition, fully equipped, with all the necessary anchors, lines, chains, pumps, etc." and that she should be "in charge of a competent man to be selected and paid" by the owner; the contract also providing for an inspection of the vessel by the United States before it should enter the service of the latter. *Held*, on the facts, that the

provision for inspection was a stipulation on the part of the United States reserving to it the right to decline to permit the vessel to enter its service should the United States be dissatisfied with her condition, and was not intended to nor did it directly or indirectly operate to relieve the owner of his obligation that the vessel should be in proper condition, with sufficient equipment and in charge of a competent man.

(Syllabus by the Court.)

Benjamin Nields and John P. Nields, for petitioner.
Lewis C. Vandegrift, U. S. Dist. Atty.

BRADFORD, District Judge. This suit is a proceeding by the Charles Warner Company, a corporation of Delaware, against the United States by petition under the provisions of the act of Congress of March 3, 1887 (24 Stat. 505), entitled "An act to provide for the bringing of suits against the Government of the United States." The amount demanded by the petitioner as set forth in the petition is \$2,092.72, with interest, that sum representing, as alleged, the balance of certain indebtedness of the United States to the petitioner for the price of cement and hawsers, the cost of repairing damage sustained by the barge Saunterer and certain incidental expenses connected therewith, the value of a small boat which was destroyed, and the hire and services of certain vessels. The facts in the case found by the court are as follows. In the summer of 1893 the United States undertook to repair Cross Ledge Light Station in the Delaware Bay, and for the purpose of carrying on the work certain negotiations were entered into between duly authorized agents of the United States and the petitioner. The petitioner wrote June 17, 1893, to Capt. F. A. Mahan of the U. S. Engineer Corps, then stationed in Philadelphia, in part as follows:

"We are in receipt of yours of the 16th inst., asking for a boat 100 feet in length, 25 feet beam, with capacity of 175 to 225 tons. In about ten days from this date we might spare you our barge Saunterer. This is a house barge, 100 feet long, 23 feet, six inches beam and eight feet hold. She is covered and competent to carry 150 tons on deck. * * * Our price would be \$10 per day, with vessel at Government's risk."

The petitioner again wrote June 20, 1893, to Capt. Mahan in part as follows:

"We will charter you one of our small sand scows at ten dollars per day; and the barge Saunterer at ten dollars per day, Sundays included, you to assume all risk of vessels. We will charge you for towage forty dollars each round trip of tug, Wilmington or Bulk Head Bar, to Cross Ledge Light and return. Please advise about the time you will want these barges. We will deliver 350 to 1,000 barrels of Alsen's cement on lighter at Wilmington at \$2.75 per bbl."

H. F. Brandebury, superintendent of construction, by direction of Capt. Mahan wrote July 1, 1893, to the petitioner in part as follows:

"Your proposition of June 20, 1893, in relation to the hire of certain vessels, etc., is accepted under the following conditions: The barge 'Saunterer' and small scow will be chartered by this office on and after July 12, 1893, for the sum of ten (10) dollars per day each, (Sundays included), it being understood that both vessels shall be in first-class condition, fully equipped, with all the necessary anchors, lines, chains, pumps, etc., and that each shall be in charge of a competent man to be selected and paid by you. An inspection of the vessels will be made on or before July 8, and, if found in proper condition, the same will enter the service of the United States on July 12, 1893, and continue

therein until otherwise directed. The United States will be responsible for and assume all risks on account of loss or damage to the vessels by reason of storms, fire or accident while at Cross Ledge Light. The United States will not be responsible for nor pay any charges on account of loss or damage to said vessels from any cause while en route from Wilmington to Cross Ledge Light or returning therefrom. In this connection it is well to add that it is the intention of this office to employ one of your tugs to do the necessary towing. The men you place in charge will have undisputed authority over and direction of the boats, the loading and unloading of the same. It is expected that they will faithfully perform the duties assigned them and give all the necessary assistance by direction and otherwise, so far as the handling of the boats are concerned, when called on so to do. Your bid for towage 'forty (40) dollars for each round trip' is accepted. It is not known at present just how much towing will be necessary. Your bid to furnish Alsen's Portland cement f. o. b. the boats at Wilmington @ \$2.75 per barrel, is also accepted. You will please have at the disposal of the agent of this office 350 barrels of the same. In each and every instance the cement called for will be placed on the lighter in prime condition and in tight barrels. The full quantity required cannot at this writing be stated. Perhaps 350 barrels will be sufficient. * * * I shall call and perfect arrangements on Wednesday, July 5th, about say 10 a. m."

Brandebury visited the petitioner in Wilmington July 2 or 3, 1893, and inspected the barge Saunterer and her equipment. The inspection was not a minute, particular and thorough examination in detail, but an examination somewhat general in its character for the purpose of ascertaining what the vessel was like and whether it and its equipment were suitable for the work for which it was to be employed at Cross Ledge Light. The result of the inspection was, save as to some minor details unnecessary to be recapitulated, satisfactory to Brandebury. On the same day he examined a scow similar to but smaller than scow No. 2 which afterwards was towed to Cross Ledge Light as hereinafter mentioned. No insufficiency in scow No. 2 is either alleged or appears from the evidence. Brandebury again visited the petitioner in Wilmington on the morning of July 5 and at that time a certain correction or modification of the offer contained in the letter of July 1 to hire the Saunterer and scow were agreed on by Brandebury and the petitioner. This correction consisted of the insertion of the words "of steam-tug" after the words "each round trip," making the sentence containing the correction read as follows: "Your bid for towage forty (40) dollars for each round trip of steam-tug is accepted." In reply to Brandebury's letter of July 1, as corrected on July 5, the petitioner wrote on the day last mentioned to Brandebury in part as follows:

"Replying to your favor of July 1, confirming our conversation of this morning, we beg to say that as corrected the conditions as stated therein are satisfactory to us, and we will have the barge ready for you on July 12 with 350 barrels Alsen's on barge, unless we are advised differently by you prior to that date. * * * It is understood the value of each barge, in case of loss or damage, is \$3,000, and that the towage of \$40 is for the round trip of steam tug, whether towing or light."

The principal contract between the parties, so far as material to this case, as it existed prior to July 15, and in so far as it was evidenced by writing, is contained in the correspondence above quoted. The Saunterer is a freight barge without propelling power of her own either by steam or sail. She is provided with a mast and gaffs for hoisting and has a freight house on her main deck. She is 98

feet long and her breadth of beam is 23 feet and 6 inches. Her depth of hold is 7 feet and the distance between the main deck and the upper deck or top of the freight house is also 7 feet. She was built about 1870 for carrying freight between Wilmington and New York and was used for freighting purposes between those cities and also between Wilmington and Philadelphia. While owned by the petitioner the Saunterer was several years prior to July, 1893, employed on work for the United States at Ship John Light in Delaware Bay and while so engaged had by reason of the condition of wind and water narrowly escaped being lost, being unaccompanied by any vessel capable of rendering her assistance. There is a conflict of testimony between the president of the petitioner and Brandebury as to certain alleged oral statements by the former at the time of the inspection by the latter of the Saunterer as to her seaworthiness and whether she would be safe at Cross Ledge Light without a tug-boat to move her. This contradictory evidence, however, is not of such a character as to add to or detract from the effect of the contract as disclosed in the written correspondence, and it is therefore unnecessary particularly to allude to it. Pursuant to the contract between the parties the petitioner between July 5 and 13 furnished and delivered on board the Saunterer at Wilmington 350 barrels of Alsen's Portland cement in prime condition and in tight barrels, the agreed price for the cement being \$2.75 per barrel, aggregating for the whole quantity furnished \$962.50. Subsequently 48 barrels of this cement were returned from Cross Ledge Light and of all so returned the petitioner had the use and benefit. The amount claimed on account of cement so furnished is \$830.50 with interest, representing 302 barrels at \$2.75 per barrel. Between July 5 and 13 scow No. 2 which had been approved by Brandebury was laden at Wilmington with certain material for the use of the United States at Cross Ledge Light. The Saunterer and scow having been chartered or hired by the petitioner to the United States under and pursuant to the contract above mentioned for the sum or price of \$10 per day each, the petitioner placed Addison Rash in charge of the Saunterer and John Dilks in charge of the scow, and the Saunterer and scow in charge of Rash and Dilks respectively started July 13 about noon with their cargoes and equipment for Cross Ledge Light in tow of the steam-tug Meteor furnished by the petitioner. The vessels arrived at their destination early in the evening of the same day, when the Saunterer and scow were anchored at a short distance from Cross Ledge Light and on the easterly side thereof; the Meteor a few hours later leaving the Saunterer and scow where they had been anchored and returning the same evening to Wilmington. There was a thunder-gust of short duration and not of a violent character from the north-west at Cross Ledge Light late on the evening of July 13 while these vessels lay at anchor, which, however, did not result in any appreciable damage to either of them or to their contents. The gust was succeeded by fine weather and certainly until toward or about noon on Saturday, July 15, there was nothing in the condition of the wind or water calculated to cause damage to either of the vessels if in proper condition or to their contents. During the morning and aft-

ernoon of that day the general direction of the wind was from the southeast, blowing up the bay. The tide turned to ebb between ten and eleven o'clock in the morning and thereafter the wind meeting the tide caused the water to be rougher than it would have been had the tide not changed. From the time the tide turned to ebb until the Saunterer was taken away as hereinafter stated that vessel remained at anchor, being anchored from her bow, and the relation of the tide to the wind was such that she continued in the trough of the sea rolling considerably from side to side. The evidence as to the condition of the wind and water while the Saunterer remained in this position is voluminous and conflicting. But the following facts in this connection are established by a decided preponderance of the evidence. There was no storm during that time and at that place in any legitimate sense of the term. None of the weather records at the light-houses in the vicinity, of which copies are in evidence, show the existence of a storm. Indeed, the references made therein to the state of the weather are such as clearly to indicate to the contrary. The day was bright and sunshiny. The velocity of the wind was not more than ten or fifteen miles an hour. There was only what is known as a whole-sail breeze. The height of the waves where the Saunterer lay did not exceed three feet from trough to crest. The ground tackle of the Saunterer and scow held them without any dragging. A boat of the size of a small gunning skiff was rowed, while the water was as rough as it had been that day, in safety and without difficulty from Cross Ledge Light to the vessels, and carried a line from the scow to the Saunterer, and a line from the latter vessel to the steam-tug Taurus just before the tug took her and the scow away from that place on the same day as herein-after mentioned. Other row boats of substantially the same size were also used on the water without difficulty or danger on the same afternoon in the vicinity of Cross Ledge Light. Brandebury went to Cross Ledge Light with the Saunterer and scow July 13 and from that place wrote to the petitioner on the evening of that day or on the next following day, stating that it was necessary to have a tug there and asking on what terms the petitioner would charter the Taurus. He had concluded that the service of a tug would facilitate the handling of the Saunterer and scow and also conduce to their safety. The petitioner telegraphed to Capt. Mahan on the morning of July 15 as follows:

"Mr. Brandebury has written, it will be necessary to have tug constantly at ledge and requests us to telegraph rate we will charter the 'Taurus.' We will name \$40 per day, tug at Government risk."

In answer to the above telegram Capt. Mahan on the same morning telegraphed to the petitioner as follows:

"Your offer of Tug Taurus for forty dollars per day for Cross Ledge is accepted."

Pursuant to the agreement thus entered into the petitioner sent the Taurus to Cross Ledge Light July 15, where she arrived between three and four o'clock in the afternoon. During that day until after the arrival of the Taurus all the cement with which the Saunterer was

laden in Wilmington remained on her, from two-thirds to three-fourths of it being in tight barrels in the hold, and the residue in similar barrels together with a quantity of sand being in the freight house on her main deck. The evidence does not satisfactorily show that before the arrival of the *Taurus*, while the *Saunterer* lay broadside to the sea as above described, any of the cement was damaged or destroyed by water shipped by reason of her rolling or that by reason of such rolling she shipped water in such manner or quantity as to be calculated to produce material damage to her cargo. The evidence on the contrary points to a different conclusion. It appears, however, that the *Saunterer* herself while so rolling sustained injury. The nature and cause of such injury are shown, but not its extent. Encircling the upper portion of the *Saunterer's* mast was an iron collar or band to which her shrouds were attached. So long as the band remained in its proper place on the mast and the shrouds continued taut the vessel received no damage. But as she rocked to and fro the weight of the mast and of the gaffs or hoisting spars with which it was provided caused the tension of the shrouds on the band to be largely increased alternately on the one side and the other, and under the stress of this alternating tension of the shrouds the band "chewed the mast" in such manner as to slip down a distance of about a foot, thereby slackening the shrouds to such an extent that they no longer held the mast in proper position, but allowed it to work from side to side in the vessel. This lateral play of the mast, together with the sudden tightening of the shrouds first on one side and then on the other by reason of the rocking or rolling of the vessel, caused her seams to open, though to what extent or in what portion of her hull the evidence does not disclose. Had the mast been provided with a shoulder or other proper support for the collar or band, whatever injury the *Saunterer* received before the arrival of the *Taurus* would have been avoided. The petitioner knew where the *Saunterer* was to serve while the work at Cross Ledge Light was progressing and had no reason to believe that after she left Wilmington July 13 and before the *Taurus* arrived at Cross Ledge Light two days thereafter the former vessel was or was to be attended by a steam-tug or other self-propelling vessel for her protection. The petitioner also knew that the *Saunterer* had theretofore been employed in Delaware Bay and there been in grave peril of loss, and was chargeable with knowledge that a vessel of her size and construction at anchor in the lower bay would, when lying broadside to the sea, even in the absence of a storm, rock or roll in such manner as to subject the mast-band or collar to a severe strain, and that such a condition of things was likely to occur. In omitting to provide a shoulder or other proper support for the band the petitioner failed to observe the degree of care or precaution which might reasonably have been expected, and in the absence of such provision the *Saunterer* was not then or at the time she left Wilmington for Cross Ledge Light in first-class or proper condition for the service for which she was chartered or hired. But further, the *Saunterer* should not have been so handled as to permit her on or after the change of the tide from flood to ebb to swing into the trough of the sea and there continue rocking and rolling. Had that vessel been in charge of

a competent person and provided with ground tackle suitable in kind and quantity and with proper appliances for the convenience and safety of herself and her cargo in the lower bay, particularly when unattended by a tug or other self-propelling craft, no reason is perceived why she should have been allowed to swing broadside to the sea and remain in that position. For several hours, before the tide changed the wind was from the southeast and the tide was running in practically the same direction, and during all this time the Saunterer, anchored only from the bow, must have had her head to the sea. A fresh southeast breeze with an ebb tide obviously would tend to cause a vessel so anchored to roll more or less in the trough of the sea, and possibly to ship water and strain herself. If before or at the change of the tide the Saunterer had been anchored from the stern as well as from the bow she would have remained head to the sea and have largely or wholly escaped the rocking and rolling to which she was subjected. It seems, however, that she was not provided with ground tackle and appliances suitable for that purpose, and it does not appear that Rash, who was in charge of her, at any time either attempted or suggested that an attempt be made so to dispose of the vessel. That she should have been allowed to swing broadside to the sea was the result either of incompetence on the part of Rash or of an insufficient equipment or supply of ground tackle and appliances, or, possibly, of both. The wind having sensibly increased about or shortly after noon on July 15, and Brandebury, who was then at Cross Ledge Light, fearing that the ground tackle of the scow might fail to keep her from going on the rocks at that place and also being apprehensive for the safety of the Saunterer as well as of the scow should the wind continue to grow stronger, he deemed it prudent that both vessels should be removed temporarily to a place of safety. Having reached this conclusion about or shortly before three o'clock in the afternoon, he examined an official chart of the bay and shortly before the arrival of the Taurus laid down on the chart a course from Cross Ledge Light to Maurice River on the easterly side of the bay as one over which the vessels safely might be towed. When the Taurus arrived he sent a man who was familiar with the waters of the bay between Cross Ledge Light and Maurice River and had been present when Brandebury laid down the course on the chart, in a small row boat to the tug with an oral order that the tug should forthwith proceed with the Saunterer and scow to Maurice River and with instructions to the messenger to act as pilot should those on the tug not be familiar with those waters. The master and the pilot of the Taurus, after consultation with each other, declined to obey Brandebury's order to proceed to Maurice River on the ground, as alleged, that in their judgment it would be unsafe so to do; and the tug against the order and will of Brandebury started down the bay with the Saunterer and scow in tow about four o'clock the same afternoon, and having reached the lower end of Cross Ledge proceeded westerly into the main channel and thereafter followed that channel up the bay until it with its tow left the channel to go into Duck Creek on the westerly side of the bay, where it arrived late in the evening of the same day. The evidence shows that the Saunterer in passing, in the trough of the sea, around the lower end of Cross Ledge and into the

main channel, and while continuing therein on her way up the bay, was seriously strained and racked. During this time she rapidly made water, her pumps were unable to keep it down, a large portion of the cement in the hold was injured or destroyed, and a number of barrels of cement were by direction of the superintendent of the petitioner thrown overboard. After reaching Duck Creek she was run aground, and she and the scow were shortly thereafter on the same night left there by the Taurus which proceeded to Wilmington. The Saunterer and scow when left by the tug in Duck Creek were unnecessarily at such distance from each other that it was impracticable to transship from the former to the latter such of the cement in the freight house as had not been injured, and with the rise of the tide early on the following morning all of the cement which had not theretofore been injured, with the exception of 48 barrels of which the petitioner had the use and benefit as above stated, was destroyed. It appears from the evidence that neither the master nor pilot of the Taurus was familiar with the waters of the bay between Cross Ledge Light and Maurice River and that the tug was not provided with a chart of the bay. A decided preponderance of evidence is to the effect that under the then existing conditions of wind and tide there was sufficient depth of water to allow the Taurus with the Saunterer and scow in tow to proceed from Cross Ledge Light to Maurice River in obedience to Brandebury's order; that such a course was shorter than that to Duck Creek; that the course laid down on the chart by Brandebury was a practicable one; that less rough water would have been encountered; that it was much safer than that taken by the Taurus; and that it is highly probable that had the vessels been towed to Maurice River much less damage would have been received by the Saunterer and her cargo than resulted from her trip to Duck Creek. One of the obvious purposes for which it was desirable to have the Taurus in attendance on the other vessels was to remove them to a place of safety in case of stress of weather or accident. This required competent knowledge on the part of those having the tug in charge of the waters of that portion of the bay including the depth of water and channels between Cross Ledge Light and Maurice River, which was the most convenient and accessible haven of refuge. The United States in engaging the services of the Taurus had a right to assume that her master or pilot possessed such knowledge or at least that she would be provided with a suitable chart of the bay from which such knowledge might be derived. While most, if not all, of the damage to the cement occurred after the Saunterer had been taken in tow by the Taurus, the evidence does not show what proportion of the damage to the former vessel was received before that time. It appears, however, that most of the straining and racking to which she was subjected occurred after the Taurus in disregard of Brandebury's order began to tow her into the main channel. The other facts of the case may briefly be disposed of. On July 16, the day following that on which the Taurus left the Saunterer and scow in Duck Creek as above stated, the Meteor was sent by the petitioner to Cross Ledge Light. She returned to Wilmington the same day. The petitioner seeks to recover \$40 for this round trip. The Meteor rendered no service to the United States on that day and the

evidence does not disclose any request by the United States that she should make the trip, or any undertaking on the part of the United States to pay the petitioner therefor. The Meteor again went to Duck Creek July 17 and pumped water out of the Saunterer, and towed her to Wilmington on the same day. The petitioner claims \$20 for such pumping and \$40 for the round trip of the Meteor. There was no undertaking by the United States to pay either for the pumping or for such round trip. Neither inured to the benefit of the United States, but both were solely for the protection of the property of the petitioner. On July 18 the petitioner caused the tug Martha to tow the Saunterer from the southerly side of the Christiana River to the yard of the Jackson & Sharp Company for repairs, and for such towage seeks to recover \$3. There is no evidence of any undertaking by the United States to pay for such towage. The Saunterer received certain repairs at the yard of the Jackson & Sharp Company for which the petitioner paid \$707.42. This amount the petitioner claims from the United States. Unless the United States was liable for the damage sustained by the Saunterer there was no contract express or implied on the part of the United States to pay the whole or any part of this sum. The petitioner claims to be entitled to hire for the Saunterer at \$10 per day for 18 days from July 12 to July 29, 1893, inclusive, covering the period during which she was repaired. The evidence shows that she was in fact in the service of the United States only on July 12, 13, 14 and 15, and there is nothing to show any undertaking or liability by or on the part of the United States for her hire beyond the sum of \$40 for those four days. The petitioner seeks to recover \$40 for the trip of the Taurus to Cross Ledge Light July 15 and her return to Wilmington on the evening of that day. She was chartered or hired to render service to the United States, but wholly failed to do so. On the contrary, against the order and will of Brandebury, the master and pilot of the tug refused to go to Maurice River and through their incompetence or willfulness pursued a different and dangerous course to the great damage of the Saunterer and her cargo as heretofore stated. The petitioner claims the right to recover \$14.40 for unloading sand and damaged cement from the Saunterer after she had been towed to Wilmington by the Meteor as above stated. This work did not inure to the benefit of the United States and there was no contract, express or implied, between the United States and the petitioner that the latter was to be paid for it. The petitioner also claims to be entitled to \$10 as an unpaid balance of the hire for the scow at \$10 per day. But it appears from the petition that the scow was in the employ of the United States only from July 11 to August 6, 1893, inclusive, a period of 27 days, and it is admitted in the petition that the petitioner has received from the United States \$270 for such hire. The petitioner originally claimed that it was entitled to recover from the United States \$81.40, for two hawsers sent by it to Cross Ledge Light, valued respectively at \$75 and \$6.40. These hawsers were part of the equipment stipulated for and this claim was abandoned by the petitioner at the hearing. The schooner Slaymaker was in the employ of the United States at Cross Ledge Light at the hire of \$12 per day during the first five days of August, 1893. It is claimed by the petitioner that the schooner was

in such employ for the first six days in that month, but the evidence does not support this contention. The petitioner having received \$60 for the hire of the schooner has been paid in full. The *Taurus* was in the employ of the United States at Cross Ledge Light at the hire of \$40 per day during the first five days of August, 1893. The claim of the petitioner that the tug was in such employ for the first six days of that month is not sustained by the evidence, but the petitioner having received only \$120 on account of hire during that period there is a balance due from the United States to it of \$80. The *Slaymaker* and *Taurus* were discharged from the service of the United States August 5, at 2 o'clock in the afternoon, and with due diligence both vessels should have reached Wilmington before midnight of that day, and consequently the United States did not expressly or impliedly bind itself for their hire beyond that day. The *Taurus* on July 12, 1893, rendered certain services to the United States, as set forth in the petition, for which two charges aggregating \$5 were made. These services were accepted by the United States, the amount charged was moderate, and no reason is perceived why the petitioner is not entitled to recover the amount so charged. It appears that a small boat, of the value of \$10, by which Brandebury sent his order to the *Taurus* was through the negligence of the messenger permitted to drift against the wheel of the tug and that thereby it was destroyed. It was owned by the petitioner. It is admitted in the petition that the United States is entitled to a credit of \$21 for sand returned by the latter to the former.

The conclusions of law reached by the court are as follows:

1. The petitioner in contracting with the United States for the chartering or hiring of the *Saunterer* to the latter undertook that she should be "in first-class condition, fully equipped, with all the necessary anchors, lines, chains, pumps, etc.," and that she should be "in charge of a competent man to be selected and paid" by the petitioner. The provision for an inspection of the vessel before it should enter the service of the United States was a stipulation on the part of the United States reserving to it the right to decline to permit the vessel to enter such service should the United States be dissatisfied with her condition, and was not intended nor did it directly or indirectly operate to relieve the petitioner of its obligation that the vessel should be in proper condition with sufficient equipment and in charge of a competent man. Much stress was laid in the argument for the petitioner on the proposition that the approval of the vessel and her equipment by the United States after inspection must be treated either as a conclusive admission by the United States that she was in proper condition and sufficiently equipped or as a waiver by the United States of any and all defects or insufficiencies in her condition and equipment. Some color is lent to this contention by the sentence in Brandebury's letter of July 1, 1893, as follows: "An inspection of the vessels will be made on or before July 8, and if found in proper condition the same will enter the service of the United States on July 12, 1893," etc. But taking the correspondence constituting the contract as a whole the contention thus made cannot be sustained. The petitioner in its letter of June 20, said: "We will charter you one of our small sand scows at ten

dollars per day; and the barge Saunterer at ten dollars per day, Sundays included, you to assume all risk of vessels." This proposition contemplated that without condition or qualification the Saunterer, if employed by the United States, should be at its risk, and it did not express any undertaking on the part of the petitioner that the Saunterer should be in proper condition and with sufficient equipment. This offer in the unqualified form in which it was made was not satisfactory to the United States; for Brandebury in his letter of July 1, says: "Your proposition of June 20, 1893, in relation to the hire of certain vessels, etc., is accepted under the following conditions: The barge 'Saunterer' and small scow will be chartered by this office on and after July 12, 1893, for the sum of ten (10) dollars per day each (Sundays included), it being understood that both vessels shall be in first-class condition, fully equipped, with all the necessary anchors, lines, chains, pumps, etc., and that each shall be in charge of a competent man to be selected and paid by you." To hold that the subsequent provision in the same letter for an inspection by the United States must be so construed as to emasculate and largely nullify the stipulation, pointedly insisted on by the United States, that the Saunterer should be in first-class condition and with sufficient equipment, would contravene the manifest intention of the parties. If it had been contemplated that an inspection by the United States should constitute the conclusive test of the condition and equipment of the vessel no reason is perceived why the provision for an inspection should not have stood alone, and the stipulation that the vessels should be in proper condition and with sufficient equipment been omitted. Contracts must receive such reasonable construction as will give, if possible, appropriate effect to their various provisions. There is no difficulty here in resorting to such construction. So construed, the contract, in this connection, is to the effect that the Saunterer when employed by the United States should be in first-class condition and properly equipped, and further that the United States should not be obliged to accept her for such employment without an opportunity of first inspecting her in order to judge whether she would prove suitable for the work for which she was to be employed. It is unreasonable to assume that such an inspection as was provided for was intended to be so minute and in such detail as to dispense with the usual liability of the vessel owner for unseaworthiness in particulars discoverable perchance only by close examination.

2. The United States in contracting with the petitioner for the chartering or hiring of the Saunterer and scow undertook to "be responsible for and assume all risks on account of loss or damage to the vessels by reason of storms, fire or accident while at Cross Ledge Light," but stipulated that it should not be responsible for nor pay any charges on account of any loss or damage to said vessels from any cause while en route to Cross Ledge Light or returning therefrom. Nor did the United States undertake to be responsible for any loss or damage to the Saunterer or her cargo resulting from unseaworthiness either in the condition or equipment of the vessel or in

the incompetence of the person placed in charge of her by the petitioner.

3. The petitioner in chartering or hiring the *Taurus* to the United States July 15, 1893, to attend the *Saunterer* and scow during the progress of the work at Cross Ledge Light impliedly contracted that the tug was properly equipped and that those in immediate charge of her movements had reasonably competent knowledge of the waters and channels of the bay in the vicinity of Cross Ledge Light including the course from that place to Maurice River. The omission to supply the *Taurus* with a chart and the want of familiarity of her master and pilot with those waters constituted a breach of such implied contract for the consequences of which the petitioner, and not the United States, is responsible.

4. The United States is entitled to the benefit by way of defense to this suit, so far as it is sought to recover the price of the 302 barrels of cement, of any claim it may have against the petitioner for the loss or destruction of that cement through breach of contract on the part of the petitioner. By virtue of sections 1 and 2 of the act of March 3, 1887 (24 Stat. 505), under which this petition was filed, this court has jurisdiction to hear and determine "all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government." Section 6 of the act provides, among other things, that a copy of the petition shall be served on the district attorney and that "it shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises." It appears from the record that service of a copy of the petition on the district attorney was made May 10, 1894, and that the answer was filed July 16, 1894. It does not appear that any order was made extending the time for filing the answer nor that aside from the answer any notice of counter-claim, set-off, claim for damages or other demand or defense has been filed. The answer, however, among other things, in substance avers that the *Saunterer* was unseaworthy, that her master was incompetent, that the *Taurus* needlessly followed a dangerous course instead of proceeding with the *Saunterer* and scow to Maurice River, that thereby the cement was lost, and that the petitioner is not entitled to recover its price or value from the United States. These allegations, while not formally and technically setting forth the loss of the cement as constituting a counter-claim or claim for damages on the part of the United States, fully notified the petitioner that by reason of the fact that the United States was through breach of contract by the petitioner prevented from having the use and benefit of the cement, the United States thereby sustained damage and would resist the claim of the petitioner to be paid for the lost cement.

Though informal in this connection the answer contains a sufficient notice of counter-claim or claim for damage. When the answer was filed this notice was necessarily filed. That the notice was not contained in a paper separate from the answer involves at most a question of form and not of substance. The omission to file the answer and notice within the prescribed period was not a jurisdictional defect in the proceedings, but only an irregularity. After the filing of the answer and notice the parties without objection on the part of the petitioner adduced voluminous evidence in relation to the circumstances under which the cement was lost and no objection has at any time been made to the discussion or consideration of the question whether on the evidence so adduced the United States has a counter-claim or claim for damages by way of defense to the recovery by the petitioner of the price of the cement. In view of these facts the irregularity in the procedure must be held to have been waived.

It follows from the foregoing findings of fact and conclusions of law that the petitioner is entitled to recover, with interest, from the United States, subject to a deduction of \$21 on account of sand returned to the petitioner, \$80 for the hire of the Taurus in the early part of August, 1893, \$10 for the destruction of the small boat July 15, 1893, \$40 for the hire of the Saunterer from July 12 to 15, 1893, inclusive, and \$5 for towage services rendered by the Taurus July 12, 1893, but nothing further. Judgment will accordingly be entered in favor of the petitioner for \$114, with interest from September 1, 1893, but without costs.

POWERS v. MASSACHUSETTS HOMŒOPATHIC HOSPITAL.

(Circuit Court, D. Massachusetts. December 7, 1899.)

No. 330.

1. CHARITIES—PUBLIC HOSPITAL—LIABILITY TO PATIENTS.

The fact that a public hospital, chartered as a charitable corporation, exacts or receives a pecuniary consideration from a patient, does not affect its character as a charitable institution, nor its rights or liabilities as such in relation to such patient.

2. SAME.

There is no liability on the part of charitable corporations, arising out of the method of administering the charity, to those who accept their bounty.

3. SAME.

A patient in a public hospital chartered as a charitable corporation cannot recover from such corporation for injuries resulting from the negligence of a nurse employed in its hospital.

On Motion by Defendant for Direction of a Verdict.

Thomas H. Russell and Arthur H. Russell, for plaintiff in error.
Charles P. Greenough and Julian Codman, for defendant in error.

PUTNAM, Circuit Judge (orally). This is a suit for damages to compensate for an injury alleged to have occurred to a patient through the neglect of one of defendant's nurses.

The first question which presents itself is whether this is a chari-

table corporation. The original charter of the corporation, standing alone, leaves the matter in great doubt. Of course, it provides for the maintenance and care of the sick, but that is not necessarily a public charity. There are hospitals for the care of the sick which are private institutions, and are run for private advantage. But the act of 1890 expressly declares this to be a "charitable corporation," and that ends the question. We must also recognize the fact that the statutes of Massachusetts, as well as the common law, fully recognize charities and charitable uses, and favor them, so that I am not administering simply what I may gather to be the sentiment of the community, but that sentiment enacted into law as fully as though it was printed at large in the statutes of the state. The common law recognizes charities, and favors them, and therefore, in determining the relations of charities, I must consider that the underlying ideas of charitable institutions, and the underlying sentiment which governs the community with reference to them, form a part of the common law, and are to be administered by me accordingly.

The foundation on which the rules must be built up which govern this case is the charter of the defendant corporation, and the effect to be given to it. That is strictly a local question, as to which the courts of the United States are compelled to follow the decisions of the state courts, if clearly in point. The fact that the hospital received a pecuniary sum in this particular case from the patient, or the fact that it generally receives sums from patients, does not, under the laws of Massachusetts, change its nature. That was decided in *Gooch v. Association*, 109 Mass. 558, 567. The court said:

"The small amount of money and property required to be furnished by those who entered as inmates goes to supplement the charitable fund, and falls far short of being a compensation to the defendants for what the inmates receive. Hospitals and schools generally require some payment of this kind, but are none the less charities on that account."

I think I would be justified in disposing of the case in behalf of the defendant on the authority of *McDonald v. Massachusetts General Hospital*, 120 Mass. 432. But the reasons given are not satisfactory to my mind. In fact it is difficult to say where that case is rested. Therefore, though I must be careful not to assume anything inconsistent with what I find in the Massachusetts decisions, I prefer to put the case on its true ground. The opinion in 120 Mass. makes some reference to the fact that the funds of a charitable corporation cannot be appropriated to payment for an injury to a patient by the neglect of the officers of the corporation. The funds held by the defendant in this case, and generally by hospitals throughout New England, are not tied up by specific trusts, and may be supposed to be somewhat under the control of the corporation. I certainly would not be willing to accept here a rule of law which would compel me, if hereafter it should turn out that this corporation neglected the interior stairways or other portions of Beck Hall, which it owns, and out of which it derives a profit, to say that it had no funds out of which a payment could be made in case of an injury arising from such neglect. In my view the true rule is that there is no liability on the part of charitable corporations, arising out of the administration of

the charity, to those who accept their bounty. And neither the suggestion that there is no fund out of which an execution can be satisfied, nor that made in *Railway Co. v. Artist*, 9 C. C. A. 14, 60 Fed. 365, 23 L. R. A. 581, that public policy requires that suits of this sort should not be entertained, nor the contrary suggestion in *Glavin v. Rhode Island Hospital*, 12 R. I. 411, that public policy requires they should be sustained, touches the real issue.

This brings me back to the proposition that no person who accepts the bounty of a charitable corporation, or accepts the bounty of any charity, can maintain a suit on account of the method of the administration of the bounty which is accepted. This is putting into the law the homely, but expressive, phrase: "You must not look a gift horse in the mouth." It is absolutely inconsistent with the underlying idea of charities as recognized by the law, to hold that the same rule applies to a person employed for compensation to do a certain service as to the distribution of "charity." The person who enters a charitable hospital is not a contractor; neither is the hospital a contractor with that person. The person who enters is a mere licensee, like a guest who enters one's house, and who must take the service as he finds it. Assume that a person enters one's house, and is taken with a severe sickness; assume that he is a stranger, and is suddenly taken with a severe sickness, and is received into one's house. Can one be held responsible for the selection of an incompetent surgeon or physician, or for neglect on the part of a servant, with reference to the care of that person? Pollock (Torts [4th Ed.] at page 473) lays down what has always been held to be the law:

"'Invitation' is a word applied in common speech to the relation of host and guest. But a guest (that is, a visitor who does not pay for his entertainment) has not the benefit of the legal doctrine of invitation in the sense now before us. He is, in point of law, nothing but a licensee. The reason given is that he cannot have higher rights than a member of the household of which he has for the time being become, as it were, a part. All he is entitled to is not to be led into a danger known to his host, and not known or reasonably apparent to himself."

That is the precise rule which applies to a public charity. In this respect private charity and public charity rest on exactly the same ground, and there is no basis in either case to hold that the person who receives bounty is a contractor, a person contracting for service, as one of us engages service when we ordinarily employ a surgeon. He is, in law, only a licensee.

Feoffees of Heriot's Hospital v. Ross, 12 C. & F. 506, came up in Scotland, and the lord ordinary decided in favor of the hospital. It went before the second division of the court of sessions, and the court of sessions decided in favor of the plaintiff. The house of lords reversed this, and restored the decision of the lord ordinary. This institution was founded to receive young children, and train them, by the beneficence of Mr. Heriot. In this case a boy claimed the right to be admitted to the hospital under the terms of the donation. He brought a suit in the nature of a writ of mandamus to require the corporation to admit him, and, inasmuch as the litigation might not be determined before the time when he could be admitted would have expired, relief was asked in the alternative that he might be

allowed damages; and so the case went before the house of lords on the question of damages against the corporation for improperly performing its duty. I gather from the report that there was much dissatisfaction with the administration of the hospital, and that this suit was brought for the purpose of compelling its managers to improve their methods through a public exposition that they were not acting in consonance with the purposes of Mr. Heriot, and not performing their duties as they ought to be performed. In other words, instead of applying to the officers of the crown to remedy the maladministration of a charity, this personal suit was resorted to. The issue was stated by the counsel for Ross as follows:

"If the trustees are made liable, they will be entitled to be repaid out of the trust fund, for this is a mistake in the administration of the trust fund, and is not like an improper and fraudulent act by trustees in direct violation and breach of their trust. They intended to carry out the trust, but have fallen into error in their mode of doing it."

In other words, the charge there was exactly the charge here; that is, negligence, and not willfulness. This case went off on the proposition that there was no fund from which to pay damages. By the terms of the donation, the whole property of the corporation was held under an express trust for its support. But the point to which I call attention, and which is the proposition which ought to guide the courts, is the affirmation that an action of this kind was not known to the common law. Lord Campbell said:

"A doctrine so strange as the court below laid down in the present case ought to have been supported by the highest authority. There is not any authority for it, not a single shred to support it. No foreign or constitutional writer can be referred to for such a purpose."

Again he said:

"It is to be hoped we shall never again hear of a decision like the present, contrary to reason, sense, and justice, and which is wholly unsupported by authority, and is contrary to the law of Scotland."

It is said in this case that there was a special contract. I need only refer again to the fact that the reception—the frequent reception—of money from patients does not change the nature of the institution; and the following out of that proposition necessarily leads to the conclusion that the reception of money from any particular patient does not change the nature of the service rendered that patient, so far as anything which we have here is concerned. What is received is well stated in the case of *Gooch v. Association*, already referred to, as a proper contribution to a charity on the part of the person who makes the payment and obtains the benefit of the charity. It is not received as compensation. It is not compensation in the sense of the law.

Dr. Powers, who was the plaintiff's physician, testified that he understood that he contracted to receive what the hospital should give. That is the substance of his testimony. He was one of the surgical staff. He knew exactly what the hospital was doing. He knew its methods, and was thoroughly informed of all the matters now before us; and yet he testified as we have said. If it were not so, the condition in law would be the same, because, this being a

charitable corporation by express statute, any contract made by its officers which would impose a liability beyond that which the law raises would be ultra vires, and of no value.

I do not wish any one to accept the idea that, because this court denies a private suit, it gives encouragement to the unsuitable or careless management of this hospital or any other. If such a condition of things should arise with any charitable corporation, the remedy is in the hands of the state. A public charity is subject to the visitation of the state, and, in Massachusetts, expressly subject to the visitation of the attorney general; and provisions are made to remedy any maladministration. While I do not anticipate in this particular hospital any such necessity, yet I wish to be understood that any disposition of civil suits by the courts does not leave those who manage public charities free to neglect them. The true remedy in such cases is in the hands of the commonwealth.

There must be a judgment for the defendant.

CITY OF ATLANTA v. CHATTANOOGA FOUNDRY & PIPE CO.

MANION et al. v. SAME.

(Circuit Court, E. D. Tennessee, S. D. May 5, 1900.)

Nos. 647, 599.

1. MONOPOLIES—ACTION FOR DAMAGES UNDER ANTI-TRUST ACT—LIMITATION.
 An action under Anti-Trust Act (Act July 2, 1890; 26 Stat. 210) § 7, providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, * * * and shall recover three fold the damages by him sustained," is not an action for a penalty or forfeiture, within Rev. St. § 1047, prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the state in which it is brought.

2. SAME—TENNESSEE STATUTE.

An action brought under such section, in which the right of recovery is based on an alleged exorbitant charge made by defendant to plaintiffs for manufactured articles purchased, by reason of a combination or trust entered into by defendant with others for the purpose of monopolizing trade in violation of the act, is for an injury to personal property, and comes within Shannon's Code Tenn. § 4470, which prescribes a limitation of three years for "actions for injuries to personal or real property," being, in effect, the same as an action on the case for the recovery of the money which plaintiffs were illegally compelled to pay in excess of the fair market value of the articles purchased.

On Demurrers to Pleas Interposing the Defense of the Statute of Limitations of Tennessee.

Pritchard & Sizer, for Manion & Co.

C. P. Gore, L. A. Dean, Westmoreland Bros., and J. L. Faust, for city of Atlanta, Ga.

Brown & Spurlock, for Chattanooga Foundry & Pipe Co.

CLARK, District Judge. These suits are brought to recover damages under section 7 of the so-called "Anti-Trust Act" of congress of July 2, 1890, which reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The first-named case is a suit on behalf of the city of Atlanta, Ga., a municipal corporation, and the second on behalf of plaintiffs, who aver that they are contractors engaged in the business of furnishing and laying gas, water, and sewer pipes in the city of New Orleans, La. The defendant heretofore has been, and now is, engaged in the business of manufacturing and selling cast-iron pipe and fittings, used for the purposes of public drainage and sewerage, and by gas and water companies in the business of operating gas and water plants. The declarations in the two cases vary slightly in the form of statement of the case. Both suits are actions on the case, and, in substance, proceed upon the ground that the defendant entered into an unlawful trust or combination with others for the purpose of monopolizing trade in violation of the anti-trust act. The trade combination or trust complained of here was involved in *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. —, and is there fully described. The plaintiffs in each case became purchasers of the manufactured product of the defendant in large quantities, and at prices set out in the declarations. It is charged with sufficient detail that by reason of the unlawful combination and trust contract entered into, the defendants were enabled to advance, and did advance, the price on their manufactured goods, and that the plaintiffs were, in consequence, compelled to pay an exorbitant and unfair price, which is called a "bonus," on the goods purchased. The estimated difference between the just and fair market price of the goods and the price actually paid is stated in figures, and the specific damages claimed are laid at this difference between the fair price of the goods and the trust price paid, the declarations concluding with an averment of the right to increase the actual damages sustained threefold, as authorized by the act. Besides other pleas, the defendant interposes as a defense the state statute of limitations of one and three years, as found in the Code of Tennessee (*Shannon's Revisal*), §§ 4469, 4470,—the former section prescribing a limitation to actions for statute penalties, injuries to the person, and other civil wrongs, not necessary to be noticed; and the latter prescribing a limitation period of three years for injuries to property, real and personal. To these pleas the plaintiffs demur upon the ground that section 1047 of the Revised Statute applies to the actions, and that the state statute is inapplicable.

The case, in respect of the issues thus presented, turns in part on the distinction between a penalty, as such, imposed by statute for a breach of its provisions, by way of punishment for the act,

and in the public interest on the one hand, and a private remedy conferred on a person specially injured by the unlawful act, and by way of compensation for the injury sustained, on the other. If the action authorized by section 7 is a penalty in the sense indicated, it might be conceded for the moment, or for the purposes of the question now to be decided, that section 1047 of the Revised Statutes would be applicable, and under that view the demurrer would be well taken. On the other hand, if the suit is not in its nature and substance a penal action, but a civil remedy for a private injury, compensatory in its purpose and effect, the action is subject to the state statute of limitations applicable to cases of this class, if there be such a statute: *Campbell v. City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 240; *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62; *Adv. S. U. S. 62*, 44 L. Ed. —. In the last case cited Mr. Justice Peckham, giving the opinion of the court, said:

"The court below was, as is stated in the opinion, somewhat influenced in its decision of this question by the belief that, if this were not a penal statute, there was no federal statute of limitations applicable to it, and said that it could hardly be supposed that it was the intent of congress to permit such a statutory rate of damages to run without federal statutory limitation. If there were no such federal statute, then the state statute would apply. Although not an action to recover a statutory penalty or forfeiture, still, in the absence of any federal statute of limitations, it would be limited by the limitation existing for the class of actions to which it belongs in the state where the action was brought. *Campbell v. City of Haverhill*, 155 U. S. 610, 614, 15 Sup. Ct. 217, 39 L. Ed. 270."

See, also, *Cockrill v. Butler* (C. C.) 78 Fed. 679.

Section 1047 of the Revised Statutes prescribes limitations as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: provided, that the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property."

It is necessary, therefore, to determine the question whether the suits are essentially penal or civil actions in their object and result. This question whether the action authorized is intended as a punishment or as compensation obviously involves the distinction between a civil remedy and a penal action in its primary or international meaning, this being the sense which was under consideration in the leading case of *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, in which Mr. Justice Gray, for the court, said:

"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws."

In the previous case of *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, Mr. Justice Gray, for the court, had said:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors,

but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties."

In *Huntington v. Attrill* [1893] App. Cas. 150, before the privy council of England, precisely the same question was in judgment as that involved and decided in *Huntington v. Attrill*, supra, the suit being between the same parties. Lord Watson, delivering the judgment of their lordships, quoted the above passage from *Wisconsin v. Pelican Ins. Co.*, rendering in italics the words "but to all suits in favor of the state," and then went on to say:

"Their lordships do not hesitate to accept that exposition of the law which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the state law, as well as against individuals who may be injured by their conduct. But foreign tribunals do not regard these violations of statute law as offenses against the state, unless their vindication rests with the state itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the state, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

In Dicey, *Confl. Laws*, p. 220, the general proposition is laid down (as rule 40) that the high court of justice in England cannot entertain an action for the recovery of a penalty due under the laws of a foreign country, or an action on a foreign judgment for such penalty. Upon the authority of leading cases cited, the rule is then commented on as follows:

"What is a penal law? The application of rule 40 raises the difficult question, when is a law to be considered a penal law? Or, what is really the same inquiry under another form, when is an action to be considered a penal action? These inquiries are to be answered as follows: A 'penal law' is strictly and properly a law which imposes punishment for an offense against the state; and a 'penal action' is a proceeding for the recovery, in favor of the state, of a penalty due under a penal law. A law, on the other hand, is not a penal law merely because it imposes an extraordinary liability on a wrongdoer, in favor of the person wronged, which is not limited to the damages suffered by him; and an action for enforcing such liability by the recovery of the penalty due to the person wronged is not a penal action. The essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual. A proceeding, then, in order to come within rule 40, must be in the nature of a suit in favor of the state whose law has been infringed."

This question of distinction between penal actions brought by a common informer, or on behalf of the state, to redress a public wrong, and remedial actions brought by the party injured to redress a private wrong, has been under consideration in many adjudged cases. 13 Am. & Eng. Enc. Law (2d Ed.) 52; 16 Enc. Pl. & Prac. 229, where the subject will be found fully treated, and the cases cited.

It is quite obvious that no sound reason could be suggested why congress would have been concerned in prescribing a limitation to actions for penalties or forfeitures other than such as are prosecuted in favor of the United States for breaches of public law, punishable by pecuniary mulct, or otherwise, at the instance of the United States. In *Campbell v. City of Haverhill*, the court said:

"Is it not more reasonable to presume that congress, in authorizing an action for infringement, intended to subject such action to the general laws of the state applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction."

This language is equally applicable to the remedy provided by section 7 of the act in question.

In examining the question of what "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," is within the purpose and meaning of section 1047, it would seem that reference may, with propriety, be made to section 919 as possibly throwing light on the inquiry, in which it is provided that:

"All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States."

The action provided for in section 7 of the act could neither be brought in the name of the United States, nor prosecuted as a popular or *qui tam* action, the remedy being expressly restricted to the party "injured in his business or property." The phraseology of the proviso in section 1047 must be regarded as somewhat significant as to the character of the prosecution within the legislative purpose. In view of these and other provisions of the Revised Statutes, and of the doctrine of more recent cases, it seems permissible to entertain serious doubt whether section 1047 applies, or was intended to apply, to suits other than those prosecuted in behalf of the United States. But, be this as it may, I conclude that this is not a penal action, and the recovery sought is not a penalty within the sense here involved, which is substantially the same as the international sense.

In *Brady v. Daly* the case was considered with reference to jurisdiction, as well as the statute of limitations, and the case at bar, in principle, is undistinguishable from that case, and is governed by it. Mr. Justice Peckham, giving the opinion of the court (page 154, 175 U. S., page 64, 20 Sup. Ct., page 64, Adv. S. U. S., and page —, 44 L. Ed.), said:

"The statutes, it will be perceived, all use the word 'damages' when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong, and to grant to the proprietor

the right to recover the damages which he has sustained therefrom. The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter."

The reasoning thus adopted is forcibly applicable to the cases at bar. In *Pidcock v. Harrington* (C. C.) 64 Fed. 821, the main question was whether the anti-trust act conferred on a private person a right to sue in equity to restrain the act forbidden by the statute. It was determined that an action at law for damages was the only remedy of a private person. In analyzing the statute, Judge Coxe said:

"The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. If it ended with section 6, there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The only section which gives a private remedy is the seventh, which is as follows." Then, setting out section 7 in the very language of the statute, the court proceeded to say: "But for this section, no private person would have any standing in court, and, as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell v. Hagan* (C. C.) 54 Fed. 40, affirmed in 56 Fed. 696, 6 C. C. A. 86."

See, also, 14 Enc. Pl. & Prac. 55.

It is insisted by plaintiffs' counsel that, in so far as the statute authorizes the recovery of damages above those actually sustained, the actions must be regarded as penal. As, undoubtedly, the chief object of this section of the statute is remedial and protective, the fact that damages above actual compensation are allowed would not change the real character of the action. In many civil actions for the redress of private wrongs, exemplary or punitive damages may be allowed by the court or jury, but this does not make the action penal. As was said by the supreme court of the United States in *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463:

"The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages."

In suits for the infringement of patents in the event a verdict is rendered for the plaintiff, the court is expressly authorized to enter judgment for any sum above the amount found by the verdict as actual damages, not exceeding three times the amount of the verdict, together with the costs (Rev. St. § 4919); and under section 4921, a court of equity, when exercising jurisdiction, is empowered in like manner to increase the damages found; the statute providing:

"And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions of the nature of actions of trespass upon the case."

Nevertheless, *Campbell v. City of Haverhill* was an action on the case for infringement of letters patent, in which it was adjudged that the statute of limitations of the several states applied to such actions, and the suggestion that the action was penal evidently did not occur to counsel or the court.

Another view affecting the proper interpretation of the statute should be mentioned in closing the discussion of this point in the case. Section 3 of the statute declares unlawful and prohibits every trade combination or trust contract, and inflicts punishment for a violation of the statute by enacting that:

"Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It would be unusual to discover that a statute inflicted punishment for infringement of its provisions by fine and imprisonment, or either, and again in the form of pecuniary penalty for the same act. A sound rule of interpretation would be that when a statute inflicts punishment by way of fine and imprisonment at the suit of the state for a public wrong affecting the whole community, and also confers a remedy on a party for private injuries resulting from breaches of the statute, the latter will not be regarded as a penalty unless the statute so declares. It was accordingly so decided by the supreme court of Ohio in *Railway Co. v. Methven*, 21 Ohio St. 586. A statute providing for a fine or penalty usually either fixes the amount, or prescribes maximum and minimum limits within which the amount must be fixed by the court or jury, as the punishment, and the amount bears no direct relation to damages sustained by private injury. The amount of damages which may be recovered in the remedial action afforded by section 7 of the act in question is determined by the injury sustained, and the actual compensation therefor increased to treble that amount. The damages actually claimed here in the first case are laid at the sum of \$50,000, and in the second \$20,000. The great disproportion between these sums and the maximum limit of the fine imposed by section 3 is a circumstance admitting of no rational explanation, if the damages recovered under section 7 must be regarded as a penalty inflicted as punishment, like the fine imposed under section 3. These and other characteristic points of difference between penal and remedial actions support the conclusion arrived at that these actions are remedial and compensatory only.

The question now remains whether the statute of limitations of the state relied on is applicable to these actions, or actions of the class to which they belong. The statute (Shannon's Code, § 4466) expressly declares the legislative purpose and intent to prescribe a bar to "all civil actions other than those for causes embraced in the foregoing article," the limitation of real actions having been provided in the preceding article. Sections then follow prescribing a period of limitation to various suits, such as actions for injuries to the per-

son, and statute penalties, among which is section 4470, which reads as follows:

"Actions for injuries to personal or real property; actions for the detention or conversion of personal property, within three years from the accruing of the cause of action."

The words "personal and real property" are by the Code itself (section 63) thus defined:

"The word 'property' includes both personal and real property; the words 'personal property' include money, goods, chattels, things in action, and evidences of debt; 'real estate,' 'real property,' 'lands,' include lands, tenements and hereditaments, and all rights thereto and interests therein, equitable as well as legal."

A definition of "personal property," as given by a critical writer, and fully sustained by authority, is in these words:

"Personal property includes every kind of chose in action, using that term in its very widest sense. It includes, that is to say, every movable which cannot be touched, or intangible movable. Thus it includes 'debts,' in the strict sense of the term, and also everything (not an immovable) which can be made the object of a legal claim; as, for example, a person's share in a partnership property." Dicey, *Confl. Laws*, p. 313.

See, also, 1 Schouler, *Pers. Prop.* (3d Ed.) 2-17.

It will be observed that by the very terms of the act of congress, the remedy of a suit to recover damages is only conferred on "any person who shall be injured in his business or property." The suits in these cases must, therefore, necessarily be construed as actions to recover damages for an injury to "business or property."

The plaintiff in the first-named case is engaged in no business whatever, and the plaintiffs in the second case are engaged in the business of taking contracts to furnish and place in position pipes and fittings. They do not deal in or handle pipes and fittings as merchants or dealers would do. It will admit of question whether, in an action under the statute for an injury to business alone, it would not be necessary for a plaintiff to allege that he was engaged in interstate trade or commerce, in order to come within the protection of the act. *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* (C. C.) 55 Fed. 851; *Bishop v. Preservers' Co.* (C. C.) 51 Fed. 272. In *Lowry v. Association* (C. C.) 98 Fed. 817, facts are disclosed which, in respect of both the character of business and method of injury to such business, bring the case within the anti-trust act. However, the injuries alleged in the declarations as grounds for recovery are not injuries to any business in which the plaintiffs were engaged. The suits are clearly for the recovery of the difference between the fair market value of the goods purchased and the unlawful prices arbitrarily fixed by the trust combination; or, stated in another form, the suits are to recover back, as damages, the sums of money unlawfully demanded and paid, increased threefold by the express direction of the act. Now, money has been declared to be personal property, not only by state statute, but again and again by text writers and in judicial statement. Confessedly, the declarations present no case of an injury to property at all unless it is personal property. I am unable to perceive that the actions are for injuries other than to personal property.

The contention, finally, is that section 4470 of Shannon's Code of Tennessee is applicable only when the injury is direct. Such an interpretation would disregard all progress, and carry us back to the old action of trespass. Before the reformed code systems of pleading adopted in most of the states, the action on the case had, by wide application, become the remedy for every wrong or injury to personal property to which trespass would not apply. Trespass upon the case would lie for every civil wrong to chattels personal, whether corporeal or incorporeal, and whether the injury was direct and immediate or indirect and consequential. And Steph. Pl. § 52; Bish. Noncont. Law, § 45; Cooley, Torts (2d Ed.) 510; Poll. Torts (5th Eng. Ed.) pp. 13, 22, 495. See, also, Carrol v. Green, 92 U. S. 509, 23 L. Ed. 738; Railway Co. v. Clark, 38 U. S. App. 573, 20 C. C. A. 447, 73 Fed. 76, 74 Fed. 362; Cockrill v. Butler (C. C.) 78 Fed. 679. No valid reason could be suggested for a construction of the statute which would restrict its application within such narrow limits in view of the wide and various applications of actions on the case. The words of the statute, "actions for injuries to personal or real property," are general, and in no wise restricted by the specific mention of actions for detention or conversion. If, indeed, money unlawfully obtained as alleged in these declarations is not a direct injury, the civil wrong belongs to a class for the redress of which trespass on the case had been a long-used remedy at the time of the adoption of the Code. In 1 Add. Torts (6th Ed.) § 27, it is said:

"If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, not the money of the wrongdoer, but of the injured person, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession."

The author then, declaring that an action will lie to recover back money paid under such conditions, continues:

"Such an action also lies against all persons who extort money for doing what they are by law bound to do without payment or reward, or who receive, and have in their possession, and wrongfully detain, the money of another; 'for,' as it has been observed, 'no man will venture to take, if he knows he is liable to refund.'"

The doctrine is supported by reference to cases in which it was decided that money may be recovered back when wrongfully paid under different circumstances. Thus, excessive charges demanded by a carrier of goods for transportation, and paid by the consignee in order to get possession, would support an action to recover back the excess. So, of money paid under the coercion of threatened litigation, or money unlawfully demanded and received by a revenue officer for the release of goods seized, or other like payments wrongfully demanded and taken. In 2 Greenl. Ev. (16th Ed.) § 224, the distinction between an action of trespass and an action on the case is stated clearly, and in the fewest words possible, thus:

"By the former, redress is sought for an injury accompanied with actual force; by the latter, it is sought for a wrong without force."

And in reference to the character of the injury which would support an action on the case it is further observed:

"So, though the property was forcibly taken, the force may be waived, and trover, which is an action on the case, may be sustained, for the value of the goods." *Id.* § 226.

The extended use of the action of trespass on the case is well indicated by the following definition, which has been generally accepted as accurate:

"The writ of trespass upon the case lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply." *And. Steph. Pl.* § 52.

See, also, upon this subject, *Cockrill v. Butler* (C. C.) 78 Fed. 679, and authorities there cited.

The circumstance that an exorbitant price for a commodity arbitrarily fixed by a trust combination is demanded and received through the medium of a contract of purchase in no wise affects or changes the real nature of the injury as an unlawful taking and detention. "The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment." *Poll. Torts* (5th Ed.) p. 23.

In *Conk v. Railroad Co.*, 1 Tenn. Cas. 409, possession of the goods was obtained through a contract for transportation, and the action was for the value of the goods. "The action," said the supreme court, "is for the detention or conversion of the plaintiff's property. It is true, the contract for carrying the goods is averred, and that the defendant failed to comply with it. Yet the gist of the action is the detention or conversion of the property, by which it was lost to the plaintiff." It was held that three years was the limitation.

In the light of this exposition of the law in respect of the form and proper application of the older and well-defined remedies, the inquiry into the legislative purpose disclosed in the section of the Code with which I am dealing ought not to involve a question of interpretation which will not admit of satisfactory answer. The Code of 1858 is a systematic compilation enacted as such, every part of which must be read in view of this circumstance, and not as an independent enactment. Forms of actions were abolished by the Code, and the statute of limitations does not depend on the form, but on the cause, of action. *Conk v. Railroad Co.*, 1 Tenn. Cas. 409. In construing the words "actions for injuries to personal or real property," as found in section 4470, it seems allowable to refer to sections 4437 and 4438 in the preceding chapter, under the same title, both chapters belonging to part 3 of Shannon's Code, which treats "Of the Redress of Civil Injuries." In the sections last referred to the Code undertakes to deal with all actions in the well-recognized classes of actions *ex contractu* and *ex delicto*, and to completely abol-

ish forms of action. Section 4437 declares that "all contracts may be sued on in the same form of action," and section 4438, dealing with the general subject of torts, provides that "all wrongs and injuries to the property, in which money only is demanded as damages, may be redressed by an action on the facts of the case." No valid reason could be offered to support an interpretation which would give to the words "actions for injuries to personal or real property," in section 4470, a meaning more restricted than the sense in which the words "all wrongs and injuries to the property" are used in section 4438. It is hardly to be doubted on any substantial ground that the legislative purpose in both sections was to include and provide for every species of injury to personal property included in the more general or collective name of torts or civil wrongs. The new remedy provided by congress must be enforced just as like actions within the same jurisdiction (*Campbell v. City of Haverhill*; *Cockrill v. Butler*), in accord with Rev. St. § 914. The actions are, therefore, prosecuted according to Shannon's Code Tenn. § 4438, as actions "on the facts of the case"; and, agreeably to Rev. St. § 721, as expounded in the cases last cited (also, *Brady v. Daly*), the state statute of limitations furnishes the rule of decision.

Having regard to the real nature and purpose of the actions, I conclude that they are suits for an injury to personal property, and within section 4470 of the state statute of limitations prescribing a period of three years as a bar to such suits. It follows, of course, that section 4469 is inapplicable. Accordingly, the demurrer as to the second plea is sustained, and as to the third plea overruled.

WESTERN INDUSTRIAL CO. et al. v. DODGE et al.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1900.)

No. 899.

VENDOR'S LIEN—EXTENSION TO OTHER LANDS—CONTRACT—CONSTRUCTION.

Plaintiffs sold and conveyed to S., M., and J. 36 tracts of land, reserving in the deeds therefor a vendor's lien to secure the payment of certain promissory notes for part of the purchase price. Thereafter, and before the payment of said notes, M. and J., who had succeeded to the interests of S. therein, conveyed said lands, with numerous other tracts of land, to W., the deed reciting that the conveyance was made "subject to all incumbrances now existing upon any or all of the lands hereby conveyed," and also made another deed of the same lands to the same grantee, wherein the latter assumed "all the incumbrances now existing" upon the lands described. Subsequently plaintiffs entered into a written agreement with W., whereby the latter bound itself for the payment of said purchase-money notes, the time for the payment thereof was extended by plaintiffs, the vendor's lien originally reserved therein was referred to as a continuing lien, and it was provided that W.'s default in the payment of taxes, or of the principal and interest on said rates, should operate to mature all of the notes. *Held* that, under the above-mentioned instruments, plaintiffs were entitled to a first lien upon the 36 tracts of land conveyed by them to S., M., and J., for the satisfaction of said notes, but that they were not entitled to any lien whatever upon the other lands embraced in the deeds from M. and J. to W.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

F. B. Stanley, M. A. Spoons, George Thompson, and D. T. Bomar, for appellants.

Chas. K. Bell, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The record in this case is voluminous. There are 432 closely-printed octavo pages, which embrace so much of the record as the parties deemed it necessary to print. There are also four briefs, each of which presents in liberal display the learning of the eminent solicitors who appear for the respective parties. It would be tedious and unprofitable to reproduce in this opinion the manifold pleadings, the propositions and counter propositions of fact and law, and the multiplied minute distinctions which, with microscopic keenness and intensity, have been made to obscure, and to almost hide, the few vital and simple facts and principles on which the case hinges.

On February 12, 1890, the complainants sold to G. P. Meade, Wm. F. Sommerville, and J. Grant Jones the 36 tracts of land first described in the complainants' bill, and conveyed the same to the purchasers by 36 separate deeds. In part consideration for the purchase of each tract, the purchasers executed three several promissory notes, maturing at different dates, bearing interest from date, and providing for the payment of 10 per cent. on the principal and interest as attorney's fees if the notes were not paid without suit; and both in the deed and in the notes mention was made that a vendor's lien was retained on the land to secure the payment of the notes given in each case, respectively. Meade, Sommerville, and Jones, though not so named in the deed to them, were in fact trustees for an unincorporated association known and called the "Wichita Colony Company." The members of this unincorporated association, before the 15th of February, 1891, became substantially the only stockholders in the defendant the Western Industrial Company. Before that time Sommerville had released his right and interest as one of the trustees to the other two, Meade and Jones, and on February 15, 1891, these two trustees, on the request of the *cestui que trust*, conveyed to the defendant the Western Industrial Company, which took title as trustee for the same parties, the 36 tracts of land which had been sold to Sommerville, Meade, and Jones by the complainants, and, along with these 36 tracts of land, very numerous other tracts of land, amounting in the aggregate to more than 150,000 acres. It appears that Meade and Jones executed two deeds to the defendant the Western Industrial Company, bearing the same date, February 15, 1891, and purporting to convey the same land, which is more particularly described in one of the deeds than in the other. In one of these deeds this language appears: "This conveyance is made subject to all incumbrances now existing upon any or all of the lands hereby conveyed." This deed was authenticated for record before D. T. Bomar, a notary public, on March 14, 1891, and ap-

appears to have been filed for record in Wichita county, Tex., on June 25, 1895. In the other deed this language appears: "Know all men by these presents, that we, G. P. Meade and J. Grant Jones, of the county of Tarrant and state of Texas, for and in consideration of the sum of \$357,666.66, to us cash in hand paid, and the assumption of all the incumbrances now existing upon the hereinafter described lands by the Western Industrial Company, have this day granted," etc. This deed also was authenticated for record on the 14th of March, 1891, before D. T. Bomar, notary public, and was filed for record in Baylor county on March 23, 1891. The bill avers, and the answer of the Western Industrial Company admits, that on December 9, 1892, and on divers other dates prior and subsequent thereto, the Western Industrial Company, by its agreement in writing signed by its proper officers thereunto duly authorized, acknowledged itself bound for, and promised to pay to the complainants, the indebtedness evidenced by the notes of Meade, Sommersville, and Jones to the complainants. The bill avers, and the answer of the Western Industrial Company admits, that at the special instance and request of that company, and in consideration of \$3,201.12 paid on account of the indebtedness evidenced by the notes declared on, the complainants by a contract in writing agreed to and did extend the time of payment of all of the notes, agreeing in detail as to the terms of the extension; and that thereafter the defendant corporation, at different times, paid on the notes divers sums of money, a portion of which was applied to the satisfaction of the interest thereon, and a part to the principal thereof; and that the complainants and the company then made up, settled, and stated an account in writing of all sums of money which the defendant corporation then paid, and which it had before that time paid, on the indebtedness evidenced by the notes in question. On July 1, 1892, Meade and Jones, by their deed in writing, duly authenticated for record on July 7, 1892, and filed for record in the proper office in Baylor county, Tex., on August 8, 1892, had undertaken to release any lien they had, or might be supposed to have, on any of the land conveyed in the two deeds of February 15, 1891; and both before and after July 1, 1892, and before August 14, 1895, the Western Industrial Company had, by various deeds and other instruments in writing, duly executed and recorded, in favor of the various other defendants in this bill, conveyed, incumbered, and dealt with the numerous tracts of land constituting the 150,000 acres or more embraced in the deeds of Meade and Jones of date February 15, 1891. In this condition of affairs, the complainants in this suit and the Western Industrial Company did, on August 14, 1895, enter into this agreement in writing:

"This agreement made and entered into by and between Melissa P. Dodge, executrix, and William E. Dodge, Jr., and D. Stuart Dodge, executors, of the will of William E. Dodge, late of the state, county, and city of New York, a certified copy of said will, with its probate, from the surrogate's court of the county of New York, state of New York, having heretofore been filed in the office of the county clerk of Lampasas county, Texas, parties of the first part, and the Western Industrial Company, a corporation duly incorporated under the laws of the state of Iowa, and having a permit from the state of Texas authorizing it to transact business in Texas, party of the second part, wit-

nesseeth that whereas, the estate of Wm. E. Dodge did heretofore convey to the parties named below the following sections of land situated in Baylor county, Texas, to wit:

No. of Sec.	Price.	Date of Sale.	Name of Purchaser.		
			G. P.	W. F. Som-	J. G.
			Meade.	merville.	Jones.
57	\$1,300 00	Feb. 12/90.			
59	1,300 00	do.	"	"	"
61	1,360 00	do.	"	"	"
63	2,400 00	do.	"	"	"
65	2,300 00	do.	"	"	"
83	1,720 00	do.	"	"	"
97	1,800 00	do.	"	"	"
103	2,200 00	do.	(Part of) "	"	"
109	2,720 00	do.	"	"	"
111	2,520 00	do.	"	"	"
113	2,440 00	do.	"	"	"
115	1,800 00	do.	"	"	"
117	1,720 00	do.	"	"	"
119	2,000 00	do.	"	"	"
151	1,700 00	do.	"	"	"
161	2,600 00	do.	"	"	"
187	2,600 00	do.	"	"	"
195	2,500 00	do.	"	"	"
197	2,320 00	do.	"	"	"
199	2,440 00	do.	"	"	"
201	1,920 00	do.	"	"	"
203	2,440 00	do.	"	"	"
205	2,720 00	do.	"	"	"
207	2,600 00	do.	"	"	"
209	2,200 00	do.	"	"	"
211	2,440 00	do.	"	"	"
215	2,000 00	do.	"	"	"
217	1,920 00	do.	"	"	"
219	1,920 00	do.	"	"	"
221	2,440 00	do.	"	"	"
223	3,000 00	do.	"	"	"
227	2,520 00	do.	"	"	"
229	2,200 00	do.	"	"	"
231	2,200 00	do.	"	"	"
235	1,920 00	do.	"	"	"
237	1,600 00	do.	"	"	"
239	1,700 00	do.	"	"	"
243	2,600 00	do.	"	"	"

"And whereas, said purchasers did pay one-fourth of the purchase price for each tract upon delivery of deed, and did execute three promissory notes, each for one-fourth of the purchase price, due on February 12, 1891, February 12, 1892, and February 12, 1893, respectively, said notes providing for 6% interest per annum, the interest upon each note being made payable annually on February 12th, and each note retaining the vendor's lien; and whereas, the Western Industrial Company has become the purchaser of each of said tracts from the vendees of the estate of Wm. E. Dodge, and as a part consideration therefor did assume the unpaid purchase money due said estate; and whereas, all interest on each of said notes has been paid down to February 12, 1895 (the interest from February 12, 1894, to February 12, 1895, being settled at the rate of 5% and 60%, or (3%) three-fifths of the principal sum due upon each of said notes, originally maturing in 1891, has been paid, and the party of the second part desires an extension on the remaining unpaid purchase money, which is granted for the considerations, and subject to the conditions, named below, to wit: First, the party of the first part has and does hereby reduce the rate of interest on each of said notes from 6% to 5%, commencing February 12, 1895; second, the party of the second part hereby releases and relinquishes all claims that have heretofore arisen or may hereafter arise or accrue against the estate

of Wm. E. Dodge, growing out of any conflict in the boundary lines of said surveys with other surveys or with each other; third, the party of the second part agrees and binds itself to pay up annually all taxes assessed against said property, and to keep same free from tax sales; fourth, the party of the second part agrees and binds itself to pay to the parties of the first part, at the office of the estate of Wm. E. Dodge, in the city of New York, annually, on February 12th in each year, the annual interest of 5% upon the unpaid principal due upon each of said purchase-money notes, and in addition thereto to pay on February 12, 1896, 20%, or $\frac{1}{5}$ th, of the original principal sum due upon each of said notes, maturing originally in 1891, and on February 12, 1897, to pay the remainder of said first notes, and on or before February 12, 1900, to pay the said notes which originally matured in 1892 and 1893, together with the interest then unpaid on same; fifth, the parties of the second part reserve the right to pay up in full any one or more of said notes at any time within said extension; sixth, it is especially agreed and understood that the failure on the part of the party of the second part to strictly perform the obligations assumed by it in items third, fourth, and fifth of this agreement shall mature each and all of said notes, at the option of the party of the first part, and the same may thereupon be collected, allowing 5 per cent. interest instead of 6 per cent. In witness whereof said parties have hereunto signed this agreement on this the 14th day of August, A. D. 1895.

"Estate of Wm. E. Dodge.

"Melissa P. Dodge, Ex.

"D. Stuart Dodge, Ex.

"The Western Industrial Co.,

"By Morgan Jones, Vice President."

Learned discourse touching the origin and character of vendors' liens and implied liens in equity, and ingenious refinements as to the distinctions obtaining between these and expressly retained liens in the nature of a mortgage appearing on the face of a deed or purchase-money note, and the laborious array of judicial precedents to indicate and illustrate the construction to be placed on the assumption clauses in the deeds of February 15, 1891, all blush themselves away beyond the vanishing point before the explicit dealings of the parties to the agreement of August 14, 1895, as the same appear on the face of that instrument and in the previous transactions we have recited. It is clear to us that the complainants at the time of entering into the agreement of date August 14, 1895, had not in contemplation, and in good conscience could not then have had in contemplation, and may not now look to or rely upon, a first mortgage lien or any other lien accruing to them upon or against the 150,000 or more acres of land, which they had never owned, embraced in the deeds of Meade and Jones of date February 15, 1891, to which reference has been made, and of which they do not claim to have had any knowledge or notice other than that constructive notice resulting from the recording thereof, precisely similar in kind and extent to the constructive notice with which they were then charged of all the dealings of the defendants in reference to this 150,000 and odd acres of land. It is therefore clear to us that the complainants have for the satisfaction of their debt the first lien on the lands described in the bill as having been sold and conveyed by them on February 12, 1890, which they were careful then to expressly retain, and which they were so careful to protect by the agreement of August 14, 1895. It is equally clear to us that the dealings of the complainants with the Western Industrial Company since February 15, 1891, all along down

to and including the agreement of August 14, 1895, conclusively show that they did not claim, and they should not now be allowed to claim, a first mortgage lien, or any other lien, in advance of judgment, against the other lands described in their bill, and held by the decree in this case to be ultimately subject to the satisfaction of their debt.

The defense attempted to be set up by the Western Industrial Company, joined in by the other defendants, and based upon alleged fraud on the part of the complainants in having paid a commission to J. W. Jennings, is not, if well pleaded, sustained by the proof. This defense having wholly failed, as the circuit court also found, the amount of the indebtedness due to the complainants, as shown in the decree, namely, the sum of \$59,740.80, with interest thereon at 5 per cent. per annum from the 11th day of December, 1899, the date of the decree, appears to be admitted by all the parties, or, if not so admitted, to be amply proved. The whole case being now before us, we reverse so much of the decree of the circuit court as adjudges that the complainants have a lien on any of the land described therein other than the 36 tracts of land first therein described; and, as thus reversed and amended, the decree of the circuit court is now here affirmed and rendered as the decree of this court. The costs of this appeal are adjudged against the appellees.

MYERS v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Iowa, W. D. June 4, 1900.)

1. RAILROADS—PERSONAL INJURY—DEFECTIVE CROSSING—EVIDENCE—INSTRUCTIONS TO JURY—NEW TRIAL.

Plaintiff's horse became frightened at one of defendant's trains, but followed the highway until it came to the railway crossing, when plaintiff was thrown out of her buggy by the severity of a jolt caused by the wheels striking the covering to a waterway under the road, which was so constructed as to form a ridge across the highway. The evidence showed that the ridge was not an obstruction to the safe use of the crossing, under ordinary circumstances, and that, if plaintiff's horse had been traveling at a reasonable rate of speed, plaintiff would have been carried over the crossing without injury. *Held*, that the court properly instructed the jury that defendant was not negligent in permitting the ridge at the crossing to exist.

2. SAME—PROXIMATE CAUSE—EVIDENCE—INSTRUCTIONS TO JURY.

It appearing from the evidence that defendant was not negligent in permitting the ridge at its railroad crossing to exist, because of its safety for ordinary travel, the court properly instructed the jury that the condition of the crossing was not the proximate cause of the accident to plaintiff, though the contact of the wheels of her buggy therewith, while her horse was running away, caused her to be thrown out and injured.

On motion for new trial filed by plaintiff.

Lewis & Lewis, for plaintiff.

Shull & Farnsworth and H. H. Field, for defendant.

SHIRAS, District Judge. On July 16, 1898, the plaintiff received severe personal injuries from being thrown from a buggy in which she was riding, at a crossing over the line of the defendant railway

company near the town of Akron, in Plymouth county, in this state. For the recovery of the damages thus caused the plaintiff, this action was brought, and on the trial before the court and jury the plaintiff based her right of recovery on two grounds: First, that the railway company negligently caused or permitted steam to escape from an engine upon its track, thereby frightening the horse drawing the buggy in which plaintiff was seated, and causing it to run away; and, second, that the crossing of the highway over the railway, which it was the duty of the defendant company to keep in safe condition for use by the public, was in bad and unsafe condition, and as a result the plaintiff was thrown from the buggy, and received the injuries complained of.

The evidence on the trial showed that the plaintiff and her daughter, the latter driving the horse, were passing along the highway at a point where it approached the crossing, and while at some little distance from the crossing a freight train overtook them, and the horse took fright thereat, and ran away, but in its flight followed the highway until it reached the railway crossing, when first the plaintiff, and then the daughter, were thrown from the vehicle. Upon the question whether steam was negligently allowed or caused to escape from the engine, thereby frightening the horse, the evidence was in conflict; and the court instructed the jury that if they found from the evidence that, when approaching the crossing, the parties in charge of the engine negligently caused or permitted steam to escape from the engine, thereby frightening the horse, that would justify them in finding a verdict for the plaintiff, without regard to the question of the good or bad condition of the crossing; for the evidence clearly showed that the rapid speed of the horse caused the plaintiff to be thrown from the buggy, and therefore, as the rapid speed of the runaway horse was due to its fright, if that was caused by the negligence of the company in causing or permitting the escape of the steam from the engine, then the proper causal connection was proven to exist between the negligent act of the company and the resulting injury to the plaintiff. The court further instructed the jury that if they found under the evidence that the defendant company was not in fault in causing the fright of the horse, or, in other words, did not negligently cause or permit the escape of steam from the engine, then the verdict must be for the defendant, for the reason that the evidence would not justify them in finding that the condition of the crossing was the proximate cause of the accident.

Under these instructions, the jury found for the defendant; thus finding that the fright of the horse was not caused by any negligence or fault on part of the railway company. The plaintiff now moves for a new trial on the ground that the court erred in not submitting to the jury the question of the condition of the crossing, and in ruling that, under the evidence, its condition was not the proximate cause of the accident to plaintiff. In support of the motion for new trial, it is earnestly contended by counsel for plaintiff that the facts of the case bring it within the rule recognized in that class of cases of which *Manderscheid v. City of Dubuque*, 25 Iowa, 108, is a fair type. In that case plaintiff's horses ran away, and in passing over

a bridge forming part of one of the city streets one of the horses fell into a hole in the bridge, and broke its leg. It was ruled that the plaintiff could recover for the injury thus caused to the horse. The principle recognized in this class of cases is that if there is a defect in the highway of such a nature that it may cause injury in the ordinary use of the highway, and if in fact an injury is caused to person or property by such defect, then a recovery may be had against the party whose negligence caused the defect, even though the primary cause of the accident may be traceable to another matter, such as the running away of the horse or the like. In these cases it will be found that the defect was of such a nature as to cause danger in the ordinary use of the highway, such as a hole in a bridge, an excavation in a street, an unfenced or unprotected embankment, or the like. In other words, the defect was such that it would constitute in itself an efficient cause of injury without regard to the speed of the vehicle suffering the accident, although the resultant damages might be increased in case of a rapidly moving wagon or carriage.

In the case now before the court it was claimed on behalf of the plaintiff on the trial that the crossing in question was in bad condition in several particulars; that at the point where the highway turned to meet the approach to the crossing proper there was a mud hole at one side of the traveled track; that there was a sluice or waterway constructed under the wagonway, distant some ten or more feet from the rail of the track; that the top of this waterway, which extended across the highway practically at a right angle, was about a foot higher than the top of the rails, distant ten feet or more; and that the planks forming the crossing at the rails had become worn, so that the rails were one or two inches higher than the planking. The evidence wholly failed to show that the mudhole at the side of the traveled track contributed in any degree to the accident, but it was clearly proven that when the buggy reached the covered waterway the bump or jolt resulting from its passage over the ridge formed by the covering of the waterway was such as to throw the plaintiff out of the vehicle, and upon the ground, thus causing the injuries complained of to the person of the plaintiff. This "ridge," to call it such, had existed in the highway for years. It had been driven over daily by all who had occasion to use the crossing. It was not shown or claimed that it had ever caused an accident to any one. The evidence, without contradiction, was to the effect that the ridge was not an obstruction to the safe use of the crossing, under usual and ordinary circumstances. The testimony of the persons who had been in the habit of driving over this crossing proved that, if the plaintiff's horse had been traveling at any reasonable, even though fast, rate, the plaintiff would have been carried over the crossing without injury. The plaintiff was undoubtedly thrown out of the buggy by the severity of the jolt caused by the wheels striking the so-called "ridge," but the dangerous character of the jolt was due to the rapid speed of the horse, and not to any inherently dangerous condition of the crossing resulting from the existence of the ridge across the same. To sustain the contention that its presence in the highway would have justified the jury in finding that thereby the cross-

ing had not been maintained in a safe condition would require the holding, as matter of law, that it is incumbent on cities, towns, counties, and railway companies, upon whom the duty of keeping the highways in proper condition is placed, to so maintain them that they are not only in safe condition for usual and ordinary use, but to keep them in such smooth and even condition that they may be safely passed over at any rate of speed that a frightened and runaway horse may be able to attain. The inequality produced in the surface of the crossing by the so-called "ridge," due to the covering over the waterway, was not greater or more dangerous in its effect than the inequalities that exist in all the ordinary roads and highways of the country, but which do not make them at all unsafe for ordinary use by the public. From our common observation, we all well know that in nearly every mile of the highways of the country there are to be found depressions or ridges, or other inequalities of the surface of the road, which do not interfere with the safe use of the highway when traveled over in the usual and ordinary method, but which are sufficient to cause severe jolts to a vehicle passing over them at an unusual and very high rate of speed. As already stated, the evidence on the trial showed that the plaintiff was thrown from the buggy as a result of the jolt caused by the wheels striking the inequality in the surface of the roadway produced by the covering over the waterway. If thereby a cause of action was created in favor of plaintiff against the defendant, it must be because the duty and obligation is imposed upon the defendant to keep the surface of the railway at the crossing so smooth and free from all inequalities that no serious jar or jolt will be caused thereby to vehicles passing over the crossing at the unusual and high rate of speed attained by a frightened and runaway horse. This certainly is not the law, and, as the evidence clearly proved that the inequality in the surface of the crossing was not such as to prevent a safe use of the crossing in the usual and ordinary methods of travel, the court was justified in instructing the jury that there was no evidence in the case which would sustain a finding that the defendant company had been negligent in causing or permitting this inequality to exist on the surface of the highway.

Upon the trial before the jury, the plaintiff claimed that the defendant had been guilty of negligence in two particulars: First, in permitting an unnecessary escape of the steam, thereby frightening the horse, and causing it to run away, which resulted in the plaintiff being thrown from the buggy, to her injury; second, that the defendant had not exercised proper care in constructing and maintaining the crossing in safe condition for ordinary use, as a result of which the plaintiff was injured by being thrown from the vehicle in which she was riding.

It is now contended, in support of the motion for new trial, that the court erred in charging the jury that the condition of the crossing could not be held, under the facts of the case, to be a proximate cause of the accident, and consequent injury, to plaintiff. If the court was justified in the ruling that the evidence would not sustain a finding that the company had been negligent in causing or per-

mitting the existence of the ridge or inequality in the surface of the highway, then it was justified in saying to the jury that the proximate cause of the accident was not the condition of the crossing, but it was the speed of the horse. In the brief of counsel for plaintiff it is said: "The supreme court of the United States have clearly, tersely, and comprehensively given us a definition of 'proximate cause' in *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, where the court say: 'The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.'" If the case now before the court was one wherein the injury complained of resulted from the horse falling into a hole in a bridge, or into an excavation in the highway, or over an embankment or other like defect in the highway, then it might be maintained that the defect, being of a character that, through its own operation, would cause injury to the users of the highway, should well be held to be the proximate cause of the injury resulting therefrom. The alleged defect in this case was not, however, of that description. In and by itself, it would not cause such accidents as happened to the plaintiff. As already said, this inequality in the surface of the crossing had existed for years, and its position was such that it must be passed over by every vehicle that was driven over the crossing. It was not shown that it had ever caused, or aided in causing, an accident other than the one in which the plaintiff was injured. By itself, it was not a self-operating or efficient cause of the accident. As is said by the supreme court in *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395: "The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is of course to be charged with the disaster." Under the facts of this case, it must be held that the primary, efficient, and proximate cause of the accident in question was the rapid speed of the horse, due to its frightened condition, and that, while the ridge in the crossing aided in giving the jolt to the buggy which caused the plaintiff to be thrown therefrom, it was but an incident in the operation of the efficient cause of the accident, and not an independent and self-operating cause. If the evidence had been such that a finding of the jury to the effect that the defendant had been negligent in allowing the existence of the ridge at the crossing could have been sustained, then the question would have been presented whether this negligence did not form, at least, a contributory cause to the accident, for which the defendant might have been held liable; but, if the court ruled correctly in holding that the evidence was not sufficient to sustain such a finding, then this suggested question could not arise in the case. In view of the serious injuries caused to the plaintiff by the accident in question, I have carefully considered the ruling at the trial of which complaint is made, but I can find no sufficient ground in the evidence for submitting the question of the condition of the

crossing to the jury for their consideration, and, in that view of the case, I can find no error in the instructions to the jury. The motion for new trial is therefore overruled.

In re GOODMAN.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1900.)

No. 657.

APPEAL.—TIME OF TAKING—HOW PERFECTED.

An appeal is not taken until the order allowing the same and the bond are filed in the court in which the decree or order appealed from is entered, and this must be done within the time allowed by statute for taking the appeal.

On Motion to Dismiss Appeal.

F. C. Winkler, for the motion.

Hugo Pam, opposed.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. The motion to dismiss the appeal in this case because not taken within 10 days after the entry of the order appealed from must be sustained. The petition for an appeal and an appeal bond were presented to the judge out of court, and an order indorsed on the petition granting the prayer for appeal, and an approval of the bond indorsed thereon, were signed by the judge on the last day on which an appeal could be taken, and were delivered to counsel for the appellant; but they did not reach the hand of the clerk and were not filed in the court below until the next day. In *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665, was laid down the rule, often reaffirmed since in respect to appeals as well as writs of error, that "a writ of error is not brought, until filed in the court to which it is addressed, and whose record is to be removed by it; and, therefore, though the writ is tested within five years, if it be not filed in the court which rendered the judgment until after the expiration of that period, it is barred." See the cases cited under *Brooks v. Norris*, 5 Notes U. S. Rep. 23. See, also, *Herrick v. Dock Co.*, 43 Wis. 93, and *Harkrader v. Wadley*, 172 U. S. 148, 163, 19 Sup. Ct. 119, 43 L. Ed. 399. The appeal is therefore dismissed.

EVANS v. NELLIS.

(Circuit Court, N. D. New York. May 23, 1900.)

1. CORPORATIONS.—KANSAS STATUTE RELATING TO LIABILITY OF STOCKHOLDERS —CONSTITUTIONALITY.

The Kansas act of January 11, 1899, which repealed the prior statutes for carrying into effect the provision of the state constitution securing dues from corporations by an additional liability of stockholders equal to the amount of stock owned by each by giving any judgment creditor of a corporation, on return of an execution nulla bona, the right to enforce payment of his judgment by an action against any stockholder to the extent of such stockholder's additional liability, and which substituted for such statutes provisions making such additional liability of stockhold-

ers an asset of the corporation, to be collected in full by a receiver, and applied to the payment of the costs and expenses of the receivership, and to all the debts of the corporation ratably, any excess to be returned to the stockholders, as a retroactive measure is invalid as impairing the obligation of contracts, inasmuch as it deprives both the judgment creditor and the stockholder of substantial rights arising by contract under the former statute,—the former by depriving him of the right to enforce the additional liability of any particular stockholder for his own exclusive benefit, and by diverting a portion, and perhaps all, of the amount collected from such stockholder to the payment of costs and expenses which are not "dues of the corporation," and of claims of simple contract creditors, to which it was not applicable under the former statute; the latter by depriving him of the right, in an action against him, to interpose any defense he might have against the judgment creditor suing by subjecting him to suit for the full amount of additional liability imposed by the constitution, regardless of the amount of the judgment indebtedness of the corporation, by which such liability was previously limited, and by applying the sum so collected from him to the payment of matters for which he was not liable under the constitution or the statute in force when he became a stockholder.

2. SAME.

The defense that such act is unconstitutional as impairing the obligation of contracts made by a stockholder in a suit brought against him thereunder by a receiver cannot be avoided by the receiver by consenting that recovery shall be limited to the amount of the judgment indebtedness of the corporation, since the act repealed the statute so limiting the defendant's liability, leaving no law in force under which it can be so limited, and the act itself gives the receiver no authority to consent to such limitation, but requires him to "immediately institute proceedings against all stockholders to collect * * * the additional liability of such stockholders equal to the par value of the stock held by each," and provides that such collections "shall be held for the benefit of all creditors."

At Law. Action to recover stockholder's additional liability of \$60,200 under the constitution and laws of Kansas.

Facts.

The plaintiff is a citizen of Kansas and sues as receiver of the Interstate Loan & Trust Company, a corporation organized under the laws of that state July 22, 1885. The defendant is a citizen of New York, and was and is the owner of 602 shares of the capital stock of said loan and trust company of the total par value of \$60,200. On the 31st of December, 1897, one E. B. Crissey recovered a judgment against the said company for \$6,792.20 and on the 5th of June, 1899, another judgment was recovered by the same plaintiff for \$5,289.50. In 1896 one Hannah G. Streeter recovered a judgment against the company upon which upwards of \$2,000 is still due. Upon each of the three judgments an execution was duly levied and returned unsatisfied. In addition to these judgments there is a claim against the said company of \$500 and interest, not reduced to judgment. On the 9th of June, 1898, the plaintiff was duly appointed receiver of the said company and subsequently by order of the court was directed to invoke the provisions of sections 14 and 15 of the Kansas statute, published January 11, 1899. These sections are as follows:

"Sec. 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follow: Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which said execution was issued, or to the judge thereof, a receiver shall be appointed, to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors,

and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them.

"Sec. 15. That section 46, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: Sec. 46. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors."

The act of January 11th repealed sections 6, 9, 24, 32, 41, 44 and 46 of the Kansas General Statutes of 1868. Sections 32 and 44, so repealed, provided as follows:

"Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"Sec. 44. If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The provisions of the constitution of Kansas applicable to this controversy are as follows:

Article 12, § 1. "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

Article 12, § 2. "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

Section 10, art. 1, of the constitution of the United States provides that: "No state * * * shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

The principal defenses relied upon are:

First. That the act of January 11, 1899, in so far as it attempts to alter or impair rights existing and settled at the date of its passage, is in contravention of the constitution of the United States and, to that extent, void. Sec-

ond. That the cause of action is barred by the statute of limitations. Third. That a receiver appointed by the courts of Kansas cannot sue in this jurisdiction.

L. A. Stebbins and George Lawyer, for plaintiff.
Andrew J. Nellis, pro se.

COXE, District Judge. The Interstate Loan & Trust Company was organized in 1885. The defendant became a stockholder in 1889. The first judgment was recovered against the company in 1896 on which \$2,000 is still due. The second judgment was recovered in 1897 and execution was returned unsatisfied in January, 1898. The plaintiff was appointed receiver of the company in June, 1898. During this time and until January, 1899, when the act giving the receiver a right to recover the additional liability of stockholders was passed, the General Statutes of 1868 of Kansas were in force. In order to ascertain the effect of the subsequent legislation it is necessary to understand what were the rights of the parties when that legislation took effect. Section 32 of the statutes of 1868 provided that if an execution were returned nulla bona against a corporation an execution might issue by order of the court against any of the stockholders to an extent equal in amount to the amount of stock owned by him, or the plaintiff in the execution might proceed by action to charge the stockholders with the amount of his judgment. On the 6th of January, 1898, therefore, the plaintiffs in the Crissey and Streeter suits had a right of action against the defendant, but only for the amount of their judgments. Any defense by way of counterclaim or set-off which the defendant had against Crissey or Streeter was available to him in such action. By section 44 he was given an action of contribution against the other stockholders, so that had he been required to pay the Crissey and Streeter judgments he could have compelled the other stockholders to pay their proportionate shares.

In the recent decision of *Whitman v. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, Adv. S. U. S. 477, 44 L. Ed. —, the supreme court has settled most of the vexed questions regarding the organic and statute law of Kansas as it existed prior to the amendments of 1899. The following propositions may be deemed decided:

First. The words of the Kansas constitution providing that "dues from corporations shall be secured by individual liability" are not merely directory to the legislature but of themselves declare the stockholders' liability and to this extent are self-executing.

Second. The constitution and the statutes must be taken together as forming one body of law, the statutes prescribing the mode of enforcing the constitutional liability. "Whatever else may be said about the remedy it is direct, certain and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations."

Third. The liability of the stockholder, though statutory in its origin, is contractual in its nature. In other words, each of the stockholders entered into a contract, authorized by statute, with each

other and with the creditors of the corporation that debts established by judgment against the corporation might be collected of them to an amount equal to the amount of their stock provided there was no corporate property upon which to levy. They also agreed that one stockholder paying such judgment might have contribution from all the others.

Applying the law of the Whitman Case directly to the facts now before the court, it will be seen that the defendant was only under obligation to pay the Crissey and Streeter judgments and such other debts as were reduced to judgment. If he had a defense against any of these judgment creditors he could assert it. If he were required to pay he could himself compel other stockholders to contribute. Having paid all judgment creditors his obligation ceased. *Hoyt v. Bunker*, 50 Kan. 574, 32 Pac. 126. On the other hand Crissey and Streeter were vested with certain important and valuable rights under the contract between them and the stockholders. They as individuals could enforce their judgments against any stockholder wherever found. They were not called upon to share the amount so recovered with simple contract creditors or to pay any part thereof to a receiver or as costs and fees of the officers of the court. If one of these judgment creditors were the first to sue a solvent stockholder whose liability was equal to the amount of the judgment his debt was safe. This, then, was the situation when the law of 1899 went into operation. The new law wrought a sweeping and radical change. New liabilities are created and new remedies are provided. Section 23, as amended, provides for the appointment of a receiver upon an execution being returned nulla bona. The receiver so appointed shall close up the affairs of such corporation and shall immediately institute proceedings against all the stockholders to collect unpaid subscriptions and the additional liability. The money thus collected shall be held for the benefit of all the creditors and shall be used under the direction of the court to pay the costs and expenses of the receivership and all claims against such corporation. Any judgment obtained by the receiver against a stockholder who has not paid the amount due from him may be assigned to the stockholders who have paid and enforced by them against the delinquent stockholder for his proportionate amount. Section 46, as amended, provides that the stockholders shall be liable to the creditors for unpaid subscriptions and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be an asset of the corporation to be collected by a receiver for the benefit of all the creditors. Under the former law the stockholder's additional liability was an obligation to pay the judgment creditor who was unable to collect his debt from the corporation. Under the present law this liability is an asset of the corporation for the benefit of all the creditors. Under the former law the right to collect his judgment rested with the judgment creditor. He could act immediately. Nothing but his own laches could impair this right. Under the latter law the judgment creditor has no advantage over the most negligent and supine contract creditor. All alike must trust to the discretion of the receiver; if he fails in duty the debt of the

judgment creditor is lost. In the one case the entire indebtedness of the stockholder was applied without diminution upon the judgment. In the other case the entire amount collected may by order of the court be devoted to the payment of the receiver's commissions, costs and expenses. Under the former law the stockholder could avail himself of any defense, counterclaim or set-off he might have against the pursuing creditor. These defenses no longer exist. Under the former law, when he had paid the judgment creditors the liability of the stockholder ended; now he must pay the entire amount to the receiver even though it be twice the amount necessary to pay the corporation's debts. Whether any of the balance be returned or not depends largely upon the economy, prudence and honesty of the receiver. In short, the new law destroys, absolutely, all rights which the judgment creditor, qua a judgment creditor, possessed; takes away all right of independent action and compels him to share pro rata with all the creditors. As to the stockholder, it deprives him of defenses which would defeat the former action, compels a full payment when a partial payment was oftentimes sufficient and devotes the amount recovered to the payment of obligations not mentioned in the former statute. It is not difficult to suppose a case where a stockholder absolutely safe from pursuit under the former act may be financially ruined under the present act. For instance, where a stockholder was sued for, say \$10,000, by the only judgment creditor. If the judgment creditor owed the stockholder the sum of \$10,000 it is manifest that he could not recover. Or, assume a situation where the entire amount recovered is consumed in paying the expenses of the receivership. In the first of these instances the receiver takes money which could not be collected under the former act; in the second, he applies the money collected to the payment of obligations which are created for the first time by the act of 1899, and which are not "dues from corporations." *Ward v. Joslin* (C. C.) 100 Fed. 676. It is true that under the prior statute in certain circumstances an equal amount might be recovered, but the stockholder might discharge his entire obligation by paying much less than the full amount. Under the present law his liability is increased by compelling him to pay the full amount and by applying it in payment of an entirely new class of obligations.

Since the trial of this action the supreme court of Kansas, in the case of *Woodworth v. Bowles*, 60 Pac. 331, has declared unconstitutional similar provisions of the Kansas statute relating to the liability of stockholders in banks. Section 55 of chapter 47 of the act of 1897, provides that the receiver shall, after the expiration of one year, institute the proper proceedings in the name of the bank for the collection of the liability of the stockholders to be distributed pro rata among the creditors. No action by creditors against stockholders shall be maintained unless it shall appear to the satisfaction of the court that the receiver has failed to begin the action as required by law. The court held that if the statute were given a retroactive construction it was invalid because it deprived creditors of their right to maintain proceedings against the stockholders or, at least, postponed that right for a year. The court says:

"The act of 1897 does not assume to abrogate the contract or relieve the stockholder from liability, but it does assume to do two other things: First, to suspend for one year the pursuit by the creditor of the special remedy afforded by the laws in existence at the time of the making of the contract; and, second, to deprive the creditor of such remedy altogether if the receiver at the end of the year should institute an action for him and for the other creditors, in which last-mentioned case the fund collected by the receiver is to be distributed pro rata between all the creditors. * * * If, however, the new enactment, although not designed to effect the substantial right, does nevertheless embarrass or substantially delay the creditor in the collection of the debt, it will be held to have impaired the obligation of the contract. We deem section 55 of the law of 1897, in its application to existing contracts between creditors and stockholders, to be an enactment of the latter kind. * * * If the receiver should institute an action and collect the liability, even though every stockholder should be solvent and should discharge his liability in full, the creditor might, nevertheless, not receive full payment of his claim. He must share with other creditors. * * * Vigilance and diligence on the part of a creditor in the pursuit of one or the other of his remedies in one or another of the contingencies stated, might avail to secure the payment of his claim in full. Under the statute as it now exists, vigilance and diligence may avail nothing."

It is thought that the logic of this opinion when applied, in similar circumstances, to the law of 1899 in its retroactive aspect, must result in a similar judgment. In *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143, the supreme court decided that where a mortgage contained a power to the mortgagee to sell on breach and thereby pay the debt, a subsequent law giving the mortgagor 12 months to redeem and prohibiting the property from being sold for less than two-thirds its appraised value, so altered the remedy as to impair the obligation of the contract. *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93. It is true that a law will not ordinarily be declared unconstitutional on the objection of one whose interests are not injuriously affected by the objectionable features. If the accusations against the act in question were only those which might be presented by the judgment creditors, whose rights have manifestly been invaded, there might be more difficulty in declaring it invalid. There are, however, exceptions to the general rule which are stated by Judge Cooley to be found in cases "where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others." Cooley, *Const. Lim.* (4th Ed.) 219. It would, indeed, be a strange anomaly if the statute in question were held valid when attacked by stockholders and invalid when attacked by judgment creditors. Such a construction would lead to endless confusion and injustice. But, as has been seen, the contractual rights of the stockholders have been impaired equally with those of the judgment creditors. It is undoubtedly true that whatever belongs merely to the remedy may be changed as the legislature may direct, but the court cannot believe that this familiar rule is applicable to a law which makes such fundamental changes in the terms of the contract.

The case of *Hill v. Insurance Co.*, 134 U. S. 515, 10 Sup. Ct. 589, 33 L. Ed. 994, is relied on by the plaintiff. The point decided is well stated in the syllabus:

"A state statute which confers upon a judgment creditor of a corporation, when execution on a judgment against the corporation is returned unsatisfied, the power to summon in a stockholder who has not fully paid the subscription of his stock, and obtain judgment and execution against him for the amount so unpaid, in no way increases the liability of the stockholder to pay that amount; and, inasmuch as he was before then liable to an action at law by the corporation to recover from him such unpaid amount at law, as well as to a suit in equity, in common with other similar stockholders, to compel contribution for the benefit of creditors, no substantial right of the stockholder is violated."

It is manifest that the case involved merely a change of remedy. The defendant was liable at law to pay the amount of his subscription for which he had given his notes to the company. Then came the law permitting a judgment creditor to collect the amount due but changing in no way the extent of the liability. The court says:

"His undertaking was to pay each and all of his notes on demand, and it was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf—such remedy not increasing the debtor's liability."

That the liability of the defendant has been increased is pointedly illustrated by the fact that whereas under the pre-existing statute the recovery could be for the sum of \$16,000 only, the original complaint demands judgment in the sum of \$60,200, and there is no doubt that the existing law permits such a recovery. The injustice of such a situation is impliedly conceded by the plaintiff who at the trial voluntarily consented to limit the amount of the recovery to \$16,000. In the brief the plaintiff's counsel asks the question:

"What difference does it make to the defendant whether he pays \$16,000 to the plaintiff or to the individual creditors of the Interstate Loan & Trust Company?"

The answer is:

None, but it makes a difference of \$44,200 whether judgment is entered under the old law or under the new, and this is the proper test to apply when considering the question of the defendant's liability.

The plaintiff, admitting that certain parts of the act, if given a retroactive effect, may be decided to be unconstitutional, contends in the brief as follows:

"The act of January 11, 1899, authorizes a recovery against the defendant to the amount of \$60,200. We ask a recovery in this case of about \$16,000. Conceding, for the sake of the argument that the statute is unconstitutional in so far as it authorizes a recovery to the full amount of the liability of the defendant, is there any valid reason why the \$16,000 that is constitutional cannot be separated from the \$60,200 which is unconstitutional, will not the intent of the legislature be carried out thereby?"

The difficulty with this reasoning, as it seems to the court, is that it assumes that there is some provision of the act of 1899 which authorizes a recovery of \$16,000. Where is the provision? All former provisions limiting the recovery to the amount of the judgments have by this act been swept away. There is no alternative provision for an action at law in favor of the judgment creditors or by the receiver to recover the amount of their judgments. The provision seems to be mandatory. "The receiver shall immediately institute proceed-

ings against all stockholders to collect * * * the additional liability of such stockholders equal to the par value of the stock held by each." The suit is brought under this section of the law and if the law falls the suit falls with it. There is no other provision authorizing an action at law in favor of the receiver for the amount of the judgments. The concessions of the receiver cannot affect the question of the constitutionality of the law. A plaintiff suing under a void law cannot make it valid by agreeing to receive one-fourth of the amount demanded. If the law, as a retroactive measure, be clearly invalid, and the defendant insists upon the point, it is not easy to see how the court can avoid pronouncing the judgment of invalidity because the plaintiff consents to make the recovery no more onerous than it would have been under a former statute which has been repealed.

It follows, therefore, that the law in question impairs the obligation of the defendant's contract if construed to act retroactively and, to that extent, is invalid. The complaint is dismissed.

TEXAS & P. RY. CO. v. WHITE.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1900.)

No. 891.

1. RAILROADS—NEGLIGENCE—PERSONAL INJURY—EVIDENCE—DIRECTING VERDICT.

Plaintiff testified that, upon being advised by the conductor that defendant's freight train would remain on the side track 40 or 50 minutes, he entered one of the cars to look after his cattle, and that while in there the car was suddenly moved a few feet, and as suddenly stopped, without warning, throwing the weight of half the cattle in the car against him, and pushing him against a trough, whereby he received a serious injury in his abdomen. Plaintiff did not mention the fact of his having been hurt to any of the servants of defendant, though he proceeded with his car of cattle to its destination, where he and an employé drove the cattle to a ranch 37 miles distant. A witness who saw plaintiff before he went into the cattle car and immediately after he came out testified that he saw a difference in plaintiff after he came out, and that he had a bruised place on his side. The conductor, brakeman, and engineer of the train testified that the car which plaintiff entered was not moved while he was in it. *Held*, in an action for damages, that the court properly refused to direct a verdict for defendant.

2. SAME—DAMAGES.

There being evidence tending to show an injury to plaintiff's spine, it was not error to refuse to instruct the jury that, if they found for plaintiff, they should not estimate anything for such injury.

3. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTION TO JURY.

Defendant's request for an instruction that plaintiff could not recover if his own negligence contributed to his injuries being fully embraced in the charge of the court, the refusal to further instruct the jury on such point was not error.

4. SAME—AGGRAVATION OF INJURY—DAMAGES—INSTRUCTIONS TO JURY.

After plaintiff received the injury complained of, he continued his journey to the point where the cattle were to be discharged, drove them 37 miles across the country to his ranch, where he remained for a few days, and then returned to his home, traveling part of the distance afoot, and part by stagecoach. Although suffering severe pain most of the time,

he did not consult a physician until after his return home, and there was evidence that a part of the troubles resulting from plaintiff's injury could have been speedily cured at small expense, and without hazard, by prompt surgical treatment. *Held*, that the court should have instructed the jury, as requested by defendant, that plaintiff could not recover for pain or suffering, either physical or mental, which he may have sustained by reason of his failure to use ordinary care in having himself treated or operated upon by physicians.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

T. J. Freeman and W. T. Armistead, for plaintiff in error.

J. F. Jones, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. G. R. L. White, the defendant in error, brought his action against the Texas & Pacific Railway Company, the plaintiff in error, claiming damages for an injury alleged to have been received by him, while a passenger on the railway company's railroad, through the negligence of its servants. He had shipped a car of cattle by this railroad from Jefferson to Abilene, in Texas, and was traveling by contract on a drover's pass for the purpose of caring for the cattle on the way. They arrived at Dallas on the morning of November 25, 1897. At the time of arrival the plaintiff was in the caboose asleep. He was awakened by the conductor of the train, and told that his car of cattle needed his attention, and to get up and look after them, which he proceeded to do. He alleged and testified that in a few minutes after he was awakened he left the caboose, and going towards the car which contained his cattle he met the conductor, and asked him how long the train would remain standing on the side track, and was told that it would remain 40 or 50 minutes. He then proceeded to his car, and by the use of a prod pole got up all the cattle that were down, except one in the middle of the car, which he could not get up with such help as he could render from the outside of the car. He therefore entered the car to open the press of the standing cattle, so that he could relieve the one that was down; and as he was about to do this the car was suddenly moved a few feet, and as suddenly stopped, without any warning to him, throwing the weight of half of the cattle in the car against him, and pushing him against a trough; whereby he received a serious injury in his abdomen, resulting in causing him great pain, and in producing a serious and painful disease of his bowels, and sharp, severe, and continuing pain in his spine or back, and in producing varicocele. He gives detail of symptoms and suffering unnecessary to recite. The defendant answered by a general demurrer and a general denial. The conductor, the engineer, and the brakeman on the train all testified that the car did not move during the time that the plaintiff was in it. It was shown without dispute that the plaintiff did not at any time mention the fact of his having been hurt to any of the servants of the company; that he proceeded with his car of cattle, riding on the top of that car, from Dallas to Ft. Worth. There the cattle were unloaded, and after a few hours re-

loaded, during which time he was with the servants of the company, and did not mention having received any injury; that he then proceeded on the train, carrying the cattle from Ft. Worth to Abilene, where the same were discharged, and he and an employé of his took charge of them, and drove them to his ranch in Jones county, a distance of 37 miles from Abilene, the plaintiff traveling on foot; that he remained at his ranch several days, and then walked to Anson, and from there traveled by stage to Abilene, where he took the train, and proceeded to Winnsboro, where his family then were. During this journeying, which consumed about 10 days, he made no complaint to any of the servants of the company of having received any injury on the company's car. He testified that he would not have gone into the car had not the conductor told him that the car was going to stand there; that after he was hurt he went to the caboose, and laid down half an hour, and then went and got on the car which had his cattle in it a few minutes before the train left Dallas; that a man named Carpenter, who had some cattle on the same train, went to the caboose with him; that he told Carpenter that he was hurt and suffering, and opened his clothes to see if the skin was broken anywhere. Carpenter testified that he saw the plaintiff before he went into the cattle car, and also saw him immediately after he came out, and saw a difference in him after he came out; that the plaintiff had a bruised place on his side, and said he thought he was badly hurt. He showed Carpenter the bruised place. The plaintiff testified that the reason he did not tell the railroad people about his being hurt at the time was that there was not a railroad man about the caboose when he got back to it. There was no brakeman where he was on the train. He left the caboose, and went to his car, before they got ready to leave. The railroad men were with the train when it got to Ft. Worth, and there were railroad men in the engine all the way. When the train stopped at Ft. Worth he could have told them about it, but did not do it that he remembers, and he does not know what they could have done for him if he had told them; that he was among strangers there at Ft. Worth. He also testified that he suffered much in going from Abilene to his ranch; that immediately after receiving the hurt—that is, as soon as he recovered and got his balance—he left the car because he was scared; that he did not think then that he was seriously hurt; that, though it pained him considerably, he supposed he would get over it, and the reason he did not have a physician until he got back to Winnsboro was because he had hopes of wearing it out, and that it would pass off; that he wanted to get back to his home, where he could get his family physician; that at Anson, on the way back to Abilene, he suffered so much that those who were with him advised him to get a doctor, but he told them that he was going to try to go home if possible. He testified that there had been no cessation in the pain since he was injured; that he did not call for a doctor as he went through Winnsboro on his way home, nor send for a doctor while he was at home, but, as the suffering continued, he went to see the doctor a few days after he reached his home, and about 10 days after receiving the hurt; that on his way home he suffered so much, and his symptoms were

so violent, that at Greenville persons who were with him brought a physician to see him, but that he (the plaintiff) hardly remembers this physician being with him. He testified that he was positive that he did need a doctor on the trip; that there were doctors all along through that country, but that he had hopes that he was not hurt seriously, and was willing to endure the pain rather than be out the money that the doctor would charge him, and that he thought he could get along without one; that he did not get any medicine at that time to relieve the pain, because he did not know what to get; that those who were with him gave him medicine at Anson to relieve his pain, and wanted him to get a doctor, but that he determined to try to worry through without one. Many witnesses testified on the trial. There was sharp conflict in the testimony as to the moving of the cattle car while the plaintiff was in it, and as to whether he received any injury, and, if so, as to the nature and extent of it. There was a verdict and judgment for the plaintiff in the sum of \$9,000.

The plaintiff in error assigns as error:

"(1) The court erred in refusing special charge No. 1 asked by the defendant, as follows: 'Upon the law and the facts in this case, you are instructed to return a verdict for the defendant.' (2) The court erred in refusing to give special charge No. 2 asked by the defendant, as follows: 'The plaintiff does not prove any injury to his spine, and if you should find for the plaintiff under the instructions you will not estimate anything for injury to the plaintiff's spine.' (3) The court erred in refusing to give special charge No. 4 asked by the defendant, as follows: 'If you find that the present condition of the plaintiff could have been averted by proper medical treatment, and the plaintiff failed to use ordinary care in having himself treated, he cannot recover for the pain or suffering, mental or physical, which he has suffered, if any, by reason of his neglect in failing to have himself treated or operated upon by physicians.' (4) The court erred in refusing to give special charge No. 5 asked by the defendant, as follows: 'If you believe from the evidence that the plaintiff was injured as alleged by the defendant company, and that his said injuries were caused by his own negligence, or that his negligence contributed to his said injury, you will find for the defendant.'"

The first error assigned is clearly not well taken, because there is evidence tending to support the plaintiff's case. For a similar reason, the second error assigned is not well taken; for there is evidence tending to show that the plaintiff's spine, or his back, was affected by the injury. The fourth error assigned is not well taken, because it is fully embraced in the charge given by the court. The third assignment of error presents matter on account of which we think the judgment must be reversed. The defendant in error believed that the exigency of his business required him to continue the journey with his cattle, and to continue his care of them until they reached the ranch, and it is not unnatural or unreasonable that he should hesitate to employ physicians who were strangers to him while he could endure the suffering he experienced until he could reach home, to have the advice and attention of his family physician. While these reasons for his action commend themselves to our experience and sympathy, yet if therefrom an aggravation of his injury resulted, from his active attention to his business, or from his failure to obtain the advice and aid of competent physi-

cians who were accessible, such aggravation, whether it resulted from his positive active exertion, or from his neglect or failure to obtain the needed medical or surgical assistance, cannot, in justice, be charged against the defendant railway company in addition to its liability for the original injury to the extent of the damage it necessarily caused. The subject of the aggravation of damages by reason of his continuing his journey under the conditions shown by the proof is amply covered by the charge of the court. It was, however, as incumbent on the plaintiff to procure the advice of a competent physician and surgeon, if accessible, as it was to refrain from such physical exertion as tended to aggravate his injury. We consider that the requested charge No. 4 is sound in substance, and, while it is not exhaustive, it was error in the court to refuse it without giving an appropriate instruction on the subject to which it relates. *Railway Co. v. Patton*, 23 U. S. App. 333, 9 C. C. A. 487, 61 Fed. 259; *Kirby v. Estill*, 75 Tex. 484, 12 S. W. 807. There was proof tending to show that a part of the trouble of which the plaintiff below complained could have been speedily cured, at a small expense and without hazard, by prompt proper surgical treatment. As to the existence, nature, extent, and likelihood of relieving the other troubles of which the plaintiff complained, the evidence is vague, conflicting, and difficult to weigh. It is competent evidence, however, and it is the province of the jury, difficult as it may be, to weigh all competent evidence, and determine issues of fact to which it relates. The difficulties presented by this character of proof furnish the strongest reason for invoking the aid of a jury in civil actions. It is no more difficult to determine whether or not the plaintiff's injuries were aggravated by his failure to procure competent medical and surgical advice and aid, and, if so, to what extent, than it is to determine to what extent, if any, his injuries were aggravated by his pursuing his journey, taking his cattle to their destination, and returning home in the manner shown by the evidence. No witness has testified, or probably can testify, either as to the fact or to the extent of the aggravation of the injury, if any, which may have been caused by the subsequent conduct of the plaintiff, either in the matter of his continuing severe physical exertions, or in the matter of his failure to employ competent medical or surgical advice and assistance. Direct testimony on this subject can hardly be had. From the nature of the case, opinion testimony must be relied on, and in considering opinion or expert testimony the opinion of the jury is the chief factor in reaching ultimate conclusions. The conditions may or may not have required a surgical operation. Prompt and skillful treatment of the bruised locality might or might not have prevented or arrested the bowel trouble complained of, or the affection of the spine or back, but the subject should have been submitted to the jury for their consideration on the proof offered. On another trial the court may amplify the charge presented in the fourth request, which we hold it was error on the former trial to refuse without giving an appropriate charge on the subject. The learned trial judge recognized the settled doctrine that it was the plaintiff's duty to use reasonable care not to aggravate,

or suffer to be aggravated, so far as he could prevent it, the injury which he had received. The application of this doctrine to the subject of the plaintiff's failure to promptly obtain professional medical and surgical assistance is not very clearly shown by the adjudged cases or text writers, so far as we have been able to examine. The plaintiff in error has referred us to only one case (*Secord v. Railway Co.* [C. C.] 18 Fed. 221), which is the report of a trial in the circuit court. Mr. Beach, in his work on Contributory Negligence (sections 69-71), and the notes thereto, refers to cases more or less analogous to the instant case (*Car Co. v. Bluhm*, 109 Ill. 20; *Chase v. Railroad Co.*, 24 Barb. 273; *Sherman v. Iron Co.*, 2 Allen, 524; and others), some of which we have carefully examined. The judgment of the circuit court is reversed, and the cause is remanded to that court, with direction to award the defendant therein a new trial.

DILLINGHAM v. MORAN et al.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1900.)

No. 556.

1. RECEIVERS—COMPENSATION—OBJECTIONS TO REPORTS.

An order of court was made, that a railroad receiver should be paid a monthly salary as long as he continued to act, or until the further order of the court. On the sale of the railroad a sum was allowed the receiver, and accepted, in full compensation for his services to that time; but certain other property of the defendant was expressly retained for further administration by the court, and remained in charge of the receiver, who continued to act, making quarterly reports showing the payment to himself of such monthly compensation. The most of such reports were approved by the master without objection. As to one or more, objections were filed, which were heard by the master and overruled; and his reports filed in court were allowed to stand confirmed, under the equity rules, for lack of exception thereto. *Held*, that parties interested, who had taken no steps for the removal of the receiver, or to bring the matter in any manner to the attention of the court, could not thereafter attack the compensation retained by him in accordance with the order under which he was acting.

2. APPEAL—REVIEW—FINDINGS OF MASTER.

The findings of a special master, approved or adopted by the court, are subject to review on appeal, where they embody only conclusions of law or deductions from undisputed facts.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Geo. Clark and D. C. Bolinger, for appellant.

L. W. Campbell, for appellees.

Before SHELBY, Circuit Judge, and NEWMAN and MAXEY, District Judges.

NEWMAN, District Judge. This case was before this court at a former term, and a decision rendered reversing the decree of the circuit court (26 C. C. A. 596, 81 Fed. 759); and this decision was subsequently by the supreme court reversed because of the disqualification of Circuit Judge Pardee, who had been a member of the court render-

ing the decision here (174 U. S. 153, 19 Sup. Ct. 620, 43 L. Ed. 930). The facts in the case are fully stated in the former opinion by this court, and also, to some extent, in the decision of the supreme court; and a repetition of them here is unnecessary, except in so far as is necessary to state the views now entertained.

By the original order allowing Dillingham \$150 a month, it was to continue while he gave his personal attention to the business of the company, or until the further order of the court. After the railroad was sold he accepted \$20,000 as full compensation for his services as receiver. After this amount was paid to him, which was in September, 1891, he continued to act as receiver for the purpose of holding and managing certain property not covered by the trust deed under which the railroad was sold, and which did not pass by the sale. In the original decree of confirmation, dated August 28, 1891, it was provided that:

"Nothing contained in this decree is intended to affect, or shall be construed as affecting, the receivership of any of the property of the defendant railway company, other than the property so transferred to said purchasers, possession of which said property other than that so transferred is retained for further administration subject to the order of this court."

In an order correcting the decree of confirmation, November 4, 1891, there was the same provision, and similar language was used. Dillingham continued to act as receiver after this, and to pay himself \$150 per month. His accounts which showed this payment to himself were filed quarterly with John G. Winter, the special master in the cause, for examination, apparently by order of the court. No exception whatever was made to this allowance by Dillingham to himself until May, 1894. The objection then made was to the accounts for April and May, 1893; and the objection was heard; apparently, when the accounts for July, August, and September were under examination. It appears from a subsequent report that in the same connection the special master also heard objections to the accounts for July, August, and September, 1893. The exceptions made to Dillingham's receiving this \$150 a month were by the purchasing trustees of the railroad, the appellees here. The special master, as appears by his report of June 24, 1894, overruled these objections, and subsequently, on June 30, 1894, overruled the objections to the allowance for October and November, 1893, also. The objections went in effect, however, to the correctness generally of this charge of Dillingham after the sale of the railroad. The accounts for some of the subsequent months were approved by Special Master Winter, as appears from his report of November 17, 1894, and apparently without objection; none being referred to, although notice was given to counsel. Exactly what the truth is about the filing of these reports in the office of the clerk of the circuit court it is somewhat difficult to ascertain from the record. The vouchers alone show entry of filing in the clerk's office. The reports themselves bear much earlier dates.

The statement by this court in its former opinion in this case that if the approval of the court is presumed up to April, 1893, its approval should also be presumed as to the subsequent months, is fully justified, if we are controlled by the dates of the reports of the special master,

certainly up to the report of the master of November 17, 1894. If the dates of filing the accounts in the clerk's office, and not the date of the reports, is considered, probably this presumption would not be justified. As to the charge of the receiver after April 1, 1893, objections had been filed, and the same had been overruled after hearing counsel for the objectors. Whether the general practice in this district was to furnish counsel with a draft of the report, the record does not advise us. It does appear from the record, however, to have been done in connection with the compensations fixed in this case in 1891 by Special Master Winter. If the reports of the special master are to be considered as of the dates they bear, they certainly stood approved, under equity rule 83, as they bear date more than 30 days before any exceptions were filed in court, except as to the last 6 months, now in question. There can be no question that the charge from April 1 to June 30, 1893 (\$450 of the amount which Dillingham was directed to refund), stands approved by the court, by virtue of the equity rule; for the report of these items was filed, in any view of it, July 30, 1894,—several months before the exceptions were filed in court. Even if the views of Special Master Lathrop on this part of the case are correct, there should be a reversal as to this \$450. There would seem to be even stronger ground for sustaining the report of the special master where counsel had notice, and appeared and objected to a matter in question, and an adverse report was subsequently filed, than in a case where the report was filed without appearance or without objection. But we are satisfied that the circuit court erred in approving the report of Special Master Lathrop, directing Dillingham to refund this \$150 a month, and that the error went to the whole amount to which the order applied. Dillingham was to receive this \$150 a month, as stated, until the further order of the court. He paid it to himself from September, 1891, to May, 1894, without objection. His quarterly accounts filed with the special master showed all along this payment to himself. While objections were made in 1894, these objections were not sustained, and yet the matter was in no way brought to the attention of the court until April, 1895. In March, 1894, McHarg, one of the purchasing trustees, in a letter to Dillingham, recognized the fact that he was on the pay roll of the company. Dillingham had the duties and the responsibilities of the receivership on him during all the period for which he charged, and that by an express and unrescinded order of the court.

It is said that the report of Special Master Lathrop, as approved by the circuit court, should not be interfered with, because of the rule that the report of a master on questions of fact will not be interfered with unless it is manifestly erroneous. This is the rule, undoubtedly, where a master in chancery makes a finding on conflicting evidence, but we do not see any conflicting evidence in this case. There are conflicting views of the meaning of conceded facts, and there are conflicting views of the law as applicable to particular circumstances and to particular orders of the court. The views of Special Master Lathrop as to the meaning of Judge Pardee's original order making Dillingham an allowance of \$150 a month, and as to the effect on that

order of the payment made to Dillingham of \$20,000 at the time the railroad was sold, are not findings on conflicting facts, but on conceded facts. There may be some matters as to which the witnesses in the case are not in entire accord, but, substantially, we think the case turns on the construction of the orders of the court, and of the effect of admitted facts. The many authorities cited by counsel for the appellees are not questioned, but we think the rule applicable here is more clearly stated in *McConomy v. Reed*, 152 Pa. St. 42, 25 Atl. 176, as follows:

"It may be stated as a general principle that where the evidence is conflicting, and the credibility of witnesses is involved, a master's finding upon a question of fact is entitled to the same consideration as the verdict of a jury, and will not be set aside unless it is clearly and palpably against the weight of the testimony. If, however, his finding is a deduction from undisputed facts or from uncontradicted and credible evidence, the controlling reason for the application of this principle is not present, because in such case he has no greater facilities for reaching a correct conclusion than the court has in passing upon the exceptions to his report."

This rule is cited and approved in *Beach*, Mod. Eq. Prac. § 711.

It is entirely evident that the re-reference of Dillingham's accounts to Special Master Lathrop, after the same had been considered and while some of them were being considered by Special Master Winter, was caused mainly by the charge made in the exceptions to the special master's report as to Dillingham's improper use of funds in his hands. It can hardly be supposed that the reports of a special master, who had continued in the service of the court for years, and satisfactorily so, should be referred to another special master without strong reasons therefor. This is found in the charge against Dillingham made in the exceptions of April 8, 1895, to some of Special Master Winter's reports, and upon which the re-reference was ordered. These exceptions made a charge against Dillingham of gross abuse of his trust, and, as to this charge, Special Master Lathrop says that it was not sustained by the proof, and that the testimony clearly exonerated him. We are satisfied that the decree of the court below, directing Dillingham to repay this money, was erroneous. It is therefore ordered that the decree be reversed, and the cause be remanded, with directions to overrule and discharge the motions attacking the receiver's account.

McGHEE et al. v. CAMPBELL.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1900.)

No. 762.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS DEFENSE.

Contributory negligence is not a defense to a count of a complaint based on acts alleged to have been committed "wantonly, recklessly, and negligently."

2. RAILROADS—ACTION FOR KILLING PERSON ON TRACK—QUESTIONS FOR JURY.

Upon an issue as to wanton and reckless negligence in the running of a railroad train which ran down a hand car in the night, and killed the

plaintiff's intestate, it was not error to refuse to direct a verdict for the defendant, where there was testimony of several witnesses that the train was being run at a speed of 25 or 30 miles an hour, with no headlight burning on the engine.

3. ACTIONS FOR NEGLIGENCE—TRIAL—QUESTIONS FOR JURY.

Negligence and contributory negligence being matters of inference from the facts proved, it is only where the facts are not left in doubt, and are such that the same inferences must be drawn from them by all reasonable men, that the court is justified in taking the question from the jury.

4. MASTER AND SERVANT—ACTION FOR DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action brought under the Alabama statute, to recover for the death of a section foreman on a railroad who was killed by a train which struck and derailed the hand car upon which he was riding with his men before daylight on a dark and rainy morning, it was shown that a rule of the company prohibited the running of a hand car after dark without special permission; but the evidence left it in doubt whether the deceased had knowledge of such rule. It was also shown that deceased usually went to work with his men about daylight, and that the evening before he received a telegram from the track superintendent, directing him to take his men in the morning to work at a particular place, to reach which with the hand car required about 1 hour and 20 minutes. *Held*, that whether such message required the deceased to go upon the track with his hand car at the early hour he did had a material bearing on the question of whether he was guilty of contributory negligence in so doing, and that, as the message itself contained nothing from which the question could be determined as matter of law by construction, it was one to be determined by the jury as an inference of fact from the message and the other facts in evidence.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Milton Humes and Paul Speake, for plaintiffs in error.

Lawrence Cooper, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. Sallie C. Campbell, as the administratrix of the estate of John W. Campbell, brought this action against Charles M. McGhee and Henry Fink, as receivers of the Memphis & Charleston Railroad Company. The defendants were appointed receivers of the company by the circuit court of the United States for the Northern division of the Northern district of Alabama. The suit is under the employé's liability act to recover damages sustained by the death of the plaintiff's intestate, which was alleged to have been caused by the negligence of the defendants. The act provides that in certain cases, when personal injuries are received by a servant or employé in the service or business of the master or employer, the latter is liable to answer in damages as if he were a stranger. One of the cases in which damages are allowed is when the injury is caused by reason of the negligence of any person in the service or the employ of the master who has charge or control of any locomotive, engine, or train upon a railway. The statute also provides that, when the injury results in the death of the servant, his personal representative can maintain the

action therefor. Code Ala. 1896, §§ 1749, 1751. These statutes are quoted in the footnote.¹

The complaint is in 11 counts. The third, fifth, ninth, and eleventh counts charge that the defendants, through their servants in charge of the train, "negligently and carelessly" drove and propelled an engine against the intestate, and so killed him, in the darkness of the night, without notice, warning, or the blowing of the whistle, and without a headlight burning on the engine, and while running at a high rate of speed. The other counts charge that Campbell's death was thus caused "wantonly, recklessly, and negligently." The declaration or complaint may in one count aver simple negligence, and in another willful and intentional wrong or wanton and reckless negligence, and proper issues may be made up under pleas to each count. When a count charges simple negligence, a plea of contributory negligence is an answer to it; but when it charges that the act was committed wantonly, recklessly, and negligently contributory negligence does not constitute a defense. The court, therefore, ruled correctly in sustaining the plaintiff's demurrers to the defendants' pleas of contributory

¹ Code Ala. 1896.

"Sec. 1749. Liability of Master, or Employer to Servant or Employé for Injuries. When a personal injury is received by a servant or employé in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employé, as if he were a stranger, and not engaged in such service or employment, in the cases following: (1) When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of the master or employer. (2) When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence. (3) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employé, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed. (4) When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf. (5) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car or train upon a railway, or any part of the track of a railway. But the master or employer is not liable under this section, if the servant or employé knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition."

"Sec. 1751. Personal Representative may Sue if Injury Results in Death. If such injury results in the death of the servant or employé, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions."

negligence, so far as they applied to the counts in the declaration which charged that the acts complained of were committed wantonly, recklessly, and negligently. *Railroad Co. v. Markee*, 103 Ala. 160, 15 South. 511; *George v. Railroad Co.*, 109 Ala. 245, 258, 19 South. 784; *Railroad Co. v. Hurt*, 101 Ala. 34, 13 South. 130; *Beach*, *Contrib. Neg.* (2d Ed.) § 64; 7 *Am. & Eng. Enc. Law* (2d Ed.) pp. 443, 444, and cases there cited.

John W. Campbell had been section foreman of the railroad company for several years, and at the time he was killed he was section foreman for the defendants as receivers. He was employed at a salary of \$40 a month. He lived at Brownsboro, Ala. J. B. Burke was the track supervisor, and lived at Gurley, Ala., which is five and a half miles east of Brownsboro. On the evening before Campbell was killed he received a telegram from Burke, dated December 7, 1896, saying: "Bring your force to second rock cut above Paint Rock bridge, to work in a. m." On December 8, 1896, the next morning after receiving this telegram, Campbell, with four men, started in a hand car from Brownsboro to the rock cut above Paint Rock bridge. They had gone about 250 yards when they were overtaken, at about 40 minutes after 5 o'clock a. m., by the defendants' freight train, consisting of a locomotive and 20 cars. It was dark and raining. The evidence offered for the plaintiff tended to show that the train was running at the rate of about 30 miles an hour, while that for the defendants tended to show that its speed was about 17 miles an hour. Several witnesses for the plaintiff, some of whom were on the hand car at the time of the accident, testified that the engine had no headlight burning; that they were prevented by the noise of the hand car and the noise made by a mill from hearing the train; and that they did not see it until it was within a few feet of them. The engineer and the fireman in charge of the locomotive and other witnesses testified that the headlight was burning and in proper condition. The engineer testified that he saw the men on the hand car ahead of him, and that he did everything he could to stop the train; that he applied the brakes, and opened wide the sand lever. The evidence for the defendants tended to show that it was not possible, after seeing the hand car, to stop the train before the engine struck it. The men on the hand car had no lantern or other light. The engine struck the hand car, and knocked it off the track, and so injured Campbell that he died several hours afterwards.

The case was tried on the plea of not guilty and contributory negligence to the counts in the declaration which charged simple negligence, and on the plea of not guilty to the counts which charged that the act complained of was committed wantonly and recklessly.

It is assigned as error, and insisted on in the oral and printed arguments, that the court refused to give peremptory instructions to find a verdict for the defendants. As has been stated, several witnesses testified that the train was running at night at the rate of 25 or 30 miles an hour, and with no headlight on the engine. The evidence showed that it was dark and raining, and that the train had just passed through the village of Brownsboro. A headlight attached to an engine is a common and necessary means adopted by all railroad compa-

nies for the protection of the lives of those rightfully on the train and on the track. No engine is constructed without a headlight. No trains are run in the nighttime by any railroad company, under ordinary circumstances, without having such a light. This is a matter of common knowledge. If the defendants' servants were running the train at night under the circumstances and at the rate of speed stated by the plaintiff's witnesses, they were unquestionably guilty of negligence. *Becke v. Railway Co.*, 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157; *Railroad Co. v. Lyon*, 62 Ala. 71.

The chief defense relied on, and the ground upon which the court was requested to take the case from the jury, is that Campbell by his negligence contributed to the injury which caused his death. Contributory negligence is nothing more than negligence on the part of the plaintiff. It is governed, therefore, by the rules and law applicable to the negligence of the defendant. The question of negligence is generally, though not always, a question for the jury. Negligence is not a fact which is the subject of direct proof, but it is an inference from facts put in evidence. Witnesses testify to the facts of the case from which negligence, if there is any, is inferred. This inference is usually within the province of the jury. *Beach, Contrib. Neg.* (2d Ed.) §§ 445, 447; *Whart. Neg.* (2d Ed.) § 420. When a case involving a charge of negligence is concluded by the presentation of the evidence, there is a preliminary question for the court. The court is to decide whether such evidence has been presented as makes it proper to submit the case to the jury. It is only when the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence becomes one of law for the court. *Railway Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186. When evidence is offered which, if true, would constitute negligence, and it is controverted by other material evidence, the case is one for the jury. When there is evidence tending to show negligence, which is not controverted, but from which different inferences could be fairly drawn, the case should be submitted to the jury. The case is for the jury, of course, when the facts are left in doubt, and the inferences to be drawn from them are uncertain, and might fairly lead different minds to different conclusions. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478.

The telegram that Burke sent to Campbell is a significant fact in the case. Burke was the track supervisor, and was the superior officer of Campbell, who was the section foreman. Campbell was directed by this telegram to bring his force in the morning to the second rock cut above Paint Rock bridge. The message was received the night before the accident. Campbell was in the habit of going to work with his force about daylight. It would take him about 1 hour and 20 minutes to go on the hand car to the place where he was ordered. The proof shows that the accident occurred about 5:40 a. m., and that he had then gone but a short distance. It may be inferred that Campbell's intention was to reach the rock cut to which he was ordered about the time he usually began work. It may be inferred that the telegram

was a direction that he should do so. We do not say that this is a necessary inference. The telegram, however, was admissible evidence, and tends, with the other facts, to make the question as to contributory negligence proper for the consideration of the jury.

In the case of *Railroad Co. v. Amato*, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 596, the main defense was contributory negligence. The accident happened while the plaintiff was crossing a railroad bridge. He was a laborer on the defendant's railroad. The boss or foreman of the defendant told him that it was safe for him to cross the bridge until half past 7 o'clock. The lower court charged the jury that they had the right to take into consideration this statement made to the plaintiff by the boss, and an exception was taken to that portion of the charge. The supreme court held that the charge was correct; that the testimony of the plaintiff that the boss or foreman of the defendant had told him that no train or engine would come over the bridge until about 7 o'clock or half past 7 o'clock was properly to be taken into consideration by the jury in determining the question of negligence.

In *Etting v. Bank*, 11 Wheat. 59, 6 L. Ed. 419, it was held, Chief Justice Marshall delivering the opinion of the court, that "it is the province of the court to construe written instruments, yet, where the effect of such instruments depends, not merely on the construction and meaning of the instrument, but upon collateral facts in pais and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury."

This telegram must be viewed in the light of the other evidence. It was proved that Campbell's crew had on some occasions been ordered out at night; that they were sometimes called on to work out of their section; that they usually began work about daylight or a little after; and that it would have taken Campbell about 1 hour and 20 minutes to go on the hand car to the rock cut, as directed in Burke's telegram. The import and effect of the telegram depend on the other facts, and they should all be considered in determining whether he exercised the degree of care and prudence "incumbent upon a man of ordinary prudence in the same calling." In speaking of the inferences to be drawn from documentary evidence when connected with facts proved orally, Chief Justice Marshall, in the case last cited, said: "These subjects are peculiarly proper for the consideration of the jury."

The defendant company had printed rules and regulations for its government, which the employes were required by one of the rules to provide themselves with. Part of one of these rules was as follows:

"They must not run their hand cars within ten minutes of the time of a passenger train, and always run with great caution, keeping a sharp lookout for material and other extra trains. They will under no circumstances allow their hand car to be used unless they accompany it, nor run it on Sundays or after dark without special permission of the division superintendent."

The contention of the defendants was that the plaintiff's intestate had violated this rule, and was therefore guilty of contributory negligence. It is the duty of a company engaged in a complex business to establish and enforce definite regulations for the protection of its employes. It is the duty of the employes to obey such rules. It was incumbent on the defendants not only to prove the existence of the rule,

but to show that the plaintiff's intestate had knowledge of it. *Railroad Co. v. Graham*, 94 Ala. 545, 10 South. 283; *Sprong v. Railroad Co.*, 58 N. Y. 56. The defendants sought to show that Campbell had knowledge of these rules. The evidence on that subject is very meager. A witness testified that he gave Campbell's predecessor one of the books containing the rules, and that he saw the book in Campbell's pocket four or five years before the accident. From this and other evidence in the record it is true that it might be inferred that Campbell had knowledge of them, but it is not, we think, an inference that should be drawn by the court. The evidence is not of that direct and indisputable character that would justify the court in determining that question, and it is not without conflict. The plaintiff's evidence in rebuttal tended to show that the book of rules furnished for the Brownsboro section was in the possession of John Hunt, the depot agent for the defendants at Brownsboro, and that it was kept in his desk. The burden was on the defendants to show that Campbell had knowledge of the rules. This could be done by direct evidence, or in many ways by circumstantial evidence. The court could not, on the facts as proved in this case, do otherwise than submit the question of Campbell's knowledge of the rule to the jury.

There is another view of this case that shows the court did not err in refusing to direct a verdict for the defendants. The chief reason urged why the case should have been taken from the jury is that the plaintiff's intestate was guilty of contributory negligence. This reason, if well founded on fact, does not meet the entire case on trial, because in some of the counts the defendants were charged with committing the act complained of wantonly, recklessly, and negligently. To these counts the defense of contributory negligence was not good. They were at issue only on the plea of not guilty. In cases where the injury is wanton or willful, the doctrine of contributory negligence has no application. A demurrer was properly sustained to such plea to these counts. Now, if there was evidence before the jury tending to prove the allegation of these counts, and to show that the acts complained of were committed wantonly and recklessly, then the case could not properly be taken from the jury, even if the evidence, admitted under the pleas to the other counts charging simple negligence, as matter of law had shown contributory negligence. It is clear that one who commits a wrong willfully cannot defend by saying that the injured person was guilty of negligence. *Cooley, Torts* (2d Ed.) p. 810; *Beach, Contrib. Neg.* (2d Ed.) § 64; *Railroad Co. v. Markee*, 103 Ala. 160, 15 South. 511. The evidence, we think, to say the least, tended to show wanton negligence, or reckless indifference to the probable consequences of the acts complained of, which is construed to be the equivalent of intentional or willful.

In *Electric Co. v. Bowers*, 110 Ala. 328, 331, 20 South. 345, the court said:

To constitute a willful injury, there must be design, purpose, intent to do wrong and inflict the injury. Then there is that reckless indifference or disregard of the natural or probable consequences of doing an act, or omission of an act, designated, whether accurately or not, in our decision, as 'wanton negligence,' to which is imputed the same degree of culpability, and held to be

equivalent to willful injury. A purpose or intent to injure is not an ingredient of wanton negligence. Where either of those exist, if damage ensues, the injury is willful. In wanton negligence, the party doing the act or failing to act is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury. These are the distinctions between simple negligence, willful injury, and that wanton negligence which is the equivalent of willful injury, drawn and applied in our decisions."

In *Railroad Co. v. Hill*, 90 Ala. 71, 80, 8 South. 90, 9 L. R. A. 442, the court said:

"We are satisfied that it tended to show a condition of the track, not to know and remedy which was such gross negligence on the part of the company as implied recklessness and wantonness,—such indifference to the probable consequences of its continual use as is the equivalent of intentional wrong, or a willingness to inflict the injuries complained of."

In the late case of *Railroad Co. v. Markee*, 103 Ala. 160, 15 South. 511, the court used the expression, "willful injury, or such wanton negligence as to be its equivalent." See, also, *Railroad Co. v. Orr*, 121 Ala. 489, 26 South. 35.

We are not called on to decide whether the evidence sustains these counts. The inquiry is, was there evidence tending to sustain them that made it a question proper to be submitted to the jury? We think the question was one for the jury.

The other charges asked for and refused raise questions settled by the principles already stated in this opinion, or are shown to have been correctly refused by reference to evidence in the record. We do not deem it necessary to comment on them separately. We find no error in the record. The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge. I dissent from the decision of the court in this case, because, in my opinion, the evidence did not show, nor tend to show, that the engineer in charge of the locomotive at the time that John W. Campbell was killed was guilty of such wanton or willful negligence as would justify a recovery in the face of the well-established, if not undisputed, contributory negligence of the said John W. Campbell.

AMERICAN NAT. BANK OF ARKANSAS CITY, KAN., et al. v. WILLIAMS.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,321.

1. NATIONAL BANK—LOAN—STOCK AS COLLATERAL SECURITY.

Plaintiff sued the receiver of a national bank for money loaned the bank for which bank stock had been given as collateral security. The receiver defended on the theory that the transaction was a purchase of the stock. At the trial, plaintiff and another testified positively that plaintiff contracted for the loan with the bank cashier on the terms claimed by plaintiff. The receiver's evidence showed that after his appointment he furnished plaintiff, at her request, with a list of stockholders, in which her own name appeared, and that she did not disclaim being a stockholder, and did not begin suit for two years thereafter. Certain entries on the bank's books showed plaintiff to be a stockholder, but she had not received for the certificates she held on the bank's books, and it did not appear that she knew of the entries. In the letters to the comptroller and to defendant, written after the bank's insolvency, plaintiff, who was inex-

perceived in business matters, referred to herself as a stockholder. *Held*, that the evidence did not estop plaintiff from showing that she was not a stockholder, and that that issue was properly submitted to the jury.

2. SAME—INTEREST.

In a suit against the receiver of a national bank for money loaned the bank while it was a going concern, it was error to permit plaintiff to recover interest on the loan after the bank's suspension and the appointment of a receiver, since debts of an insolvent bank must be liquidated by the receiver as of the date when insolvency supervenes, and the amount of all debts computed as of that day.

3. APPEAL—MODIFICATION OF JUDGMENT.

Where, in a judgment against the receiver of a national bank, interest on the claim has been erroneously allowed, and the amount of such erroneous interest can be determined by the court of appeals by a mathematical computation, the judgment of the trial court will be canceled and annulled as to the amount of such interest, and affirmed as to the balance.

In Error to the Circuit Court of the United States for the District of Kansas.

Action for money loaned by Lizzie E. Williams against the American National Bank of Arkansas City, Kan., and John Watts, receiver of said bank. From a judgment in favor of plaintiff, defendants bring error. Modified.

Samuel R. Peters (John C. Nicholson, on the brief), for plaintiffs in error.

R. R. Vermilion (W. E. Stanley, Earle W. Evans, J. C. Pollock, and J. T. Lafferty, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was before this court at the December term, 1897, a writ of error having been sued out previously by Lizzie E. Williams, the present defendant in error, to reverse a judgment that was recovered against her on the first trial by the receiver of the American National Bank of Arkansas City, one of the present plaintiffs in error. *Williams v. Bank*, 56 U. S. App. 316, 29 C. C. A. 203, 85 Fed. 376. The first judgment having been reversed on the former hearing, a second trial was had before a jury, which resulted in a verdict against the American National Bank of Arkansas City and its receiver, John Watts, the present plaintiffs in error, in the sum of \$42,586.83, to reverse which a second writ of error has been brought.

As the facts out of which the case arises are fully reported in the case above cited, we only deem it necessary to say on the present occasion that Mrs. Williams, who was the plaintiff below, sued the American National Bank of Arkansas City and its receiver, the bank having become insolvent, to recover the sum of \$28,250, which she claimed to have loaned to the bank on April 15, 1890, while it was a going concern. The receiver denied that any such loan had ever been made to the bank, and insisted that the sum of money sued for was paid by the plaintiff below to the bank on or about the time stated in her complaint, for the purchase of 250 shares of the capital stock of the bank, and that she had ever since remained a stockholder of the bank, holding stock to that amount. The issue which appears to have been litigated on the second trial, as on the first trial, was whether the sum of money last mentioned was loaned to the bank at an agreed rate

of interest of 12 per cent. per annum, and a certificate of stock taken as collateral security for the same, as the plaintiff claimed, or whether she was a purchaser of the bank's stock to the amount of 250 shares, as the receiver claimed. Upon this issue the finding on the second trial was in favor of the plaintiff, as heretofore stated.

In view of our former decision, which disposed of several questions that were then raised, only two questions are presented by the present record which we deem it necessary to notice. The first is whether the jury were properly allowed to determine the issue of fact heretofore stated; and the second is whether the plaintiff below, on the state of facts which was developed at the trial, should have been held to be estopped from denying that she was a stockholder in the insolvent bank.

The first of these questions is practically answered by our previous decision. When the case was heard formerly, we held, in substance, that upon the evidence contained in that record the case should have gone to the jury, and that the action of the trial court in withdrawing it from their consideration could only be accounted for on the ground that the trial judge entertained the erroneous view that the issuance of the stock certificate and the acceptance of the same by the plaintiff estopped her from saying that she was not a stockholder, and from explaining by parol evidence the circumstances under which the stock certificate happened to be issued in her name. 56 U. S. App. 320, 29 C. C. A. 203, 85 Fed. 377, 378. The testimony on the last trial in support of the plaintiff's cause of action appears to have been more full and explicit than it was on the first trial. She testified to the existence of an express agreement between herself and the cashier of the bank, whereby the latter agreed on behalf of the bank to borrow the sum of money in controversy, and to pay interest thereon at the rate of 12 per cent. per annum, payable semiannually, and as security for the loan to deliver to her a certificate for 250 shares of the bank's stock. She further testified that this agreement was executed on her part by the loan of the money, and that she accepted the certificate merely as collateral, being induced to do so by the representation of the cashier that the bank was solvent, and that the stock was adequate security for the money loaned. The testimony of the plaintiff to the effect last stated was fully corroborated by the evidence of another witness, who claimed to have been present in the bank, and to have heard the aforesaid agreement between the plaintiff and the cashier when it was made. We shall accordingly forego further discussion of this branch of the case, with the statement that as there was direct and positive testimony that the money in controversy was received by the bank as a loan, and that the stock was accepted by the plaintiff merely as collateral security, it was the province of the jury to decide how far, if at all, the force and effect of such evidence was overcome by the other testimony in the case. The verdict below is supported by substantial evidence, and the action of the trial court in submitting the case to the jury cannot be successfully challenged on appeal.

The contention on the part of the receiver that the plaintiff below should be held estopped to deny that she is a stockholder of the insolvent bank is founded upon the following facts: On August 7,

1891, about eight months after the bank had become insolvent and a receiver had been appointed, the plaintiff applied to the receiver by letter for a list of shareholders of the bank, and shortly thereafter was furnished with such a list, by mail, in which her own name appeared as the owner of 250 shares of the bank's stock. She did not in response to this letter assert that she was not a stockholder, and ask to have her name stricken from the list, nor did she bring the present action until July, 1893. The stock certificate book of the bank showed that on June 17, 1890, a certificate for 250 shares of stock had been issued to Mrs. Lizzie E. Williams, "being funds [as the stock certificate recited] accumulated before marriage, and separate from all other property, transferable only on special indorsement in person"; but other entries in the same book showed that this stock had been transferred to her from stock issued on account of Lamson and Thwing, who were, respectively, the cashier and president of the insolvent bank. The stock certificate in question was not receipted for by the plaintiff on the books of the bank, and it does not appear that she ever saw any of the entries respecting the stock that may have been made either upon the books of the bank, or in reports to the comptroller, by the officers of the bank. In a letter that was written by the plaintiff to the comptroller on October 1, 1891, and in a letter that was written to the receiver of the bank on December 16, 1891, in which certain inquiries were made concerning the affairs of the bank, she referred to herself as a stockholder therein.

We think that the testimony aforesaid, which is all that the record contains bearing upon the point now under consideration, was insufficient to justify a declaration by the court that the plaintiff was estopped from denying that she was a stockholder. It was competent and persuasive testimony, no doubt, on the issue whether the plaintiff had bought the stock or loaned money to the bank upon the stock as collateral; but in view of the other testimony in the case, to which reference has already been made, showing the agreement between her and the cashier, and the circumstances under which the stock was accepted, it cannot be said as a matter of law that the testimony created an estoppel, and precluded the plaintiff from showing the truth. The fact that in one or two letters the plaintiff referred to herself as a stockholder in writing to the receiver and comptroller cannot be regarded as a conclusive admission on her part that she was the absolute owner of the stock, when it is considered that she was in a measure inexperienced in business transactions, and that, having a stock certificate in her hands, she may not have understood the difference between owning the stock absolutely and holding it in pledge as security for a debt. This case is clearly distinguishable from, and must not be confounded with, those cases in which it has been held by this court that one who buys stock from a national bank while it is a going concern, and who suffers his name to be borne upon the books as a shareholder, and accepts dividends in that capacity, cannot, as against creditors, rescind the contract when the bank becomes insolvent, upon the ground that the purchase was induced by fraud. *Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865; *Scott v. Latimer*, 60 U. S. App. 720, 33 C. C. A. 1, 89 Fed. 843; *Bank v. Newbegin*, 40 U. S. App. 1, 20

C. C. A. 339, 74 Fed. 135. In the case in hand the plaintiff asserted that she did not purchase the stock; that she neither consented to become a shareholder nor received dividends on the stock as such, but that she simply accepted the certificate and held it as collateral for a loan, and received interest on the loan pursuant to her agreement with the cashier, so long as the bank was a going concern. Such being the facts, as the jury have found, she is not debarred from showing, even as against the receiver, her true relation to the insolvent bank. She never voted the stock represented by the certificate, nor attempted to exercise any of the rights of a shareholder, and, so far as the present record discloses, she never knowingly permitted herself to be listed as a shareholder, or to be held out to the world as such, so long as the bank was engaged in business. All of the acts upon which the receiver attempts to found an estoppel were committed after the bank ceased to be a going concern, and it must be adjudged that such acts as are relied upon are insufficient to preclude her from showing that she is simply a creditor of the bank, if such be the fact.

An error which is assigned upon the record was committed, however, in the allowance of interest upon the plaintiff's demand. The lower court directed the jury to allow interest at the rate of 6 per cent. per annum from October 1, 1890 (up to which time interest had been paid), to the day of trial. In accordance with this instruction, the jury allowed interest to the amount of \$14,336.87. As the suit is against the receiver of the insolvent bank to establish a demand which he had declined to allow, and as the debts of an insolvent bank must be liquidated by the receiver as of the date when insolvency supervenes, and the amount of all debts computed as of that day, it was erroneous to allow interest on the plaintiff's demand as against the receiver subsequent to December 26, 1890, when the bank ceased to do business and a receiver was appointed. *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686, 28 L. Ed. 603. It is unnecessary, however, to reverse the judgment because of this error, as the verdict of the jury shows the amount of interest which is included in the judgment, and by computing the interest on the debt from October 1, 1890, to December 26, 1890, we have been able to ascertain that interest to the amount of \$13,956.37 was erroneously allowed. Deducting this latter sum from \$42,586.83, the total amount of the verdict, leaves the sum of \$28,630.46, for which a judgment should have been entered. The judgment will be affirmed for the latter amount, and canceled and annulled for the residue, in accordance with a practice which is established by the following cases: *Railroad Co. v. Estill*, 147 U. S. 591, 622, 13 Sup. Ct. 444, 37 L. Ed. 292; *Board v. Sherwood*, 27 U. S. App. 458, 468, 11 C. C. A. 507, 64 Fed. 103, 110.

REPAUNO CHEMICAL CO. v. VICTOR HARDWARE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1900.)

No. 1,226.

1. APPEAL—SPECIFICATION OF ERRORS—COURT RULES.

Under rule 24 of the circuit court of appeals (47 Fed. xl.), providing that in cases brought up by writ of error the specification of errors relied upon shall set out separately and particularly each error asserted and intended to be urged, errors assigned, but not set out and relied upon in argument, will be disregarded by the court.

2. SAME—EXCEPTIONS.

Where an objection to the offer of a letter in evidence is sustained "until further proof," and the party offering it saves an exception, but, when the letter is finally offered, and an objection to its introduction is again sustained, no exception is saved, its exclusion cannot be made the subject of complaint on appeal.

3. SAME—ERROR WITHOUT PREJUDICE.

Where a letter excluded from evidence is afterwards admitted as a part of other documentary evidence, and is considered by the jury, any error in its rejection on the first offer is without prejudice.

4. FRAUDULENT CONVEYANCES—EVIDENCE—LETTER ADDRESSED TO MERCANTILE AGENCY.

A letter addressed by a creditor to a mercantile agency, stating that she did not intend to push a debtor named, as he had ample time, and was meeting his notes as they became due, is not admissible in evidence on behalf of other creditors of such debtor in an attack upon a conveyance by the debtor to the writer of the letter, in the absence of evidence that the letter was ever communicated to the other creditors.

5. INSTRUCTIONS—EXCEPTION TO CHARGE IN GROSS—APPEAL.

Where the only exception to the instructions to the jury is to the entire charge as a whole, which contains several distinct propositions of law, it will not avail the appellant if any part of the charge is good.

6. FRAUDULENT CONVEYANCES—PREFERENCES—INTENT TO HINDER AND DELAY.

Where the insolvency of a debtor is known to his creditors, one creditor has the right to secure the payment of his claim through the conveyance to him of all the debtor's property. Where there is no secret trust or fraudulent undervaluation of the property, other creditors have no legal ground of complaint.

7. SAME.

Although the effect of a conveyance by a debtor to one of his creditors is to place the property conveyed beyond the reach of his other creditors, and leave him nothing with which to pay his other debts, such act is not hindering or delaying creditors in the legal sense, and will not entitle the unsecured creditors to recover the property from the preferred creditor.

8. SAME—HASTE AND SECRECY.

Where a creditor accepts property in absolute payment of a valid indebtedness, without any reservation or secret trust for the benefit of the debtor, and there is such a change of possession as the property fairly admits of, the transaction is valid, without regard to whether it was consummated in haste and secretly, or openly and leisurely, or in day^{light} or in the nighttime.

9. SAME—DISCREPANCY BETWEEN VALUE OF PROPERTY AND DEBT.

A creditor whose debt is payable in money has a legal right to insist that the cash value of the property received in payment shall be equal to the amount of his debt, and the discrepancy between that value and the amount of the debt must be clearly shown to be very considerable before the transaction can be challenged on the ground that there was a fraudulent overpayment.

In Error to the Circuit Court of the United States for the District of Colorado.

The Repauno Chemical Company instituted this action against the Victor Hardware Company on August 2, 1897, and caused a writ of attachment to be issued and levied on a stock of merchandise, and certain accounts were also garnished as the property of the defendant, the Victor Hardware Company. H. B. Roby filed her intervention in the cause, claiming both the stock of goods and the accounts seized under the writ of attachment as her property, alleging that she purchased the same from the Victor Hardware Company on the 30th of July, 1897, and was in possession of the same at the time of the seizure under the writ of attachment; that the Victor Hardware Company was indebted to her in the sum of \$17,950 on notes executed by the company on July 15, 1896; that on July 30, 1897, there was due on the notes from the hardware company, after allowing all credits, the sum of \$15,067; that the hardware company was also indebted to the Mine & Smelter Supply Company in the sum of \$4,957.03, which claim had been purchased by and assigned to the intervenor; that on July 30, 1897, she purchased the stock of goods belonging to the hardware company, together with the books and accounts, for the sum of \$20,018.73, and the same were, in conformity with the resolution of the board of directors of the hardware company, delivered to her; that she immediately took possession of the property, and conducted a business on her own account until August 2d, when the United States marshal took the property from her under and by virtue of the writs of attachment issued in this cause. The plaintiff filed an answer to this intervention, denying there was any consideration for the transfer, denying that she was the owner of the property attached, denying that the sale was made by the hardware company to the intervenor in good faith; and alleging that there was nothing due to the intervenor from the hardware company, but that she was merely a stockholder in the hardware company; that the notes of the hardware company held by the intervenor were made in the name of the company without authority; that they did not evidence any just indebtedness; that the company never entered them upon its books, or mentioned them in any statements which it made to the commercial world to enable the company to obtain credit; that the claim of the Mine & Smelter Supply Company against the hardware company was sold and assigned to the intervenor to assist in the scheme to defraud the creditors of the hardware company; that the property sold to the intervenor was of the value of \$90,000; and that the entire transaction was fraudulent as against the plaintiff and the other creditors of the hardware company. To this answer a reply was filed denying that there was any fraud; denying knowledge of any false statements made by the hardware company for the purpose of obtaining credit, if any such were made by the company; denying that the property conveyed was worth \$90,000, or any more than she paid for it; and averred that the sale of the merchandise and accounts was made in good faith to the intervenor for the purpose of liquidating and paying indebtedness due her from the hardware company. There was a trial by jury, and a verdict and judgment for the intervenor, and the plaintiff sued out this writ of error.

W. S. Decker (Henry T. Rogers, Lucius M. Cuthbert, and Daniel B. Ellis, on the brief), for plaintiff in error.

W. S. Morris (Charles J. Hughes, Jr., and B. H. Giles, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There are a number of errors assigned, but in the brief of the learned counsel for the plaintiff in error, who did not try the case below, only two of the assignments of error are set out and relied upon. In *City of Lincoln v. Sun Vapor Street-Light Co.*, 19 U. S. App. 431, 8 C. C. A. 253, 59 Fed. 756, we announced our purpose to require a com-

pliance with rule 24 of this court, and it has been applied in numerous cases since. *Haldane v. U. S.*, 32 U. S. App. 607, 16 C. C. A. 447, 69 Fed. 819; *National Bank of Commerce of Kansas City v. First Nat. Bank*, 27 U. S. App. 88, 10 C. C. A. 87, 61 Fed. 809; *Hoge v. Magnes*, 56 U. S. App. 500, 29 C. C. A. 564, 85 Fed. 355.

We proceed to the consideration of the errors assigned and discussed in the brief of counsel for the plaintiff in error. The first assignment of error is as follows:

"That the court erred in refusing to admit in evidence the letter of the intervenor sent to R. G. Dun & Co., as follows, to wit:

"Victor, Colo., Sept. 24, 1896.

"To Whom It may Concern: This is to certify that I am not, neither do I intend to push Greve and Quereau for the amount of their indebtedness to me, as they have ample time, and are meeting their notes as they become due, notwithstanding all reports to the contrary.

"[Signed]

Henrietta Quereau."

But the record fails to show that there was an exception saved to the ruling of the court when it was finally offered in evidence and excluded by the court. It is true that when the letter was first offered in evidence and excluded an exception was saved, but that was a mere tentative ruling. As shown by the record, the court, in sustaining the objection, stated: "The objection to this paper is sustained until you make further proof. You may offer it later on possibly." Later on, when the witness Allen was introduced on behalf of the plaintiff in error, the letter was again offered in evidence, when the objection to its introduction as evidence was sustained by the court. To this ruling of the court no exception was then saved, and for this reason the matter is not properly before us for consideration. *Paxson v. Brown*, 27 U. S. App. 49, 10 C. C. A. 135, 61 Fed. 874. But, in view of the fact that the reports of the commercial agency of Dun & Co. stated the contents of the letter, and these reports were admitted in evidence, and considered by the jury, its rejection was not prejudicial. Besides, when the letter was first offered in evidence, and when the exception was saved, there was no evidence before the jury that the letter had ever been communicated to the creditors, and for this reason the trial judge properly held that it was at that time inadmissible.

The second assignment of error relates to the charge of the court. The charge is lengthy, covering nearly five pages of the printed record, and the only exception taken was to the entire charge; the language of the exception being as follows: "To the giving of which instructions the plaintiff, by its counsel, then and there excepted." The rule is well settled that an exception to a charge of the court in gross, which contains several distinct propositions of law, is not available if any part of the charge is good. *Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237; *Price v. Pankhurst*, 10 U. S. App. 497, 3 C. C. A. 551, 53 Fed. 312; *Schneider Brewing Co. v. American Ice-Mach. Co.*, 40 U. S. App. 382, 23 C. C. A. 89, 77 Fed. 138; *McClellan v. Pyeatt*, 4 U. S. App. 319, 1 C. C. A. 613, 50 Fed. 686; *New England Furniture & Carpet Co. v. Catholicon Co.*, 49 U. S. App. 78, 24 C. C. A. 595, 79

Fed. 294. But, aside from this fact, a careful examination of the entire charge of the court fails to show any error prejudicial to the plaintiff. The evidence tends to show that the hardware company was insolvent, and indebted to numerous persons, among them the plaintiff in error, and also defendant in error. The jury found the indebtedness due to Mrs. Roby (formerly Mrs. Quereau) was a valid indebtedness, and that the value of the property received by her in payment thereof was not in excess of the amount due to her, and that the sale was absolute, and made in good faith to pay an honest debt. These facts having been established by the verdict of the jury, the only question is, did the hardware company have the right to prefer one creditor to the exclusion of all others? On this point the court instructed the jury as follows:

"The evidence in the case shows a race of diligence between creditors, who, I think, it may be fairly said knew the failing condition of their common debtor, and knew that the latter had the right to make a preference among them, and, as indicated at the outset, the intervener had a right to secure the payment of her claim if the transaction, so far as she was concerned, was honest, and entirely free from fraud, or the knowledge by her of fraud, on the part of her debtor, the Victor Hardware Company. In other words, a mere intent on the part of the debtor, the Victor Hardware Company, in this case, to hinder and delay its creditors, or any one of them, will not of itself render a transfer made in payment of an existing indebtedness void as against the creditor. In order that the intent of the debtor to hinder and delay his creditors by such transfer shall render void a conveyance made in payment of a prior debt, such intent must be participated in by the creditor to whom the conveyance is made. Parties to a business transaction are not presumed to deal with each other in bad faith; but, on the contrary, are presumed to deal honestly and in good faith until the opposite is shown by evidence upon the trial, and any one who alleges such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the burden of showing that such is the case. In other words, fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof; that is to say, proof which is satisfactory to the jury."

This question was before this court in *Rice v. Commission Co.*, 36 U. S. App. 266, 18 C. C. A. 15, 71 Fed. 151, and we there said:

"Fraud and collusion cannot be predicated upon the fact that a debtor consented to a judgment for a debt which he honestly owed. Nor is it a fraud for a debtor to consent to a judgment in favor of one of his creditors, and deny that favor to all others. In the absence of a bankrupt or insolvent law, a debtor may lawfully pay or secure one creditor to the exclusion of all others. The preference may be given in many ways, but most commonly it is accomplished by paying the debt in money, or by the debtor's selling or mortgaging his property to his creditor, or by confessing a judgment in favor of his creditor, followed by execution and a levy upon the debtor's property. The validity of the preference is not affected by the fact that it was accomplished quickly, or secretly, in order to prevent the interference of other creditors."

A debtor who has many creditors may pay one of them in property in full, though it takes all his property, and leaves nothing for his other creditors. The debtor has an undoubted right to make the preference, and the creditor has an undoubted right to take his debtor's property in payment of his debt. While the questions in cases like this are very plain, they are sometimes obscured, and the minds of the jury confused, by telling them that any action of the preferred creditor and debtor which had the effect to hinder, delay, or defraud the debt-

or's other creditors is fraudulent and void. They should be told, in this connection, that, although the acquisition by one creditor of all the debtor's property in satisfaction of his debt to that creditor has the effect to place that property beyond the reach of other creditors, and leave the debtor nothing with which to pay his other debts, yet this is not hindering or delaying his other creditors in a legal sense; that is, it is not fraudulent as to them, and they cannot complain of it, because the debtor in paying and the creditor in receiving the property did nothing which the law did not authorize them to do, and which every other creditor would have quickly done if he had had the good fortune to be in like favor with the debtor. Other creditors may reproach the debtor for his partiality, but they cannot recover the property from the preferred creditor. The questions in such cases are: Did the debtor owe the debt? Did the creditor accept the property in absolute payment of his debt, with no reservation or secret trust for the benefit of the debtor? Was there such a change of the possession as the property fairly admitted of? When these questions can be answered in the affirmative, the transaction is impervious to attack from any quarter. These are the facts essential to constitute a valid sale of property in payment of a debt, and when they are established it is wholly immaterial whether the transaction was consummated in haste, and secretly, or openly and leisurely, or in daylight or in the nighttime. Lawful contracts, made in good faith, for a lawful purpose, may be made at any hour of the day or night, and publicly or secretly, and leisurely or hastily, as it best suits the convenience or interests of the parties to them. When a creditor is seeking payment from an insolvent debtor, it is commonly to his interest to act with celerity and secretly. If he made open proclamation of his purpose, it would probably result in some other creditor obtaining the preference. A creditor whose debt is payable in money has a legal right to insist that the cash value of the property received in payment shall equal the amount of his debt. And, as the actual cash value of most property is largely a matter of opinion, the discrepancy between that value and the amount of the debt must be clearly shown to be very considerable before the transaction can be challenged on the ground that there was a fraudulent overpayment. That charge is frequently made, but rarely sustained. It was not sustained in this case. The judgment of the circuit court is affirmed.

DAVIS v. JOHNSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 353.

1. FALSE IMPRISONMENT—ELEMENTS OF OFFENSE—PLEADING.

A count in a declaration alleging the issuance of a warrant by one defendant at the instance of another; the execution of such warrant by a third defendant, by the arrest and detention of plaintiff thereon; that such acts were done without authority of law, maliciously, and without reasonable or probable cause, and for the purpose of coercing plaintiff's action in a civil suit; but containing no allegation as to the termination of the prosecution,—states a good cause of action for false imprisonment, although not for malicious prosecution.

2. SAME—CHARGE OF CONSPIRACY.

In an action on the case against several defendants for false imprisonment, though conspiracy is charged, it is not the gist of the action, but matter of aggravation only, not essential to recovery, and, if the evidence establishes a case of false arrest and imprisonment against the defendants or either of them, the plaintiff is entitled to recover against those shown to be guilty.

In Error to the Circuit Court of the United States for the District of West Virginia.

This is a writ of error to the judgment of the circuit court of the United States for the district of West Virginia, at Charleston. The action is trespass on the case by the plaintiff in error to recover of the defendants in error damages growing out of the following occurrences: The plaintiff in error hired a horse from the defendant in error Ellis, a liveryman, at Ft. Spring, W. Va., to ride horseback to Lewisburg, and in that vicinity, at an agreed price of \$1 per day, with an understanding that Davis might purchase the horse at the price of \$100, if it suited him, and, in the event of purchase, he was not to be charged for the hire of the horse during the trip; and Davis obligated himself, at least impliedly, to take good care of the animal, and return it to the owner at the expiration of the term of hiring. During the trip the horse's back became sore to such an extent that Davis would not use it; and he hired a conveyance, and drove a portion of the way, leading the disabled animal. The horse was returned on Saturday, the 6th of July, 1895, the trip having taken six days, and was left at Ft. Spring with a brother of Ellis, who was informed that the plaintiff in error had to catch a train hurriedly to Alderson, his headquarters, and that he would return that evening going to Ronceverte, and that if Ellis would be at the depot the amount of the hire would be handed him. That evening before Davis left Alderson, and as he was dressing to catch the train on his return trip to Ronceverte, Ellis, the defendant in error, appeared at Alderson, and called to see him in reference to the horse, and demanded that Davis take the horse under the conditional agreement for sale hereinbefore referred to, because, as he claimed, the horse had been seriously injured, and was not returned to him in good condition, as contemplated in the contract of hire. He refused to accept anything on account of hire, and insisted on Davis paying for the animal, which the latter refused to do, as the horse did not suit him, as he claimed; and he, moreover, insisted that he had taken the best care of the horse possible, and that the sore back was caused by the excessively hot weather, and the fact that the horse had been fed on grass, was extra fat, and unaccustomed to saddle use. Being unable to come to an agreement, Ellis and Davis separated, and the latter left on the train for Ronceverte. That night, between 10 and 11 o'clock, Ellis and the defendant in error Chew appeared at Ronceverte with a civil warrant issued by the defendant in error Johnson, and executed the same on the plaintiff in error, requiring him to appear before said Johnson at Ft. Spring, on the 11th day of July, 1895, to answer the complaint of the defendant in error Ellis for the sum of \$100, for the recovery of money due by account; and said Chew demanded that Davis acknowledge service of the summons, which upon his failure and refusal to do he was arrested, and for a while held in custody; and after protesting against Chew's authority to make an arrest on a mere civil warrant, and refusing to submit to his authority, Chew presented another warrant, being a criminal warrant, charging Davis with cruelty to animals, sworn out by Ellis before the defendant in error Johnson, and plaintiff in error was taken in custody under this warrant, the defendant in error Ellis and one Vawter, called on by constable Chew, assisting in taking physical hold of Davis, according to Davis' statement, which was corroborated by others. Chew insisted that, by order of Johnson, he was to be arrested and brought before him at Ft. Spring, unless service of the civil process was acknowledged. After being held in custody under these circumstances, and counseling with friends, and when about to be taken by Chew and Ellis in a buggy to Ft. Spring, the point was made that a justice at Ronceverte could take the bail; and while Davis was being carried under arrest, about 1 o'clock Sunday morning, to the residence of a justice of the peace at Ronceverte, he consented to acknowledge

service of the civil warrant, to avoid further annoyance, and to secure release from arrest. This being done, he was discharged, and returned to his hotel. Two days later, while at Lewisburg, he was again arrested by Chew under the warrant charging cruelty to animals, and, after being held in custody some time, was taken before a justice of the peace, and allowed to give bail for his appearance before Justice Johnson at Ft. Spring. Upon a hearing before the justice, judgment was given for the plaintiff for \$100 and costs in the civil case, and the criminal warrant was dismissed, the defendant agreeing to pay the costs, but under protest, as he insists. The declaration contains three counts, to the first two of which a demurrer was sustained, and upon trial of the case under the third count the court instructed the jury to return a verdict for the defendants, being of the opinion that under that count it was necessary, in order for the plaintiff to recover, that he should prove a conspiracy, which he had failed to do.

John H. Holt and C. C. Watts, for plaintiff in error.

John Osborne, for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge, after stating the facts as above, delivered the opinion of the court.

The assignments of error present for the consideration of the court quite a number of questions, but those specially relied upon involve the correctness of the court's ruling on the demurrer to the declaration, and in instructing a verdict for the defendants as aforesaid. The difficulty in argument between counsel as to the propriety of the court's ruling on the demurrer arises from their inability to agree as to whether the first two counts in the declaration are for false imprisonment or malicious prosecution. If the two counts are for malicious prosecution, the court's ruling is manifestly correct. Malice and the want of probable cause must be averred and proved in an action for malicious prosecution, the fact that the defendants procured or instigated the prosecution, and that the same has ended and resulted favorably to the plaintiff. *Wheeler v. Nesbitt*, 24 How. 544, 16 L. Ed. 765; *Stewart v. Sonneborn*, 98 U. S. 195, 25 L. Ed. 116; *Staunton v. Goshorn*, 36 C. C. A. 75, 94 Fed. 52.

In the counts in question no averment whatever is made as to the ending of the prosecution, which of itself makes them entirely insufficient as counts in an action for malicious prosecution. But we do not conceive the counts to be for that cause of action. They are for false imprisonment, as distinguished from malicious prosecution; and while it is true the issuance of the warrants, under which the arrests of the plaintiff in error were made, are set forth with some detail, it is by way of inducement merely, and not intended to be the gravamen of the action. It was for the subsequent arrest and imprisonment, by virtue of the warrants, that the suit was instituted to recover damages; and as counts in a declaration for false imprisonment they are good, and contain the essential averments necessary to a good declaration in this cause of action. The first count, after setting forth the issuance of a certain order of arrest against the plaintiff in error by the defendant in error Johnson, at the instance of his co-defendant J. P. Ellis, and the execution thereof by the defendant in error John F. Chew, and the arrest and

detention of the plaintiff in error by said Chew, avers that said acts were done maliciously, and without authority of law, and for the purpose of harassing, oppressing, and imprisoning said plaintiff in error, and without any reasonable or probable cause, for the purpose of forcing him to accept service of a summons in a certain civil suit instituted by said Ellis against the plaintiff in error. The second count sets forth the same cause of action, except that the arrest and detention of the plaintiff in error was by virtue of a certain civil warrant issued and executed by the same parties under the circumstances above set forth. The third count is for the same cause of action, describing it in another way, and setting forth the issuance of the summons in the civil suit, and the swearing out of a warrant for cruelty to animals; and in this count the defendants in error are, one and all, charged to be conspirators, and that what they did was the result of a conspiracy to force the plaintiff in error to pay a debt to the defendant in error Ellis. In this latter count the same averments as to the want of probable cause, the existence of malice, the want of authority on the part of the defendants, and each of them, are likewise made, and the fact that by virtue of said summons and order of arrest the plaintiff in error was taken in custody, and detained and held without lawful authority for a long space of time. *Newell, Mal. Pros.* p. 360; *Parsons v. Harper*, 16 *Grat.* 64; *Scott v. Shelor*, 28 *Grat.* 891; *Womack v. Circle*, 29 *Grat.* 192; *Vinal v. Core*, 18 *W. Va.* 6, 7; *Josselyn v. McAllister*, 22 *Mich.* 300, 307; *Raysdale v. Bowles*, 16 *Ala.* 62; *Rich v. McNerny*, 103 *Ala.* 345, 15 *South.* 663; 12 *Am. & Eng. Enc. Law* (2d Ed.) 28, note 1, and 731, end of note 6.

In the trial court, the demurrer to the first and second counts of the declaration having been sustained, the case was tried solely upon the third count; and under that count the lower court held that, in order to maintain the prosecution, it was necessary to prove a conspiracy, thereby, in effect, treating the count as one in an action for conspiracy, as distinguished from one for false arrest and imprisonment; the learned judge charging the jury as follows:

"I have no hesitancy in saying that both Ellis and the constable behaved very badly, and if they had been sued before this court for having illegally restrained a citizen of his liberty by false imprisonment, and the fact had been properly established, they would have heard of it in a way they would never have forgotten. This is not the case. This case is a charge of conspiracy,—of a conspiracy to collect this debt,—and there is no evidence of the conspiracy here."

We think the lower court erred in this ruling. The third count is not for a writ of conspiracy, but a count in an action on the case for false imprisonment, and under it, if the evidence established a case of false arrest and imprisonment against the defendants in error or either of them, the plaintiff in error would be entitled to recover. 4 *Minor, Inst. pt. 1*, p. 401. In the writ of conspiracy recovery can only be had against all of the defendants, or certainly two of them; and, if the evidence showed two of them to be not guilty, no recovery could be had against the third, it mattered not how guilty he may have been. Prof. Minor says that the writ of conspiracy, though

existing theoretically, has for several generations been superseded in practice by the more convenient remedy of the action of trespass on the case. The leading English case on this subject is that of *Skinner v. Gunton*, 1 Saund. 228. In 1 Bac. Abr. p. 139, discussing actions on the case for conspiracy, the following language is used:

"If an action be brought against several, and one only be found guilty, it is sufficient; for there is a great difference between the action on the case in the nature of a conspiracy and the writ of conspiracy at common law, and in this case the damage sustained is the ground of action."

In 4 Enc. Pl. & Prac. p. 738:

"An action on the case has, in modern times, taken the place of the writ of conspiracy which lay at common law. * * * In the action on the case in the nature of a conspiracy, the conspiracy or conspiracy is not the gist of the action; for the allegation of the conspiracy is mere surplusage, intended as matter of aggravation, and is therefore not necessary to support the action which is founded upon damages alone [citing many authorities, both English and American]."

In *Van Horn v. Van Horn* (N. J. Sup.) 20 Atl. 485, 10 L. R. A. 184, Scudder, J., delivering the opinion of the court, says:

"The distinction is now well established that in civil actions the conspiracy is not the gravamen of the charge, but may be both pleaded and proved as aggravating the wrong of which the plaintiff complains, and enabling him to recover against all as joint tortfeasors. If he fails in the proof of a conspiracy or concerted design, he may still recover damages against such as are shown to be guilty of the tort without such agreement [citing *Pol. Torts*, 267; *Garing v. Fraser*, 76 Me. 37; *Hutchins v. Hutchins*, 7 Hill, 104; *Jones v. Baker*, 7 Cow. 445; *Parker v. Huntington*, 2 Gray, 124; and many other cases]."

For these reasons the judgment of the lower court is reversed, at the cost of the defendants in error, and the case remanded to said court, with instructions to grant a new trial therein.

In re ROCHE.

SMITH v. MORTGAGE & DEBENTURE CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1900.)

No. 889.

1. BANKRUPTCY—APPEALS—APPEALABLE ORDERS.

Where a mortgage creditor of a bankrupt proves his claim as a secured debt, including the amount stipulated to be paid as an attorney's fee in case of foreclosure, but the latter item is disallowed by the referee, a decision of the district court, on review of such ruling of the referee, reversing his action and ordering the allowance of the attorney's fee, is a "judgment allowing a debt or claim," within the meaning of Bankr. Act 1898, § 25, subd. 3, and is therefore appealable to the circuit court of appeals.

2. SAME—WHO MAY APPEAL.

An appeal from a judgment of the district court sitting in bankruptcy, allowing or rejecting a debt or claim of a creditor of the bankrupt, may be taken by any party injured or affected thereby, including another creditor of the bankrupt whose share of the estate will be directly increased or diminished by the decision of the question at issue.

3. SAME—PROVABLE DEBTS—ATTORNEY'S FEE TO MORTGAGE CREDITOR.

Where a mortgage contains an agreement for the payment of an attorney's fee of 10 per cent. of the amount of the debt, if the mortgagee should elect or it should become necessary to foreclose the mortgage by suit or proceedings in court, and the mortgagor becomes bankrupt, and the creditor proves his claim in the bankruptcy proceedings as a secured debt, and the property covered is sold by the trustee in bankruptcy at private sale under order of the court, such attorney's fee cannot be allowed and paid to the creditor out of the proceeds of sale, in addition to the principal and interest of the debt; the same not having become due and payable according to the contract made by the parties.

Appeal from the District Court of the United States for the Northern District of Texas.

The appeal in this case was taken by John P. Smith, receiver of the City National Bank of Ft. Worth, Tex., from an order made by the district judge allowing, in the Eugene Roche bankruptcy proceeding pending before him, an attorney's fee of \$575 to the Mortgage & Debenture Company, Limited, of London, England. On the 3d day of April, 1894, the bankrupt, Eugene Roche, and his wife, executed to the New England Loan & Trust Company their first mortgage bond for the sum of \$5,750 borrowed money. To secure the payment of the money they executed on the same day a deed of trust to J. W. Bartlett, trustee, conveying to the latter, in trust, a tract of about 630 acres of land. The bond was assigned by the New England Loan & Trust Company to the Farmers' Loan & Trust Company, and by the latter duly transferred and assigned to the appellee, the Mortgage & Debenture Company of London, England. Subsequently, in February and March, 1895, Roche borrowed from the City National Bank of Ft. Worth, of which the appellant Smith is the receiver, two several sums, aggregating \$3,794.90, for which he gave his two promissory notes, and to secure the payment of the same he executed a second deed of trust to N. Harding, trustee, by which he conveyed in trust to Harding the land previously mortgaged to J. W. Bartlett to secure the debt due to the appellee. Roche, later on, mortgaged the same land to several other persons; but, as the sum realized from the sale was insufficient to wholly satisfy the two prior mortgages, the further consideration of the junior ones becomes immaterial. Roche having been adjudicated a bankrupt, the appellee, by its attorney, F. W. Bartlett, filed proof of its claim with the referee, who allowed the entire indebtedness, principal and interest, but excepted out of the allowance the attorney's fees. The claim of the City National Bank was also proved up and allowed for the principal sum due and interest thereon. Upon the application of the trustee of the bankrupt's estate, an order was made by the referee authorizing the real estate embraced in the deeds of trust to be sold at private sale. The sum realized at the sale was \$9,800, and the trustee, under an order of the referee, paid out of the proceeds the entire claim of the appellee, except the attorney's fees, and also made a partial payment of \$1,000 on the claim of the City National Bank, leaving a large balance due the bank. A sufficient amount was retained in the hands of the trustee in bankruptcy to pay the attorney's fee claimed by the appellee, if it should be ultimately adjudged that it was a valid and subsisting indebtedness against the bankrupt's estate. The question of the allowance of the attorney's fees thereafter again came on for hearing before the referee, who entered the following order disallowing the claim: "Now, after consideration, it is ordered that the \$575 attorney's fees claimed in said proof of debt be disallowed; that the proof of debt in other respects stand as allowed." The appellee objected to the rejection of the claim, and the question was certified to the district judge for review. Upon consideration of the matter, Judge Meek set aside the disallowance made by the referee, and passed the following order: "I am of the opinion that the attorney's fee provided by the terms of the mortgage from Eugene Roche to the Mortgage & Debenture Company, Limited, should be allowed as part of the debt secured by said mortgage. It is therefore ordered that the order heretofore entered by the referee herein, disallowing the same, be set

aside, and the referee is directed to proceed in conformity with the views herein expressed." From the order thus made, Smith, as receiver of the City National Bank, has appealed to this court.

B. F. Jonas, E. B. Kruttschnitt, H. M. Chapman, Tillman Smith, and Thos. F. West, for appellant.

F. W. Bartlett, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the following opinion:

The appellee has made a motion to dismiss the appeal in this case on the following grounds:

"(1) The judgment appealed from is a judgment of the court of bankruptcy, made in the exercise of its summary jurisdiction, adjudging the amount due on a secured claim, and is not a judgment allowing or rejecting a claim, within the meaning of section 25 of the bankruptcy act approved July 1, 1898, conferring appellate jurisdiction on this honorable court. (2) Because said section 25 does not authorize an appeal to be taken by one creditor from a judgment allowing a claim of another creditor."

We think that the order allowing the claim for attorney's fees was a judgment allowing a claim of over \$500, and that an appeal would lie therefrom under the twenty-fifth section of the act of 1898, which authorizes an appeal to be taken "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." Loveland, Bankr. p. 801. The act of 1867, in providing for appeals in similar cases, was to the effect:

"And any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district." Rev. St. § 4980.

Under this statute there was strong reason for contending that an appeal from a judgment allowing a claim could only be made by an assignee dissatisfied therewith. The act of 1898 is silent as to the party who may take an appeal on the allowance or disallowance of the claim. The omission of the provision above quoted from the act of 1867 is significant, and we are of opinion that the intention of the lawmakers was, not to restrict the right of appeal, but to leave in force the general rule that, where an appeal lies from any judgment or decree, the same may be taken by any party or person injured or affected by the decree or judgment. The record in this case shows that the appellant, as a creditor of the bankrupt, is directly interested in the judgment complained of, not only as a general creditor of the bankrupt, but as having a special lien on the sum in the hands of the trustee. The motion to dismiss the appeal is overruled.

The several specifications of error relied upon by the appellant may be embodied in the following proposition: The court erred in allowing the claim of \$575 as attorney's fees, because by the terms of the contract subsisting between Roche, the bankrupt, and the appellee, the fees had not become due and payable.

It is not questioned by counsel for the appellant that, under the

laws of Texas, stipulations for the payment of reasonable attorney's fees are valid and binding upon the contracting parties. *Adams v. Addington*, 16 Fed. 89; *Miner v. Bank*, 53 Tex. 559; *Washington v. Bank*, 64 Tex. 4; *Martin Brown Co. v. Perrill*, 77 Tex. 200, 13 S. W. 975; *Neese v. Riley*, 77 Tex. 348, 14 S. W. 65. And it is also settled law that, upon a question affecting the validity and effect of a contract made and to be performed in a state, concerning land in such state, the laws of the state must govern in proceedings to enforce the contract in a federal court held within the state. *Bendey v. Townsend*, 109 U. S. 665, 3 Sup. Ct. 482, 27 L. Ed. 1065. The contract being valid according to the laws of Texas, it only remains for us to decide how it shall be construed; and that inquiry, as stated by counsel for the appellee, arises upon the following question, certified by the referee to the district judge:

"Is the owner of the bond entitled to such attorney's fees on reduction of the security to money by proceedings in bankruptcy and the payment to him of the principal and interest due on such bond?"

To the consideration of the question thus presented, our attention will be confined; and it is insisted by counsel for the appellee that, upon the reduction of the security to money by the sale of the real estate described in the deed of trust and the payment to the appellee, out of the proceeds of the sale, of its principal debt and interest, the attorney's fees became payable, because the sale made by the trustee in bankruptcy was in legal effect the equivalent of a foreclosure of the trust deed contemplated by the parties to the contract. In construing the contract, the intention of the parties must prevail, and this intention should be derived from the language employed. The contract must stand as the parties made it. A new contract cannot be made for them by the court. In a case construing a contract for attorney's fees, it was said by Mr. Justice Brewer (now associate justice of the supreme court) in *Jennings v. McKay*, 19 Kan. 121:

"The mortgagee claimed that he was entitled to a judgment for the \$50 attorney fee, or, at least, to such an amount thereof as would be proportioned to the work already done in the suit; and, upon the refusal of the district court to allow this claim, he brings the question here for our consideration. The allowance of attorney fees in the foreclosure of a mortgage is based upon contract. *Stover v. Johnnycake*, 9 Kan. 367; *Coburn v. Weed*, 12 Kan. 182. The court can allow none unless the mortgagor has stipulated to pay them, and can allow no more than he has stipulated to pay, and under no other circumstances than those under which he has stipulated to pay. In other words, the court can make no new contract for the parties. It simply enforces the contract already made. Again, it is a matter of common knowledge that, as a rule, the form of the mortgage is determined by the mortgagee. He refuses to complete the loan until the terms of the instrument are made to suit his wishes, even where he does not himself prepare the mortgage. Hence, while the rule is not so strict against him as in construing legislative grants against the grantee, yet it is fair and reasonable to construe doubtful language against, rather than in favor of, him; and this upon the general principle that he who prepares an instrument by which he is to acquire rights will seek to express fully and clearly all the rights he intends to secure."

And at page 123 the following language was used:

"If no contract had been made concerning attorney fees, then, no matter how equitable it might be that he should pay the fees of counsel employed by the mortgagee, none could be recovered. We may not enlarge his contract. We may not enforce against him a liability which he never assumed, or con-

strue a doubtful expression, prepared by the mortgagee, so as to impose a burden which, it may be, he ought to have assumed, but which, if expressly named, he might have refused to assume."

Upon a like principle the supreme court refused to allow an attorney's fee, in a suit brought to foreclose a mortgage, where the trust deed provided that, in the case of a sale by the trustee at public auction upon advertisement, all costs, charges, and expenses of such advertisement, sale, and conveyance, including commissions, such as were at the time of sale allowed by the laws of Illinois to sheriffs on sale of real estate on execution, should be paid out of the proceeds. In that case (*Fowler v. Trust Co.*, 141 U. S. 407, 408, 12 Sup. Ct. 7, 35 L. Ed. 793), Mr. Justice Harlan, speaking for the court, said:

"This provision does not impose upon the borrower the burden of paying to the lender a solicitor's fee where a suit is brought for foreclosure. The commissions referred to in the deed are allowed only where the property is sold upon advertisement by the trustee without suit. The trust deed made no provision for a solicitor's fee to the company in the event suit was brought. That a suit became necessary because of the refusal of the trustee to act is no reason for taxing such a fee against the mortgagor."

See, also, *Hardwick v. Bassett*, 29 Mich. 17; *Bedell v. Security Co.*, 91 Ala. 325, 8 South. 495.

Hence the fact that one proceeding may be the equivalent of the other is not sufficient. The fees, to become a charge against the debtor or his property, must mature according to the contract of the parties. It follows that if the attorney's fees in this case became payable only upon the foreclosure of the trust deed by suit in the usual form, as by bill in equity, or, according to the practice in Texas, by petition praying for a foreclosure, with all parties claiming adversely before the court, they would not be collectible in a proceeding where the trustee in bankruptcy had sold the property and distributed the proceeds, although the same end might have been attained in securing the payment of the debt of the mortgagee. In other words, although the one proceeding might have been the equivalent of the other, and accomplished the same purpose, still the attorney's fees could only be recoverable upon the happening of the very contingency as to which the parties had contracted. What, then, is the meaning of the stipulation used by the parties in this case? In order to arrive at their intention, the entire instrument should be considered. The deed of trust contains the following stipulation touching the payment of attorney's fees:

"And should such holder elect, or should it become necessary, to foreclose this deed of trust by suit or proceedings in court, then the first party will pay as attorney's fees ten per centum on the amount of the indebtedness secured hereby."

The instrument, after providing for a sale of the property by the trustee upon publication of notice, directs the application of the proceeds as follows:

"First, to all proper expenses of advertising, selling, and conveying, and a commission to the trustee of five per cent. upon the entire amount due and unpaid."

Why this distinction as to compensation between the attorney and trustee? Why pay the former 10 per cent. and the latter 5? Obvi-

ously, for the reason that the services of the attorney were supposed to be of a more delicate and exacting nature, demanding increased labor, and requiring an accurate knowledge of law and intimate acquaintance with the rules of judicial procedure in initiating and prosecuting to conclusion a foreclosure suit. The parties contemplated that the services of an attorney might become necessary to foreclose the deed of trust, and that such services deserved a greater compensation than those of the trustee. Had they contemplated the bankruptcy of the mortgagor when the deed of trust was executed, would the deed have provided a 5 per cent. commission for the trustee and 10 per cent. for the attorney simply for filing proof of the claim with the referee in bankruptcy? We think not; and, if the parties would not have so bound themselves, the court should not write into the contract an obligation which, if expressly named, one of them at least, would have refused to assume. Looking to the intention of the parties, as illustrated by the language employed, we think that the attorney's fees would mature and become payable when, and only when, the holder of the indebtedness should elect, or when it should become necessary, to foreclose the deed of trust by bill in equity if in the United States courts, or by petition in the usual and ordinary form if suit were filed in the courts of the state. As the appellee did not elect, as it might have done, to foreclose the deed of trust by suit in the usual form, and as it did not become necessary to thus foreclose by suit or proceedings in court, because the property was sold by the trustee in bankruptcy and the debt of the appellee discharged, the contingency contemplated by the parties did not occur. The attorney's fees have not matured, and hence they should not be chargeable against the estate of the bankrupt. This conclusion is strengthened by still another clause in the deed of trust:

"And the trustee or holder may, if he sees fit, on occurrence of default herein mentioned, sue for and obtain personal judgment on said note or coupons, and do all lawful execution thereon before or in addition to selling said property, or may foreclose in court in the usual form."

Here, then, the intention of the parties is clearly and unambiguously expressed. Foreclosure is plainly provided for, but it must be a foreclosure in court in the usual form.

The conclusion reached by us is thought not to be inconsistent with the ruling made in the cases of *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854, *Morrill v. Hoyt*, 83 Tex. 59, 18 S. W. 424, and *Davidson v. Vorse*, 52 Iowa, 384, 3 N. W. 477, relied upon by the appellee. The court in those cases ascertained the intention of the parties from the language employed by them in the contracts. We here follow the same rule; but as the contracts construed are altogether dissimilar a different conclusion must inevitably follow.

The order appealed from is reversed, and the cause is remanded, with directions to the court below to disallow the claim of attorney's fees interposed by the appellee, and to order the sum reserved for the payment thereof to be applied as a partial payment on the principal of the mortgage indebtedness proved by the appellant against the bankrupt's estate.

CLARK et al. v. AMERICAN MANUFACTURING & ENAMELING CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 341.

1. BANKRUPTCY—ACTS OF BANKRUPTCY BY CORPORATION—GENERAL ASSIGNMENT.

Where the officers of a corporation, acting under authority of a resolution of the board of directors, and in pursuance of a vote taken at a meeting of the stockholders, though against the objection of a minority of the stockholders, make a general assignment of all its property to trustees for distribution among its creditors, it is an act of bankruptcy on which a petition in involuntary bankruptcy against the corporation may be maintained.

2. SAME—INVOLUNTARY PETITION—REFERENCE.

Where answers are filed to a petition in involuntary bankruptcy, it is proper for the court to refer the case to a referee in bankruptcy to take and return the evidence and report upon the questions presented; and it is no ground of objection to such a course that the only questions arising in the case are questions of law, the action of the referee being always subject to the control of the court.

Appeal from the District Court of the United States for the District of West Virginia.

This is an appeal from a decree of the United States district court for the district of West Virginia, entered on the 12th day of July, 1899, whereby the American Manufacturing & Enameling Company was, at the instance of J. E. Poling & Co. and others, creditors of said company, adjudged an involuntary bankrupt. The said company was a corporation doing business under the laws of the state of West Virginia, in the town of Hendricks, Tucker county, in said state. On the day of the organization of the company, and at the first meeting of its board of directors, to wit, on the 15th day of March, 1898, one of the appellants, Charles B. Clark, the husband of Mrs. Alice C. Clark, the other appellant, was elected president of the corporation, and they, together with J. P. Bryan, William A. Hoffman, and C. P. Brown, were elected as its board of directors; and the said C. P. Brown was elected its vice president, Joseph P. Bryan secretary, and William A. Hoffman treasurer. The company thus organized commenced operations, but it was unsuccessful, and at a special meeting of the directors held on the 11th day of May, 1898, dissensions having arisen between said Clark and other members of the board of directors, and the bona fides of his acts questioned, the office of president was declared vacant, said C. B. Clark removed as president, and J. P. Bryan duly elected in his place and stead. This action on the part of the company was resisted by Clark and wife, who thereupon instituted proceedings in the state court of West Virginia, seeking to retain control of the company, and counter suits were inaugurated in the state courts for the same purpose. In one of said suits a temporary receiver was appointed to take charge and hold the assets of the company, and from this order appeal was immediately taken to the supreme court of appeals of the state, and the company's property restored to the hands of the corporation, through its president, the said J. P. Bryan. Pending this litigation, the business of the company was practically suspended, suits in various forms instituted against it, and judgments for considerable amounts recovered. Subsequently, at the annual stockholders' meeting held on the 16th day of January, 1899, a resolution was passed reciting that the company had become largely indebted; that numerous judgments had been obtained against it, and that it was without available assets, and that a creditors' suit, convening its creditors, had been instituted against it; that differences had arisen among the stockholders and directors of the company as to the conduct and management of its business, and that it was the sense of the stock-

holders that it was to their interest and that of the corporation to have the company's property conveyed to a trustee or trustees, for the purpose of paying its debts, and the directors were authorized and directed to execute a proper conveyance for that purpose. On said day the directors met, passed resolutions directing its president to convey all property, both real and personal, together with the books of account and evidences of debt, belonging to the company, to three trustees, with authority to them to dispose of the property. The adoption of these resolutions, by both the directors and stockholders, was opposed by said Clark and wife. On the said 16th day of January, 1899, the company, acting through J. P. Bryan, its president, and J. A. McNealey, its secretary, and in accordance with the resolutions of its stockholders and board of directors aforesaid, made a general deed of assignment of all its property to trustees for the purpose of paying its debts ratably, with a proviso that any surplus remaining after payment of the creditors should be paid to the treasurer of the company by the trustees. Said trustees thereupon took charge of the property, estate, and effects of said company under said deed. After the execution of this deed, to wit, on the 25th day of February, 1899, the involuntary bankruptcy petition herein was filed, based upon the insolvency of the corporation, and the making of said assignment as acts of bankruptcy. The company, by said J. P. Bryan, its president, appeared, waived service of process and of the petition, and filed its answer to the petition; and the creditors of the company, other than the said Alice C. Clark, likewise entered their appearance; and the trustees in the deed of assignment appeared, tendered their resignations as such trustees; and the court, by consent of the parties, appointed A. J. Valentine, one of the trustees named in the assignment, to take charge of and hold the property of the company until a trustee could be regularly elected. Subsequently, the said C. D. Clark, claiming to be president of the company, and the said C. D. Clark and Alice C. Clark, his wife, filed their separate answers to the involuntary petition in bankruptcy, in which they denied that J. P. Bryan was lawfully president of the company, or that said Clark had ever been legally removed as president of the company, or that the company was insolvent, or that the stockholders of the company and its directors had ever legally authorized the assignment to be made of its estate and effects; and, moreover, charged that the said Bryan, and those acting with him, claiming to represent the company, were acting fraudulently in what they did, and in collusion with the petitioners in the involuntary bankruptcy proceedings, for the purpose of obstructing the company in its lawful business and destroying its existence. Under this state of the record, an order was entered referring the cause to a referee in bankruptcy, with instructions to ascertain and report whether the assignment was legal, and duly authorized by the stockholders and board of directors of the company; whether it was a legal board; whether the parties signing the deed of assignment had been regularly authorized to do so; whether said deed of assignment was the act of said corporation; together with any other matter deemed pertinent as to the legality or illegality of said assignment; and leave was given to any of the parties to file additional or amended pleadings before the referee. The cause proceeded before the referee. Evidence was taken by him, and he subsequently made his report, determining the several issues raised by said Clark and wife adversely to them. To this report sundry exceptions were filed by the said C. B. Clark and wife, and thereupon the order appealed from of the 12th day of July, 1899, was entered. The assignments of error are 17 in number, but they relate chiefly to the question of the alleged error of the court below in declaring the company to be bankrupt, because of the various objections raised by them to the legality of the proceedings of the stockholders and board of directors of the company. They insist, in brief, that their several exceptions to the referee's report should have been sustained; the said C. B. Clark recognized as the representative of the corporation, instead of J. P. Bryan and the officers acting with him; and that the court should have treated the assignment made by the company as a nullity, because made collusively and without authority; and, further, that the court erred in making a reference in the case at all, the questions involved being purely matters of law.

A. M. Cunningham, for appellants.

William G. Conley, for appellee American Manufacturing & Enameling Co.

C. D. Merrick (E. D. Talbot, on brief), for appellee J. E. Poling & Co.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge, after stating the facts as above, delivered the opinion of the court.

It will not be necessary, in the view we take of this case, to pass upon all of the assignments of error made, for the reason that, if the deed of assignment was valid, then most of the objections urged by the appellants are concluded by that act, and need not be considered. There would be much force in many of the positions taken by the appellants if there was evidence in the record to support their charges, either of fraud or collusion, by and on the part of the company and its officers, with its creditors, to throw it into bankruptcy. This proof is utterly lacking, and no effort apparently was made to sustain these charges, and the record presents a case in which the stockholders and a legal board of directors of the corporation, in lawful meetings assembled, by resolutions authorized its duly-chosen officers to make conveyance of its property for the purpose of meeting its obligations, as far as the same would prove sufficient. The action of the board of directors, and of the stockholders of this company, in the matter of the change of its officers, and the execution of this assignment for the benefit of its creditors, seems to have been lawfully and properly entered into in good faith, with only the appellants, minority stockholders, objecting. The company was apparently in a state of disorganization virtually from the beginning, and with the dissensions in its ranks, the number of lawsuits it had to encounter, its failure to successfully carry on any business should not have been a surprise, even to those most enthusiastic over its prospects. Conceding the assignment to have been lawfully made, the question presented is an exceedingly simple one, under the bankruptcy law. The bankruptcy act (section 3, subd. 4) makes a general deed of assignment an act of bankruptcy; and this, regardless of whether the makers of the deed are insolvent or not. Indeed, no question under the present bankrupt law has been perhaps so well settled as this; it being the only one thus far, as we recall, that has been passed upon by the supreme court of the United States. In *re Gutwillig* (D. C.) 90 Fed. 475-478; *Id.*, 34 C. C. A. 377, 92 Fed. 337; *Lea v. George M. West Co.* (D. C.) 91 Fed. 237; *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325; *George M. West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

There was no error in the action of the lower court in referring the case, as it did, to a referee. It is true that many of the questions involved were legal ones, but their correct determination depended upon the evidence which had to be taken, and, if purely questions of law, the action of the referee was in all respects subject to the control of the court, and its action in first having the reference would afford no

ground for exception. Upon the filing of an answer to an involuntary petition in bankruptcy, it is quite usual, and in many instances the only way that the court can proceed, to have one of its referees take the evidence, and report upon the various questions presented, returning to the court the evidence taken for its consideration. This was, in effect, what was done in this case. We find no error in the judgment of the court below, and the same is affirmed.

In re COLUMBIA REAL-ESTATE CO.

(District Court, D. Indiana. June 1, 1900.)

No. 534.

1. **BANKRUPTCY—VACATING ADJUDICATION—WHO MAY APPLY.**

A petition to set aside an adjudication of bankruptcy duly made by the district court in an involuntary proceeding, being in the nature of a bill to review and vacate a judgment, can be maintained only by the bankrupt, or by a creditor of the bankrupt owning a provable debt or claim against him.

2. **SAME.**

Where a person holding the naked legal title to land, which was actually the property of the bankrupt corporation, made an agreement, as accommodation indorser or surety for another, to pledge or mortgage the property as security for the debt of his principal, this does not give the creditor a lien upon the property of the bankrupt, nor any claim or demand provable against it, in such sense as to entitle him to maintain a petition to set aside the adjudication of bankruptcy.

3. **SAME—WANT OF JURISDICTION.**

Where a petition is filed to set aside an adjudication of bankruptcy, on the ground of want of jurisdiction in the court to make it, although the petitioner may be a stranger to the proceedings, and therefore not entitled to be heard as of right, it is in the discretion of the court to allow him to be heard as *amicus curiæ*; want of jurisdiction being a question which the court should consider whenever and however raised.

4. **SAME—PRESUMPTION OF JURISDICTION.**

A district court of the United States, as a court of bankruptcy, is a court of record, and, although its jurisdiction is limited, it is not an inferior court in such a sense that all facts essential to its jurisdiction must affirmatively appear on the face of its record in order to sustain its judgments.

5. **SAME—COLLATERAL ATTACK.**

A decree of the district court, sitting in bankruptcy, reciting that "upon due consideration had" the respondent corporation "is adjudged a bankrupt, within the true intent and meaning of the acts of congress relating to bankruptcy," cannot be impeached collaterally, as for a want of jurisdiction, merely because the petition omitted to allege that the corporation belonged to one of the classes made subject to be adjudicated bankrupt in involuntary proceedings.

6. **SAME—WAIVER OF PROCESS AND TIME TO PLEAD.**

Where a petition in involuntary bankruptcy was filed against a corporation, and on the same day the defendant waived process, entered its appearance, and admitted the allegations of the petition to be true, and an adjudication of bankruptcy was made forthwith, such adjudication will not be set aside by the court of bankruptcy as void for want of jurisdiction, on the application of a stranger, when neither the bankrupt nor any of its creditors object to the decree.

7. SAME—AUTHORITY OF OFFICER OF CORPORATION.

Where the answer filed by a corporation to a petition in involuntary bankruptcy against it, in which it waives process, admits the allegations of the petition, and declares its willingness to be adjudged bankrupt, is signed in the name of the corporation by its president, an objection that no proper corporate action is shown investing that officer with authority to act for the corporation in that behalf is waived by the acquiescence of the bankrupt and its creditors in the adjudication, and, as against strangers, is concluded by the adjudication.

In Bankruptcy. On demurrer to petition of Spang, Chalfant & Co. to vacate and annul an adjudication in bankruptcy.

Wilson & Quinn and Wilson & Townley, for petitioners.

Haywood & Burnett and Stuart, Hammond & Sims, for respondents.

BAKER, District Judge. On April 27, 1900, Spang, Chalfant & Co., a corporation of Pennsylvania, by leave of court filed its petition in the above-entitled cause, alleging that on the 2d day of March, 1900, the Columbia Real-Estate Company was adjudged a bankrupt on a creditors' petition in involuntary bankruptcy, and on the answer of the defendant waiving process, entering appearance, and admitting the allegations of the petition to be true. The petition and answer were filed, and adjudication of bankruptcy entered on the same day. Spang, Chalfant & Co., claiming to be a creditor of said Columbia Real-Estate Company, petitions the court to vacate and annul the adjudication—First. Because said corporation was not engaged "principally in manufacturing, trading, printing, publishing, or any mercantile pursuits," within the meaning of the bankrupt law. Second. That while said corporation was organized under the law of Indiana, "for the purpose of buying, holding, and selling real-estate," its real purpose was to acquire, own, operate, and lease a large tenement building or flat in the city of Lafayette; that it did so acquire, own, and operate said building until a misunderstanding occurred among the stockholders, when one of them, namely, Oscar P. Benjamin, acquired and became the owner of all the stock of said company except one share, which said Benjamin gave to some person for the purpose of qualifying him to act as an officer; that after the acquisition of said stock by said Benjamin the corporation became embarrassed, and, determining to quit business, exchanged said tenement or flat for other property, and said corporation did not engage further in the real-estate business. Third. Because there was no directors' or stockholders' meeting of said Columbia Real-Estate Company for the purpose of assenting to said adjudication in bankruptcy; that said stockholders and directors never consented to the same, nor did they ever admit in writing their willingness to have said company adjudged a bankrupt, nor was there any evidence heard by the court concerning the insolvency of said corporation, or its willingness to be adjudged a bankrupt. Fourth. Because said creditors' petition does not allege that said Columbia Real-Estate Company was ever engaged principally in any manufacturing, trading, printing, publishing, or mercantile pursuits. The petition of Spang, Chalfant & Co. further alleges that it is interested in the matter of said adjudication, and claims to be a creditor of said Col-

umbia Real-Estate Company by virtue of its claim to have a lien on certain real estate which it is advised is owned by said bankrupt, the legal title thereto being in O. P. Benjamin, which claim grows out of the following facts: That on September 19, 1899, the O. P. Benjamin Manufacturing Company, a corporation of which O. P. Benjamin was president and principal stockholder, being indebted to Spang, Chalfant & Co. for goods, wares, and merchandise theretofore sold in the sum of \$2,621.52, said last-named company demanded payment. Thereupon said Benjamin, for himself and the O. P. Benjamin Manufacturing Company, requested an extension, which was granted upon the terms of the following written agreement:

"Lafayette, Ind., September 19, 1899.

"It is hereby agreed between Spang, Chalfant & Co., party of the first part, and O. P. Benjamin, of Lafayette, Ind., party of the second part, that the party of the first part is to accept a note for twenty-six hundred twenty-one ⁵²/₁₀₀ dollars, at thirty days, from the O. P. Benjamin Mfg. Co., indorsed by O. P. Benjamin, the same being in full of their claim. The party of the second part agrees that, if the said note is not paid at maturity, he will give the party of the first part a mortgage on his property.

"[Signed]

Spang, Chalfant & Co..

"By Edw. W. Wright.

"[Signed]

O. P. Benjamin."

That thereafter, about November 29 or December 1, 1899, pursuant to said agreement, and upon failure of the makers of said note to pay the same, one Charles W. Bone, representing himself as agent of the said Benjamin and the said Benjamin Manufacturing Company, went to petitioner's business house in Pittsburg, and offered to deliver to said Spang, Chalfant & Co. a mortgage covering the individual property of O. P. Benjamin. That said mortgage, being defective, was not accepted by said Spang, Chalfant & Co. Thereupon, Bone representing that he had authority in the premises, the following agreement in writing was executed:

"This agreement made this first day of December, 1899, between Spang, Chalfant & Co., of Allegheny county, Pennsylvania, parties of the first part, and the O. P. Benjamin Mfg. Co., by Charles W. Bone, their agent, of Tippecanoe county, Indiana, parties of the second part, witnesseth: That whereas, the said Spang, Chalfant & Co. have this day purchased from O. P. Benjamin lots numbers 110, 111, 112, 122, 123, 175, 176, 188, 190, 191, 192, 194, 195, 196, 248, 251, 252, 254, 255, 256, 258, 259, 260, 262, 263, 264, 266, 267, 268, 270, 271, 272, 275, 276, 320, 322, 323, 324, 326, 327, 328, 331, 332, 339, 342, 343, 344, 346, 347, 348, 349, 354, 392, 393, 394, 395, 396, 397, 398, 400, 403, 405, 404, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 419, 420, 421, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, & 475 in the Phillips Land & Gas Co.'s First addition to the city of Alexandria, Madison county, Indiana, and the same is to be duly conveyed to Henry Chalfant, trustee, by warranty deed: Now, it is agreed that if the said O. P. Benjamin Mfg. Co. shall pay to the said Spang, Chalfant & Co., within the period of five and one-half months next ensuing, the sum of \$2,652.98, evidenced by five notes, to be paid as follows, to wit: \$500.00, January 1, 1900; \$500.00, February 15, 1900; \$500.00, March 15, 1900; \$500.00, April 15, 1900; & \$652.98, May 15, 1900,—all payable to the order of Spang, Chalfant & Co., with interest thereon at the rate of 6% per annum.—the said Spang, Chalfant & Co. agree that they will cause the said Henry Chalfant, trustee, to resell and reconvey the said real estate above described to the said O. P. Benjamin, upon receipt of the sums of money named herein, and that they will not incur the above-described real estate during

the period of five and one-half months next ensuing. If the said notes named herein or any of them are not paid when due, then all are to become due and payable. This agreement is enforceable without relief from valuation or appraisal laws.

"Witness our hands and seals December 1st, 1899.

"Spang, Chalfant & Co.,

"[Signed]

Edward W. Wright.

"O. P. Benjamin Mfg. Co. and O. P. Benjamin,

"[Signed]

By Charles W. Bone, Agent.

"Witnesses: Ralph A. Heiber.

"Hugh B. Morrow.

"Executed in Duplicate."

It is further alleged that, pursuant to said agreement, the five notes therein described were executed by the O. P. Benjamin Manufacturing Company and O. P. Benjamin, payable to the latter, and were by him indorsed to Spang, Chalfant & Co., and the 30-day note for \$2,621.52 was thereupon surrendered by the said Spang, Chalfant & Co. to the said O. P. Benjamin Manufacturing Company, but that the deed of trust mentioned in said agreement of December 1, 1899, was never executed,—Benjamin, on December 2, 1899, and thereafter, writing letters to Spang, Chalfant & Co. offering various excuses therefor; that the first note for \$500 has been paid, but all the balance of said notes are unpaid. The petitioner further alleges that since the adjudication of bankruptcy herein it has been informed that the real estate described in the agreement of December 1, 1899, is owned by the bankrupt, the Columbia Real-Estate Company, having been acquired in exchange for the flat building heretofore described, but that the title thereto was taken in the individual name of O. P. Benjamin, and such was the fact at the dates of the two agreements of September 19 and December 1, 1899, and that the creditors of said Columbia Real-Estate Company are about to cause proceedings to be instituted to recover said real estate in behalf of the bankrupt's estate; that petitioner had no notice or knowledge of the facts last above recited; that it understood and believed that the real estate described in the agreement of December 1, 1899, was the individual property of Oscar P. Benjamin, and not otherwise, and that it made the agreements and did the acts described in good faith, and in reliance upon the ownership of said Benjamin as aforesaid. Prayer, that said adjudication of bankruptcy be vacated because made without jurisdiction, and for all proper relief.

The petitioning creditors have interposed a demurrer to this petition upon the following grounds: (1) The facts stated are insufficient to entitle the petitioner to the discovery and relief sought and prayed; (2) the intervening petitioner has not shown any claim, or right, title, or interest, against the bankrupt, or in, to, or against its estate; (3) the petitioner has an adequate remedy at law; (4) the petition is without equity; (5) that the statements and allegations of said petition do not invoke the jurisdiction of the court to hear and determine the matters therein set forth and alleged.

The petitioner's right to maintain the present proceeding, which is a bill or petition to review and set aside the judgment of this court, wherein the Columbia Real-Estate Company was adjudged a bankrupt,

depends upon its interest in the subject-matter of that proceeding. The bankruptcy act provides that, "upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant," etc. Section 18, cl. "a." It further provides that "the bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow." Id. cl. "b." A "creditor," as defined in the bankrupt act, is "any one who owns a demand or claim provable in bankruptcy, and may include his duly-authorized agent, attorney or proxy." Section 1, cl. "9." The Columbia Real-Estate Company was the only party upon whom service of process was required to be made, and it and its creditors were the only parties authorized to make defense. They alone were interested in that proceeding. None others were, or could become, parties thereto. The term "parties" includes all persons who are directly interested in the subject-matter in issue, who have a right to make defense, control the proceedings, or appeal from the judgment. Strangers are persons who do not possess these rights. Therefore, unless the petitioner is a creditor of the bankrupt corporation owning a provable claim or demand against it, it is a stranger to the proceeding which it seeks to have reviewed and set aside. A stranger cannot maintain a bill of review, or one in the nature of a bill of review. If, upon the face of the record, a judgment is shown to have been rendered without jurisdiction of the subject-matter or the parties, it will be treated as a nullity whenever and however drawn in question. A stranger, however, cannot maintain a bill or petition to review or set aside a void judgment or decree to which he is a stranger.

It is contended that the petitioner, "having a mortgage upon property belonging to the bankrupt, is therefore a creditor of the bankrupt's estate." But the petition states no facts showing that the petitioner has any mortgage or lien on any property belonging to the bankrupt corporation, or any demand or claim provable in bankruptcy against the estate under administration. By the agreement of September 19, 1899, Benjamin individually engaged to become surety for the debt of the O. P. Benjamin Manufacturing Company to the petitioner, and to the extent only of giving a mortgage on his property. The written undertaking of December 1, 1899, though signed by the petitioner, the O. P. Benjamin Manufacturing Company, and O. P. Benjamin, is by its terms a contract wholly between the first two parties, and its recital of the purchase from Benjamin of the real estate named evidently refers to a contemporaneous parol agreement between Bone, as agent for Benjamin, and the petitioner, which is not disclosed in the petition. Conceding, however, that there was such an agreement or conveyance, there is no pretense that Benjamin, or Bone, his agent, represented or had authority to bind the Columbia Real-Estate Company. It is admitted that the real estate described in the agreement of December 1, 1899, is the property of the bankrupt corporation; and although it is alleged that the title is now, and was on September 19, 1899, in Benjamin individually, his want of power to bind the Columbia Real-Estate Company as an accommodation surety by a pledge or mortgage of the bankrupt's property, of which he held

only the naked, legal title as trustee, is plainly manifest. "In all cases a bill must show that a defendant is in some way liable to the plaintiff's demand; or that he has some interest in the subject of the suit; otherwise, it will be liable to demurrer." 1 Daniell, Ch. Prac. 372. "The plaintiffs in a suit must not only show an interest in the subject-matter, but it must be an actual, existing interest; a mere possibility, or even probability, of a future title will not be sufficient to sustain a bill." Id. 362. As the petitioner fails to state facts showing that the bankrupt's estate is in any way liable to it for any debt, claim, or demand provable in the bankruptcy proceeding, it follows that it is not a creditor, that it has no interest in the bankruptcy proceeding, and is a stranger thereto.

Counsel for the petitioner contend that the adjudication is void for want of jurisdiction. Having decided that the petitioner is not a creditor, and that it has no interest in the subject-matter in issue in the bankruptcy proceeding, it is plain that it has no right to be heard as a matter of right, on its petition to review and set aside the adjudication. The court, however, has *ex gratia* heard counsel upon this question as *amicus curiæ*. As was said by Gray, C. J., in *Martin v. Tapley*, 119 Mass. 116, 120:

"An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before it. He has no control over the suit, and no right to institute any proceeding therein, or to bring the case from one court to another. * * * by exceptions, appeal, or writ of error. Y. B. 4 Hen. VI. p. 16, pl. 16; In re Isley, 1 Leon. 187; Vin. Abr. tit. 'Amicus Curiae'; Knight v. Low, 15 Ind. 874."

Want of jurisdiction is a question that the court should consider whenever or however raised, even if the parties forbear to make it or consent that the case may be considered on its merits. *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543. If, as insisted by counsel, the bankruptcy court is in a technical sense a court of inferior and limited jurisdiction, every fact essential to its jurisdiction must affirmatively appear on the face of its record. It is true the bankruptcy court is one of limited jurisdiction, and the constitution describes all courts of the United States, except the supreme court, as inferior courts. But the circuit and district courts of the United States as courts of bankruptcy are courts of record, and as such they are not inferior courts in the sense that jurisdiction must necessarily appear upon the face of the record. *Hays v. Ford*, 55 Ind. 52; *Bank v. Judson*, 8 N. Y. 254; *Skillern's Ex'rs v. May's Ex'rs*, 6 Cranch, 267, 2 L. Ed. 574; *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *McCormick v. Sullivant*, 10 Wheat. 192, 199, 6 L. Ed. 300; *Kennedy v. Bank*, 8 How. 586, 12 L. Ed. 1209.

The essentials of a valid judgment are jurisdiction of the parties and of the subject-matter. The latter is conferred by law; the former by service of process, or in some other manner authorized by law, as by the voluntary appearance of the party during the progress of the proceedings. It is insisted that this court had no jurisdiction over the subject-matter, because the petition failed to allege that the Columbia Real-Estate Company is a corporation "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits," and

because the adjudication was had within 15 days after the petition was filed upon the voluntary appearance and confession of the bankrupt, without service of process upon it. It is not necessary to decide whether the creditors' petition is insufficient upon demurrer, or whether it is vulnerable to a direct attack on appeal or otherwise. The question is whether the adjudication of bankruptcy is an absolute nullity for the reasons stated. The power conferred upon the bankruptcy court as a court of record to adjudge a natural person or a corporation a bankrupt necessarily includes the power to determine whether the person or corporation is of the class specified in the act. The creditors' petition in this case follows form 3 of the forms in bankruptcy promulgated by the supreme court (18 Sup. Ct. xix.), and contains every essential averment required by that form. The adjudication recites that the petition of Henry A. Taylor and others "that the Columbia Real-Estate Company, a corporation, be adjudged a bankrupt within the true intent and meaning of the acts of congress relating to bankruptcy, having been heard and duly considered, the said Columbia Real-Estate Company is hereby declared and adjudged bankrupt accordingly." The presumption which attaches to all judgments of courts of record, as well as the direct finding that, upon due consideration had, the Columbia Real-Estate Company is adjudged a bankrupt "within the true intent and meaning of the acts of congress relating to bankruptcy," concludes all collateral inquiry as to whether or not the corporation was of a class subject to be adjudicated a bankrupt. It will be presumed that the court heard and determined that question, and it was not necessary to set out upon the face of the record the facts or the evidence upon which its conclusion was reached. "Courts of record, having authority over the subject-matter, are competent to decide upon their own jurisdiction, and to exercise it to final judgment, without setting forth upon their records the facts and evidence upon which their decision is based. Their records are absolute verities, not to be impugned by averment or proof to the contrary." *Freem. Judgm.* § 122; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. Ed. 283; *Voorhees v. Bank*, 10 Pet. 449, 9 L. Ed. 490; *Bowsse v. Cannington*, *Cro. Jac.* 244. In *Voorhees v. Bank*, *supra*, it was said: "Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

Nor can there be want of jurisdiction over the subject-matter because the adjudication was had on the same day that the petition and answer were filed. There is nothing in section 18 of the bankruptcy act which precludes a waiver of process, a voluntary appearance of the bankrupt, and an answer admitting bankruptcy on the day the petition is filed. An adjudication on a voluntary appearance and an answer admitting the averments of the petition would certainly conclude the bankrupt who entered the appearance and filed the answer. It may be when an adjudication has been made without service of process, and before the expiration of 15 days, that the creditors might, upon seasonable application, procure an order vacating the adjudication so far as to allow them to plead and be heard in opposition to the petition. But such right must be exercised with reasonable prompt-

ness after actual or constructive notice of the adjudication. In the present case neither the bankrupt nor any creditor is objecting to the adjudication. Their acquiescence shows that they are content.

It is next insisted that there is no jurisdiction over the corporation because the admission of its willingness to be adjudged a bankrupt, and the appearance and answer are signed, "Columbia Real-Estate Company, by O. P. Benjamin, Prest.," without any showing of proper corporate action investing the president with authority to represent the corporation in that behalf. This is a matter which, if not waived by acquiescence, is concluded by the adjudication.

In *Bank v. Dandridge*, 10 Wheat. 64, 70, 6 L. Ed. 554, Mr. Justice Story, speaking for the court, said:

"If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."

The bankruptcy act provides for an appeal within 10 days from the adjudication; and the corporation and its creditors, being proper parties, could move the court to vacate the adjudication for the reason stated. The failure of the bankrupt, and of all of its creditors, to question the appearance and answer admitting the allegations of the petition, made on its behalf by its president, must be regarded as having the effect of ratifying his act, if it was done without precedent authority. As to this question, also, the presumption flows from the adjudication that the court considered and determined whether Benjamin had rightful authority to bind the corporation, and whether the acts done by him were sufficient for that purpose; and this conclusion being reached by the court, as recited in its judgment, after a hearing and due consideration, and it being a matter which by law it was authorized to hear and determine, even if its judgment was erroneous, it cannot be held to be absolutely null and void. In *Cornett v. Williams*, 20 Wall. 226, 249, 22 L. Ed. 259, the court say:

"The settled rule of law is that, jurisdiction having attached to the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things, and irreversible for error."

The court is of opinion that it acquired jurisdiction of the parties and of the subject-matter. The demurrer must be sustained, and it is so ordered.

CAMPBELL et al. v. CLARK et al.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1900.)

No. 905.

1. PARTNERSHIP—SUIT FOR SETTLEMENT—GROUNDS.

A bill alleging the formation of a partnership between complainants and defendants; that defendants had the active management of the partnership business, and were, by the terms of the partnership agreement, to keep accounts of the same; that they have used a part of the firm property

to pay their individual debts, and have executed deeds and mortgages covering the remainder; and that there has been no settlement or accounting,—states sufficient grounds to sustain a suit in equity for a settlement of the partnership.

2. **LIMITATIONS—SUIT FOR SETTLEMENT OF PARTNERSHIP—TEXAS STATUTE.**

A suit between partners for the settlement of the partnership, and for an accounting by defendants in relation to partnership property, is not governed by the provisions of the Texas statute of limitations relating to actions for the recovery of property, but by Rev. St. Tex. 1895, art. 3356, fixing four years as the limitation for suits for the settlement of partnership accounts.

3. **PARTNERSHIP—BILL FOR SETTLEMENT AND ACCOUNTING—MULTIFARIOUSNESS.**

A bill for the settlement of a partnership is not multifarious because it joins as defendants persons to whom it is alleged their co-defendants, being partners with complainants, have transferred firm property in their possession for the purpose of defrauding the partnership, and prays that such property be decreed to be held in trust for the firm.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

C. K. Bell (McCue, Mills & Miller, on the brief), for appellants.

H. C. Coke (A. S. Coke, on the brief), for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This suit is brought by James H. Campbell and George W. Clawson, citizens of Missouri, against Dorr Clark, a citizen of Wisconsin; D. C. Plumb, a citizen of Illinois; C. L. Ware, a citizen of Texas; and the Evans-Snyder-Buel Company, an Illinois corporation engaged in business in the state of Texas, its principal office being at Ft. Worth, Tex. The bill and exhibits comprise 86 closely-printed pages. The bill contains many repetitions and much irrelevant matter. The only questions before us, however, are raised by demurrers addressed to the entire bill. We select from the bill and condense such of its statements as relate to the questions to be decided: In October, 1894, the plaintiffs, James H. Campbell and George W. Clawson, formed a partnership with Dorr Clark, D. C. Plumb, and George E. Black. Black withdrew from the firm. Each of the remaining partners had by the agreement a one-fourth interest in the partnership. The purpose of the partnership was the "handling, raising, buying, and selling cattle, and the purchase and owning of the necessary ranches." The firm name adopted was Clark & Plumb. The plaintiffs are described as silent partners. The profits were to be shared and the losses borne equally by the partners. Dorr Clark and D. C. Plumb were to hold possession of the property purchased and manage the business. The plaintiffs were to furnish the funds through the Campbell Commission Company, an Illinois corporation. The plaintiffs were the chief stockholders in this corporation. One of the plaintiffs was its president, and the other its vice president. The notes of the firm were executed, and the plaintiffs negotiated the notes through the Campbell Commission Company, and placed the proceeds with that company, to the credit of the firm. With the funds so raised, the firm purchased a ranch of McCoy, Rumery & Hay, together with the cattle and horses on it, at the price of \$105,000. Five thousand dollars was paid in cash, and \$25,000

on December 1, 1894, and the deferred payments were secured by a deed of trust on the property. The firm also bought 240 bulls, for which it paid \$7,000. In May, 1895, with funds raised in the same manner, the firm bought of Cookson & Schultz another ranch, with the improvements thereon, and 4,000 head of cattle and a number of horses and mules, together with wagons and camp outfits, for the sum of \$43,000. The firm executed a chattel mortgage to the Campbell Commission Company for \$50,000 on the 4,000 head of cattle so purchased. This mortgage contained a power of sale, and was duly recorded. These ranches contained in the aggregate 264,000 acres, part of which, however, the firm held only by leases. The property owned by the firm on the 25th of June, 1895, was worth \$300,000, and was subject to liens to the amount of \$125,000. It was part of the partnership agreement that no salaries or commissions of any kind should be charged by any of the partners for attention given to the partnership business, and that an accurate account should be kept by Dorr Clark and D. C. Plumb of the expenses incurred by them in the transaction of the business, including interest, which should be a charge against the profits arising from the business. It was also agreed that their books and accounts should at all times be open to the inspection of any of the partners, and that Dorr Clark and D. C. Plumb would superintend personally the management of the cattle bought under the partnership contract. On the 25th of June, 1895, Dorr Clark and D. C. Plumb, without the knowledge of the plaintiffs, made a chattel mortgage conveying to D. T. Bomar all of the personal property of the firm, and on the same day made to him a deed of trust conveying to him all the real estate belonging to the firm. There has been no settlement or accounting as to the partnership transactions. Dorr Clark and D. C. Plumb used large amounts of the partnership funds to pay their individual debts, and they also used parts of the partnership property for that purpose. There is a prayer for the dissolution of the partnership, and that an account may be taken of all co-partnership dealings and transactions, and that an account may be taken of the amount paid by the plaintiffs to the defendants Dorr Clark and D. C. Plumb on account of the partnership, and that, in the settlement of the partnership, Dorr Clark and D. C. Plumb be charged with the funds and property of the partnership which they have used to pay their individual debts, and that a lien may be declared in favor of the plaintiffs upon the interests of Dorr Clark and D. C. Plumb in the partnership property for such sums as may be found to be due to the plaintiffs. The defendants demurred to the bill. The grounds alleged are, in brief, that the plaintiffs show no right to relief; that they show no interest in the property; that their rights in the personal property referred to are barred by the statute of limitations of two years; and that their right and interest in the real estate referred to are barred by the statute of limitations of three years. The Evans-Snider-Buel Company and C. L. Ware demurred to the bill upon the additional ground that it was multifarious.

The relation existing between partners is fiduciary in character. Courts of equity have jurisdiction to settle accounts as between part-

ners. "In the contract of partnership, and the relations arising therefrom, the jurisdiction embraces suits for contribution, accounting, and pecuniary recovery necessary for the settlement of all claims which may exist between the partners themselves, or between the partnership and its members and the firm and individual creditors,—all claims, in fact, for which the law, by its actions, gives no adequate remedy." 1 Pom. Eq. Jur. § 186, p. 176. The averments of the bill show the partnership and the purchase of the partnership property. It shows that the defendants Dorr Clark and D. C. Plumb had the active management of the partnership business, and that by the terms of the partnership agreement they were to keep the books and an account of the expenses. It shows, also, that they have used part of the property to pay their own debts, and have executed deeds and mortgages conveying all of it. A bill containing these averments undoubtedly has equity as a bill to settle a partnership. Pars. Partn. pp. 508, 509; *Harvey v. Varney*, 98 Mass. 118; 1 Story, Eq. Jur. (5th Ed.) § 672 et seq. A suit by one partner against another partner for an accounting is not barred by the statute of limitations of two years or of three years. A suit for the settlement of partnership accounts shall be commenced and prosecuted within four years after the cause of action shall have accrued. Rev. St. Tex. 1895, art. 3356. If it be conceded that the right of action for an accounting accrued when Dorr Clark and D. C. Plumb transferred all the partnership property, on June 25, 1895, the suit would not be barred by the statute of limitations of four years, because the bill was filed on the 29th of May, 1899, which is less than four years from the date of the deeds. On the averments of the bill, this suit is not barred by the statute of limitations. *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 283.

It is alleged in the bill that Dorr Clark and D. C. Plumb, in executing the chattel mortgage on the 25th of June, 1895, intended to cheat, wrong, and defraud the plaintiffs, and that on the same day they executed a deed of trust on the real estate of the firm with the same intention; that the purpose of the instruments was to secure a dissolution of the firm, and enable Dorr Clark and D. C. Plumb subsequently to become the owners of the property. It is averred that the deed was executed for the purpose of securing the individual debts of Dorr Clark and D. C. Plumb. The debts specified in the bill amount to \$68,060, of which only \$5,000 was a debt of the firm. It is alleged that the defendant Dorr Clark made an agreement with Henry G. Weare by which the latter was to become the purchaser of the property from D. T. Bomar as trustee and mortgagee, and that Dorr Clark was to have a one-half interest in the property. Weare bought the property under this arrangement, and took possession of it. Weare made this arrangement with the knowledge that the property belonged to the partnership. It is alleged that the Evans-Snider-Buel Company lent to Dorr Clark and D. C. Plumb a large sum of money, and that to secure it the firm property was transferred to C. L. Ware as trustee, and that afterward C. L. Ware executed a deed of trust upon all of the lands, and a chattel mortgage upon all of the personal property, to the Evans-Snider-Buel Company, for the purpose of se-

curing to them the money so advanced to Dorr Clark and D. C. Plumb. The plaintiffs do not know the amount of money that the Evans-Snider-Buel Company advanced. It is also alleged that Dorr Clark and D. C. Plumb transferred their remaining interest in the property to C. L. Ware, and that Henry G. Weare and Weare & Allison released to C. L. Ware any claims which they might have and hold in the property. C. L. Ware is the agent of the Evans-Snider-Buel Company. The bill contains a prayer that C. L. Ware and the Evans-Snider-Buel Company be decreed to hold the property as trustees for the firm of Clark & Plumb. It will be seen from these averments, extracted from the various pages of the bill, that it is charged that the defendants Dorr Clark and D. C. Plumb conspired to use the partnership property for their own benefit, and that the other defendants, with knowledge of these facts, have obtained an apparent interest in the property. One partner has no right to purchase an interest in partnership property, and thereby secure an advantage to himself to the injury of the partnership. He has no right to use the partnership property to secure or pay his own debts. Whenever he does so, no matter what form the transaction takes, equity will afford relief. If he or others, with knowledge of the facts, obtained possession or title to property under such circumstances, they will in equity be declared to hold it as trustees for the benefit of the partnership. *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 283. A suit for that purpose would not be barred usually by the statutes of limitations applicable to suits to recover personal property or real estate. *Chouteau v. Barlow*, 110 U. S. 238, 3 Sup. Ct. 620, 28 L. Ed. 132.

The bill contains two separate and distinct equities that prevent it, as a whole, from being amenable to demurrers. It is good as a bill for an accounting to settle a partnership, and it is good as a bill to charge certain of the defendants as trustees holding property described for the benefit of the partnership. It is not multifarious. It may be necessary to sell the property alleged to belong to the partnership, in order to fully settle the partnership transactions. To do this, those claiming an interest in the property should be before the court. We do not wish to comment further upon the case at this time, as it is before us only on the demurrers. We cannot tell how it will appear when answers are filed and evidence is taken. Conceding the truth of the averments of the bill, the plaintiffs are entitled to relief. The court below erred in sustaining the demurrers to the bill. The decree of the circuit court is reversed, and the case is remanded to that court, with directions to overrule the demurrer, with costs, and to take such further proceedings in the suit as shall be proper, and not inconsistent with the opinion of this court.

CUNNINGHAM et al. v. GERMAN INS. BANK.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1900.)

No. 796.

1. BANKRUPTCY—PROVABLE DEBTS—CORPORATIONS—LIMIT OF INDEBTEDNESS.

The articles of association of a manufacturing corporation limited the amount of indebtedness which it might contract to one-half the amount of its paid-up capital stock. The assets of the company having greatly depreciated, the bookkeeper made an entry on the books charging the loss to the capital stock, but this was not recognized by the officers or stockholders as a reduction of the capital, no amendment of the articles of association was filed or recorded, and no stock was called in or surrendered. Thereafter a debt was contracted by the company, which amounted to more than half the sum of its available assets, but did not exceed half the amount of stock paid up and actually issued to stockholders and held by them. *Held*, that such debt was valid and provable against the estate of the corporation in bankruptcy.

2. SAME—INCREASE OF CAPITAL—STOCK DIVIDENDS.

Where a corporation which is earning large profits divides them among the stockholders in the shape of stock dividends, the increase of its capital in this manner being authorized by the stockholders, the whole amount of the stock, comprising both the amount originally subscribed and the amount added by such dividends, is to be regarded as "paid-up capital stock," for the purpose of determining the validity of a debt contracted by the corporation under a provision in its charter limiting its indebtedness to one-half the amount of such stock.

3. SAME—MORTGAGE BY OFFICERS OF CORPORATION.

Where the stockholders of a corporation, by their direction or acquiescence, invest the executive officers of the company with the powers and functions of the board of directors as a continuous and permanent arrangement, the board being entirely inactive, and the officers discharging all its duties, a mortgage on the property of the corporation, made and executed in its behalf by such officers, is valid, although not authorized by any vote of the stockholders or directors.

Appeal from the District Court of the United States for the District of Kentucky, in Bankruptcy.

This is an appeal from a judgment of the district court of the United States for the district of Kentucky, sitting in bankruptcy, upon a petition for review of certain orders of the referee respecting the allowance of claims. Scanlan & Co., a Kentucky corporation engaged in the manufacture of glass at Louisville, was adjudicated a bankrupt upon the petition of its creditors, and thereupon the matter was referred to John B. Baskin, one of the referees in the said court. On the 15th day of November, A. D. 1899, a hearing was had before the referee upon certain claims in favor of the German Insurance Bank, also of Louisville, against the bankrupt's estate, consisting of three items,—one for the sum of \$4,443.57, another for \$412.74, and another for \$36,948.33, which latter sum was claimed to have been secured by a mortgage bearing date June 9, 1898, upon the real estate and plant of the said bankrupt. The allowance of these claims for debts and for a lien under the mortgage was contested before the referee by certain other creditors of the bankrupt, being the same persons named herein as appellants on this appeal. The grounds upon which the contest was made were these: That, with respect to the debts sought to be established, the aggregate amounted to a much larger sum than the limit of indebtedness fixed by the charter of the bankrupt, which was one-half of the paid-up capital stock of the company; and the creditors claim that so much of the indebtedness was void as to creditors as was in excess of the limit. That, with respect to the mortgage lien, the mortgage was executed by the president and secretary of the corporation, without authority of the board of directors or the stockholders, and therefore void; and, further,

that the debt purporting to be secured thereby being void, for the reason above stated, the mortgage should share its fate. The referee allowed all three of the claims as simple contract debts, but denied the bank's claim for a lien under the mortgage. The creditors filed a petition for review by the judge of the allowance of the claims as debts, in so far as they were in excess of the limitation of the bankrupt's charter, and the bank filed a petition for review of the adjudication, denying the validity of its mortgage lien. Thereupon the referee made a certified statement of the facts found by him, a summary statement of the evidence, and his conclusions thereon, and transmitted the same to the district court. Subsequently, on the request of counsel for the bank, the referee amended the certificate in certain particulars, giving further detail of the facts and evidence. The matter came on for hearing upon the questions raised before the referee, and the record shows that on the 1st day of December, 1899, the court made an order wherein it sustained the finding of the referee in respect of the indebtedness, but reversed his ruling in reference to the validity of the mortgage, which was adjudged to be a valid lien upon the estate covered thereby. The creditors have appealed from both parts of this order, as well that part adjudging the indebtedness to be valid as that which affirms the mortgage lien. The grounds of appeal are stated in the following assignment of errors: First, the court erred in allowing the German Insurance Bank, claimant therein, a mortgage lien for its whole debt, or any part thereof; second, that the court erred in failing to hold that the said German Insurance Bank was bound by the notice which it had of reduction of the capital stock of Scanlan & Co., and in allowing the claim of the bank for a greater sum than was owing at the time of said notice. In response to the appeal the clerk of the district court sent up a transcript, which was duly filed. After the filing of the transcript, counsel for the appellee has entered a motion to dismiss the appeal on the ground that the clerk's certificate to the transcript did not show that he certified the whole of the record from the district court, in consequence of which, as he insisted, the appeal failed; and, second, if that motion should be denied, that so much of the appeal as related to the adjudication of the validity of the mortgage lien should be dismissed upon the ground that that matter could not be considered upon appeal, but only under the supervisory power of this court. This motion was denied in whole and in part, on the 19th of February last. Judge Lurton delivering the opinion of the court. 43 C. C. A. 377, 103 Fed. 932. The particular facts upon which the controversy was carried on in the court below are stated in the opinion.

W. W. Watts, for appellants.

Otto A. Wehle, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

Preliminary matters having been already disposed of, we have now to dispose of the case upon the merits. The first error assigned challenges the ruling of both the referee and the judge allowing the claims of the bank in full as debts of the bankrupt, it being insisted by the creditors that the aggregate of these claims far exceeds the limit of indebtedness which bounds the power of the bankrupt corporation in that regard. This contention of the creditors rests upon the following grounds: The statute of Kentucky, under which Scanlan & Co. were incorporated, is a general act, providing for the organization of such bodies by the voluntary act of a stated number of associates, and defining their powers. These are of the usual character conferred upon corporations so organized. It is also provided that the articles of association shall be filed for record in the office of the county court clerk before the corporation shall com-

mence business. But section 5 of the act prescribes that "a notice shall be published for at least four weeks in some newspaper as convenient as practicable to the principal place of business, which notice shall specify: * * * (6) The highest amount of indebtedness or liability to which the corporation is at any time to subject itself"; and in section 6 it is declared "that their acts shall be valid if the publication in a newspaper is made," and filed in the clerk's office, and a copy filed in the office of the secretary of state, when that is necessary under the provisions of law. Chapter 56, Gen. St. Ky. 1883; Acts 1869-70. By the same act it is declared that "no change in any of the foregoing particulars shall be valid unless recorded and published as the original articles are required to be." Scanlan & Co. was organized July 16, 1881, under this law, with a capital stock of \$40,000, of which only \$15,000 was then paid up, and with respect to the residue it was provided in the articles that it was to be disposed of as the board of directors (of which there were three) might direct. The notice published under the requirements of section 5 limited the liability which might be incurred to one-half of the capital stock paid up. The management of its affairs was left to the executive officers of the company, and no question appears to have been made of their acts by any other officer or stockholder. Annual meetings of the stockholders were generally held, but from the time of its incorporation to 1896 only one meeting of the directors of the company appears to have taken place. Its business for several years was prosperous, and a surplus was accumulated, subject to dividend; but by common consent, and as shown by entries on the stock journal from time to time, the remaining \$25,000 of the original stock was distributed among the stockholders in lieu of dividends for a like amount, and certificates were delivered to the stockholders therefor. In November, 1884, an amendment to the charter was filed and recorded in the office of the clerk of the county court. This amendment provided for an increase of the capital stock to \$150,000, and recited the consent thereto and the authority from the stockholders for the execution thereof, and was signed by the president and secretary. But there was no record of any resolution of the stockholders authorizing the increase. The corporation continued to make profits, and for these profits new stock was issued, and divided among the stockholders as paid up, and the profits were consumed in that way. The stock journal showed, as the referee states, "that from time to time stock dividends were declared, and each stockholder was credited on the books of the corporation with the increased stock, and received certificates for it." The aggregate of all the stock, old and new, issued and divided among the stockholders as paid for, was \$138,000. From this and other evidence recited by him, the referee found that the increase of the capital stock to \$138,000 was sanctioned by the stockholders, and was valid. In July, 1897, the books of the corporation showed an impairment of the assets to such an extent as that only \$50,000 was left, and an entry was made by the bookkeeper on the trial balance and representative ledger charging the capital stock with the loss, but there was no actual reduction

of the certificates of stock, which, on the contrary, continued to be held as before. There was no evidence that the stockholders or board of directors assented to any reduction of the stock. The referee held that no change in the amount of the capital stock was effected by the entries made upon the books above mentioned. A bookkeeper of the bank, sent to examine the books of the company, reported on May 1, 1898, that the capital stock was then \$50,000. On the 9th day of June following, the bank took the mortgage for \$35,000, the most of which consisted of a former debt of the company secured by mortgage.

No question being made of the amount of the actual indebtedness, aside from the effect of the supposed limitation by the charter of the power to create it, we are of opinion that the referee and the district judge were clearly right in adjudging it to be valid. The proof was ample to show that the corporation of Scanlan & Co. practically devolved the powers of the board of directors upon its executive officers, and that this method of doing business was not casual and temporary merely, but continuous from the date of its commencing to do business to the end. The board of directors was dormant. The rule is that where, by the direction or acquiescence of the stockholders, the executive officers of a corporation assume and exercise the functions of the board of directors, the corporation and those deriving rights from it while it is so managing its affairs are bound by the acts of its officers to the same extent as if they had been directed by the board. In so far as the duties of the directors are not expressly prescribed by the charter, they derive their powers from the stockholders, who may, if they see fit, select other agencies for the transaction of the corporate business. 1 Mor. Priv. Corp. § 515. Not only is this so, but a similar rule applies to those things which the stockholders themselves might, and, in the ordinary course of conducting corporate affairs would, do or authorize to be done. Thomp. Corp. §§ 5318, 6165, 6179, and the cases there cited. And the court of appeals of Kentucky, whose decisions in reference to the construction of the statutes of the state in relation to incorporations, and the scope of the powers derived therefrom, we are required to follow, has recognized and adopted these propositions as applicable to the corporations of that state. *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.* (Ky.) 50 S. W. 2. These rules are, of course, as is implied from the statement of them, subject to the paramount doctrine that neither the stockholders nor any agency of the corporation can transcend the limits of the powers granted by the charter. Other principles must sometimes be applied in order to accomplish the ends of justice, but they do not proceed from a recognition of the lawfulness of the offending act. The power to create debts is an ordinary incident to a manufacturing corporation, and, when such debts are created by agents authorized to execute its powers, they must bind the corporation. The only distinction between the rulings of the court of appeals of Kentucky and those prevailing in other tribunals that we notice is that the Kentucky court, adopting the theory generally accepted that the articles of association of a corporation under a general law are of the like force and effect

as a charter directly granted, construes the provision in the articles that the highest amount of indebtedness to which the corporation is to subject itself shall be stated therein, to be, so far as creditors are concerned, an absolute limitation of its powers in that direction, and a negation of the validity of any excess of indebtedness beyond the sum so fixed, although the corporation itself would be estopped from setting up that defense. This doctrine is established by repeated decisions in that state; among them the case of *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, above cited, the most recent to which our attention has been called. This ruling seems to rest upon the public policy of protecting creditors, in whose interest this special provision of the statute was made. Upon this construction of the statute the invalidity of the excess of indebtedness seems a logical sequence.

Accepting this construction of the power of the corporation, notwithstanding it was held differently in a case arising in another state of this circuit, where a different interpretation was admissible, and that interpretation had been given by the subordinate courts of the state (*Central Trust Co. v. Columbus, H. V. & T. R. Co.* [C. C.] 87 Fed. 815), we are of opinion that there was no violation of the law in the creation of the indebtedness here in question. At the time when it was incurred the articles had been so amended as to authorize the increase of capital stock to \$150,000, and there had been taken \$138,000, which had been paid for. The amount of indebtedness is much less than one-half of the latter sum. We attach no importance to the act of the bookkeeper in charging the depreciation of the assets to the capital stock. It was not recognized by any act of the stockholders or of its officers as a reduction of the capital stock. No amendment of the articles was filed or recorded, nor was any stock, or fraction thereof, called in or surrendered. It was a mere matter of bookkeeping, and ended with that. The issuing of stock in lieu of dividends was not unlawful. It was the same thing as if the dividends had been actually paid over, and then, by the stockholders, repaid to the company for the stock.

What we have said in assigning the reasons upon which we hold the indebtedness to be valid disposes also of the second assignment of error wherein the validity of the mortgage is challenged. If it was within the power of the corporation, as we hold it was, to create the debt through the agency of the managing officers vested with the ordinary functions of the board of directors, a mortgage of its property, executed in its behalf by such officers while exercising such authority, must be held valid also, notwithstanding there was no authority from the board of directors; for it is an ordinary incident to the creation of a debt (*Thomp. Corp.* § 6133), and the power to give it came from the ultimate constituency.

There are some other incidental questions of minor importance referred to in the argument and briefs of counsel. But none of them are controlling of the main subjects of the controversy, which we have already considered, and we do not think it necessary to particularly discuss them. Finding no error in the order of the district judge, we direct it to be affirmed.

In re MORGAN.

(District Court, W. D. Arkansas, Texarkana Division. May 21, 1900.)

1. BANKRUPTCY—SPECIFICATIONS IN OPPOSITION TO DISCHARGE—AMENDMENT.

Although general order No. 32 (32 C. C. A. xxxi., 89 Fed. xlii.) in bankruptcy provides that specifications in opposition to a bankrupt's application for discharge must be filed within 10 days after the day on which the creditors are required to show cause, it is in the power of the court of bankruptcy, in the exercise of a sound judicial discretion, to permit the filing of amended specifications after the expiration of that time.

2. SAME—DISCHARGE—"CONTEMPLATION OF BANKRUPTCY."

Where a debtor arranges to sell out his entire stock of merchandise, with the intent and for the purpose of paying certain of his creditors, out of the proceeds, in preference to the others, he contemplates bankruptcy, within the meaning of Bankr. Act 1898, § 14b, providing that a bankrupt shall forfeit his right to a discharge if he has, "in contemplation of bankruptcy," failed to keep proper books of account.

3. SAME—KEEPING BOOKS.

A bankrupt sold his stock of goods in bulk, for about half its cost, and under circumstances indicating haste and secrecy, and received part of the price in the form of two checks, which were at once turned over to two of his creditors; the sale having been made to enable him to satisfy those creditors. No entry of the transaction appeared on his books, which were further so defective and irregularly kept that it was impossible to determine from them his true financial condition. A large deficit between his assets and liabilities remained wholly unaccounted for. *Held*, that his application for discharge should be denied, on the ground that his failure to keep proper books of account was "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy," within the meaning of Bankr. Act 1898, § 14b.

4. SAME—CONCEALMENT OF PROPERTY.

Where a comparison of the bankrupt's assets and liabilities at the time he engaged in business, some eight months before he became bankrupt, with the assets and liabilities scheduled in the bankruptcy proceedings, shows the disappearance of a large amount of property, which is not accounted for on his books, and of which he fails entirely to give any satisfactory explanation, it must be held that he has concealed from his trustee property belonging to his estate in bankruptcy, and his application for discharge must be refused on that ground.

In Bankruptcy. On bankrupt's application for discharge, and opposition thereto by creditors.

Paul Jones, for objecting creditors.

W. W. Webber and Mr. King, for the bankrupt.

ROGERS, District Judge. On April 4, 1899, A. C. Morgan, the bankrupt, filed an application for discharge, and notice was given creditors, returnable April 15, 1899. On that day the remonstrants filed specifications opposing the discharge. The court ordered a hearing of the application for discharge on May 10, 1899. For some reason, the case was not then heard. A demurrer, however, was interposed to the specifications, and taken in short upon the record, and on the ~~-----~~ day of November, 1899, was conceded by the remonstrants, and they were allowed, without objections, to file amended specifications. On the 14th of November, 1899, amended specifications were filed, to which the bankrupt on November 22d interposed a demurrer and a motion to strike out. The former was over-

ruled. The motion to strike is still pending and insisted upon. The question argued is whether the court has the power, after the time fixed by general order No. 32 (32 C. C. A. xxxi., 89 Fed. xlii.), in which specifications may be filed, has expired, to allow an amendment of the specifications. The question has not been decided under the present bankrupt law, so far as I know; and I am of the opinion that the allowance of an amendment is a matter of sound discretion, but should not be exercised loosely, but only to meet the ends of justice. Loveland, Bankr. pp. 603, 611, and the cases cited in the foot-notes thereto. The motion in this case is overruled.

The bankrupt has filed an answer to the specifications, and the proofs have been taken. Only two grounds contained in the specifications for refusing the discharge need be noticed. It is charged that the bankrupt, while engaged in the banking and mercantile business at New Lewisville, Ark., contemplated the following acts of bankruptcy; that is to say:

"(1) To convey his stock of merchandise at said town of New Lewisville, Arkansas, with the intent to hinder, delay, and defraud his creditors, and to conceal his cash on hands, notes, accounts, choses in action, and securities, with such intent. (2) While insolvent, to transfer to Hicks Company, Limited, who was then one of his creditors, a part of his property, with the intent to prefer said Hicks Company, Limited, over his other creditors, and also to pay to the treasurer of Lafayette county, Arkansas, the sum of money, to wit, \$3,000, which the said treasurer had deposited in said Citizens' Bank as a general deposit, and thereby preferring, while insolvent, the said treasurer over his other creditors; and that while contemplating said acts of bankruptcy, with the fraudulent intent to conceal his true financial condition, he failed to keep books of account or records, both in his business as merchant and as banker, from which his true condition might be ascertained, in this: that the pretended books and records produced by the said bankrupt in this proceeding, and kept by him, failed to disclose either a true statement of his assets or of his liabilities, or from which the amount of assets on hand and the amount of liabilities due by the said Morgan could be ascertained."

The second ground taken in the specifications for refusing his discharge is this:

"That the said bankrupt has committed an offense punishable by imprisonment, as is by the bankrupt law now in force provided, in this: that said Morgan did willfully and fraudulently omit from his inventory and schedule filed herein cash which he then held, or was held for him by others and subject to his control, in the sum of, to wit, \$10,000."

It cannot be doubted, in view of the testimony taken, that, when the bankrupt sold out his stock of merchandise, he did so with the intent to prefer the Hicks Company, Limited, and also with the intent to prefer the treasurer of Lafayette county, Ark. He not only testifies that that was his object in selling out the stock of merchandise, but he testifies that after he sold out that he devoted almost the entire proceeds of the sale to the payment of the claim of the Hicks Company, Limited, and to the treasurer of Lafayette county, Ark., as he intended to do. That the sale of his stock of goods, wares, and merchandise with that intent was an act of bankruptcy, there cannot be any question, because the necessary effect of it was to hinder, delay, and defraud his other creditors. In Loveland, Bankr. p. 608, par. 3, the author says:

"What is meant by the words 'in contemplation of bankruptcy' has been the subject of a good deal of discussion and difference of judicial opinion in this country and in England. In some cases it has been held to mean 'in contemplation of insolvency,' or a simple inability to pay as debts should become payable. In other cases it has been held that the debtor must contemplate an act of bankruptcy, or a voluntary application for the benefit of the bankrupt law. The most authoritative definition of these words in this country is contained in the opinion in *Buckingham v. McClain*, 13 How. 168, 14 L. Ed. 190. In that case the supreme court decided that the words 'in contemplation of bankruptcy' did not mean 'in contemplation of insolvency,' or a simple inability to pay as debts should become due and payable, but meant that the debtor must contemplate the commission of what was declared by the act to be an act of bankruptcy, or must have contemplated an application by himself to be declared a bankrupt."

It must, therefore, in the light of this decision, be held that when Morgan sold his stock with a view of appropriating the proceeds to the payment of the Hicks Company, Limited, and to the treasurer of Lafayette county, Ark., to the detriment and to the exclusion of his other creditors, the act was in contemplation of bankruptcy. But it is not enough, to refuse his discharge, that he made the sale of his stock of merchandise "in contemplation of bankruptcy." It must also appear that in addition thereto he had, "with the fraudulent intent to conceal his true financial condition, failed to keep books of account or records from which his true condition might be ascertained."

The proof shows that R. R. Farrar, the county treasurer of Lafayette county, Ark., had deposited, of county funds, about \$3,468.63 with the Citizens' Bank, which bank was the property of Morgan, and that Morgan had assumed to pay Hicks Company, Limited, about \$900, which was due it from the firm of whom Morgan had bought both the bank and a small stock of merchandise, including a large amount of outstanding accounts. It further appears from the bankrupt's evidence that when he sold his stock of goods, wares, and merchandise to Millwee, who was a traveling salesman for a St. Louis firm, which firm was a creditor of Morgan, he sold it at 50 per cent. of cost and carriage, or about \$4,100, and took in payment thereof two checks on banks,—one for about \$2,703.09, and one for either \$900 or \$1,000,—and the balance, presumably, in cash. The former check, it appears from the bank books, was deposited in the bank to the credit of the Morgan store, and, according to the testimony of Morgan's bookkeeper, was turned over to the attorney of the treasurer of Lafayette county in part payment of Farrar's deposit with the bank. The other check was made payable to Hicks Company, Limited, and turned over to his agent at the time it was given, and no entry made of it on either the books of the bank or the store; nor does any entry appear in the books of the store with reference to the check which was turned over to the treasurer of Lafayette county. The sale of the stock of merchandise and the payment of these two debts (one debt by the bank, and the other by the store) were, to all intents and purposes, parts of a single transaction. Indeed, the sale was made, as above stated, in order that these two debts might be paid. They were important transactions, involving large sums. They were transactions in which the bankrupt's cred-

itors were interested. They were made in violation of the bankrupt law, and it is fair to assume, from the manner in which the transactions were had, and the purposes for which the sale was made, that the bankrupt did not intend that his creditors should know, from his books or otherwise, if he could avoid it, what had gone with the proceeds of his stock of goods. This view is fortified by the fact that the invoice of his stock of goods was taken in the night, and the delivery made early the next morning, and the bankrupt immediately disappeared,—he says, to avoid annoyance from his creditors. It is to be assumed that he did not care to face those from whom he had bought the goods which he had sold, under the circumstances stated, and which were not paid for, or to give an account of his conduct and business affairs. The real facts were not disclosed to his clerks in the bank, or, so far as the proof shows, to any one else. He had also concealed his store books at a place no one would be expected to inquire for them. Had they been found, however, they would have shown nothing of the transactions I have discussed. It is true, the bank books show that, on the same day the sale of the storehouse was consummated, there was deposited in the bank, to the credit of the storehouse, the amount of \$2,703.09, evidently represented by the check given on the Camden bank, and which was turned over to the attorney for the treasurer of Lafayette county. There is nothing, however, in the books of either the store or the bank to show where the bankrupt got this money. It is a significant fact that, notwithstanding the bankrupt testifies that Millwee paid him in cash about \$4,100 for this stock of goods, when the marshal seized the stock of goods in Millwee's possession as the property of the bankrupt, no claim has ever been set up for the same, or for the money which he says Millwee paid him for the stock of goods. The court is constrained to believe from the circumstances that either the money which the bankrupt claims Millwee paid him for the stock of goods was money given to Millwee by the bankrupt to disguise the transaction, or, if the money was in point of fact Millwee's money, that the bankrupt has, since the bankruptcy proceedings were instituted, restored to him the purchase price of the goods. It is almost incredible to believe that, if the transaction was a bona fide one, some claim would not have been set up by Millwee for that amount of money which has gone to pay the Hicks Company, Limited, and the treasurer of Lafayette county,—debts which the bankrupt owed to them. This view entertained by the court is strengthened by the fact that, notwithstanding the bankrupt was placed upon the witness stand to testify in regard to these transactions, he wholly failed to give any reasonable explanation of a deficit of at least \$14,000 between his actual assets and his liabilities, the whole of which, so far as the proof shows, was contracted by him between February and November, 1898. His estate has not paid exceeding \$6,500, and he owes over \$19,000. There is no pretense in this case that the bankrupt kept any expense account,—an account which necessarily involves rents, freights, clerk hire, and many incidental expenses. There is no pretense that he kept any personal account. No accountant could take these books and ascertain from

them whether he had drawn out for personal expenses \$1,000 or \$10,000. In his efforts to explain the deficit in his assets, he has made no pretense that he lost money either by speculation or gambling, or by irregular habits of any kind. It must be assumed, therefore, in the absence of testimony, that the deficit cannot be accounted for upon the theory of either speculations, gambling, or vicious or irregular habits, since, if such were the case, it was an easy matter for the bankrupt to have accounted for losses sustained in that direction. It may be admitted that the business was recklessly conducted. The bankrupt himself testified that no entry was made of articles taken from the store and sent to his home for the support or maintenance of his family; that no entries were made of money taken from the drawers during the day for incidental expenses. He was engaged in purchasing cotton, and when money was taken from the drawer for cotton no entry was made thereof. No cotton account was kept, and there is nothing in the books to show whether he bought one bale or a thousand bales, or whether he lost or gained by reason thereof. And the significant fact in this connection is that, notwithstanding this sale took place in the very midst of the cotton season, not a bale of cotton was on hand, or, as far as the books show, had been consigned elsewhere for sale and not sold. The bankrupt is not an educated man, but he is an intelligent man. He has been in business of different kinds for eight years. He is not a bookkeeper, but he knows enough to know that if he had kept a correct cash account, a correct expense account, a correct merchandise account, a correct personal expense account, and a correct cotton account, the status of his business could have been easily ascertained. He pretended to keep a cash account in his store, but it was erroneous in many particulars, of which he was cognizant. He began keeping a personal expense account, but discontinued it. The other accounts he made no pretense of keeping, whatever. It is true that goods bought on time were credited to the merchant who sold them, in the individual account of that merchant, but no entry was made of either goods or cotton bought for cash. The entries of goods bought on time only showed what had not been paid for, but gave no idea of merchandise on hand, or goods or cotton paid for. True, an invoice of the stock might have been taken, and the bales of cotton on hand, if there had been any, might have been counted; but any quantity of goods might have been taken from the store, or cotton shipped, and no account given of either, and there was no possible way by which it could be detected through the books. If it had been the purpose of the bankrupt to prevent his creditors from ascertaining the condition of his business, no set of books which could be called a set of books at all, unless the entries they contained were purposely false, could have more completely compassed the result. And it must not be overlooked that there is an entire absence of evidence by those who kept the books of the store that the entries are correct. There is evidence that they are incorrect, or that the bankrupt has drawn out money of which he gives no account; for the cash account in the store shows that he took in \$43,594.26, and only drew out \$37,308.04, leaving a balance of cash on hand of

\$6,286.22. No account is given of this sum. Counsel argue that it was deposited in the bank to the credit of the store, and was appropriated to pay the depositors of the bank. It seems, when Morgan opened the bank it had only \$2,070 in cash, and it owed about \$8,000 to depositors; but Millwee paid \$4,100 to depositors, and \$862.77 was collected from the old accounts of Connevey, McRae & Stinston, which accounts he bought from the last-named firm at the time he bought the bank and their stock of goods. One Wheat, who had a deposit of \$500, has not been paid yet. These sums aggregate \$7,462.77,—only lacking about \$600 of enough to pay the depositors, without taking a dollar from the store. On this showing, it may be said that not a dollar of the proceeds of goods purchased after he bought the bank and the store of Connevey, McRae & Stinston went to pay depositors; for he got a stock of goods worth several thousand dollars from Connevey, McRae & Stinston, which was more than enough to have paid the deficit of \$600 to the depositors, conceding the old accounts worthless. The bankrupt says that when he bought the bank the understanding was that there were only about \$8,000 on deposit, and that it turned out that the claims of the depositors amounted to nearly \$9,000; but the stock of goods which he bought from Connevey, McRae & Stinston was sufficiently large to cover that also, and still leave a surplus of goods, and the outstanding accounts of Connevey, McRae & Stinston on hand besides. The situation may be roughly summed up as follows:

He owes mercantile debts amounting to.....	\$14,975	42
He owes Millwee.....	4,100	00
Total	\$19,075	42
His stock seized in the hands of Millwee, cost price....	\$ 8,248	56
Store accounts, uncollected at the sale, and made by him after he entered into business, about.....	5,829	66
Total	\$14,078	22
Balance unaccounted for.....	\$ 4,997	20

It must not be overlooked that the \$5,829.66 of store accounts were for goods sold on time, and, as the bankrupt himself testified, at a profit of not less than 33½ per cent.; and, moreover, that no profit realized on \$45,000 of sales is taken into the account, as above stated. It is fair to assume that the profits realized on cash sales, and on credit sales which were collected, more than paid the firm and personal expenses, without reference to any profits realized on cotton, so that the deficit should be enlarged instead of reduced, especially when it is remembered that considerable sums have been proven against his estate, with his knowledge and approval, by his clerks, which properly belong to the expense account. The bankrupt was only in business about eight months, and his personal expenses, in a small country town, upon a liberal estimate, would scarcely exceed \$1,000. An examination of his bank books does not relieve the situation. It will be assumed that the \$2,128.87 appearing to Morgan's individual account on the books of the bank went to pay its depositors, although it does not appear that this balance was ever carried into Morgan's store account on the books of the bank. Mor-

gan's store account shows he deposited in the bank \$43,594.25, which, added to \$2,128.87, makes a total of deposits by Morgan in the bank of \$45,727.13. The bank books show only \$37,308.04 were drawn out by Morgan; leaving a balance in the bank to his credit, both on account of the store and the bank, of \$8,415.09. What became of this money is not shown. The bookkeeper in the bank, conceded to be an honest man, testified that the entries made were correct, and that when the bank closed the bankrupt took the money,—how much, he does not know. The bankrupt's schedules show only a nominal sum in cash on hand from his bank and store at the time he quit business. A recapitulation of his assets and liabilities in both store and bank, as they appear on the books of the bank and store, shows:

Assets	\$21,035 25
Liabilities	15,748 20
Surplus	\$ 5,287 05

Of these assets, as shown by the books, \$12,956.13 are gone, and no account of them given, either on the books or otherwise; \$5,829.66 are sundry uncollected accounts, of nominal value, for goods sold by the store between February and November, 1898; \$1,031 represents overdrawn accounts, of what value it does not appear; while the \$15,748.20 in liabilities are mercantile debts and unpaid deposits, all created during the eight months he was in business. I may sum it up in this way: He started in business in February, 1898, with sufficient assets, if properly handled, to pay the bank and store debts,—certainly enough, and a surplus, if the \$4,100 paid him by Millwee be considered. He was in business only eight months. It is true, the assets were not ready money, nor readily convertible into money, but in goods, moneys, live stock, bank safe, fixtures, and open accounts, bills receivable, and the like. He sold goods from which he realized over \$45,000. His profits on goods sold on credit, he said, averaged 33½ per cent., and on cash sales 10 per cent. When he sold out, in November, 1898, he had on hand goods and other property which sold for about \$5,500, and uncollected book accounts for goods sold by him of \$5,829.66,—the accounts representing goods sold at a profit of 33½ per cent.,—and he owed mercantile debts, including the money Millwee paid him, of \$19,075.42. I cannot reconcile the condition of things as stated above either with integrity of conduct or purpose; nor can I, in view of these facts, believe that his books were kept in the shape they were otherwise than with the intent to conceal his true financial condition from his creditors. It is said that the fact that he did not make proper entries upon his books when he quit business was of no importance, and yet the very object which the bankrupt law had in view, when it required books to be kept, was that when a failure occurred the creditors might be able to ascertain the true condition of the bankrupt. I am constrained to find that his true financial condition cannot be ascertained from the books and records kept by him, and that he has not accounted for or turned over to his trustee all of his estate. What he has done with it, or what disposition has been made of it, does not appear. The discharge is refused on both the grounds above stated, and it is so ordered.

In re JAM.

(District Court, S. D. New York. May 25, 1900.)

1. CHINESE EXCLUSION ACT—RIGHT OF SEAMEN TO LAND—TREATY OF 1894—HABEAS CORPUS.

The treaty of 1894 with the empire of China and acts of congress of 1888, 1894, excluding "Chinese laborers" from coming into the United States, are not applicable to a Chinese seaman, who ships as steward aboard a vessel bound for a port in the United States, and who lands with the intention and desire to reship as soon as possible.

2. SAME—BOND TO RESHIP.

A Chinese seaman who lands at a port of the United States for the purpose of reshipping as soon as shipment can be obtained, must give bond to the collector of the port to ship within 30 days, and to produce to the collector a certificate of the shipping commissioner to that effect.

Jam, a Chinese seaman, native of China, shipped as steward aboard the American ship *Josephus* at Hong Kong, in October, 1899, and arrived at Bayonne, N. J., February 17, 1900.

He was immediately put under surveillance of two customs agents by the collector of the port of New York, who prevented his landing until May 8, 1900, when the ship was destroyed by fire and Jam escaped and came unmolested to New York where he sought employment as seaman. On May 15, 1900, he was again taken in custody by the customs agents and put aboard the ship *State of Maine* lying at Newtown creek. May 17, 1900, upon petition showing that he has no intention to stay here but desires to ship as soon as possible, a writ of habeas corpus was issued.

Thomas C. Jenks, for petitioner.

Clarence S. Houghton, Asst. U. S. Atty.

BROWN, District Judge. Under the treaty of 1894, and the Acts of 1888 and 1894, the exclusion is of "Chinese laborers"; the class covered by the prior law is not enlarged, and the case of *In re Ah Kee* (D. C.) 22 Fed. 519, remains therefore applicable as before. The petitioner being a seaman is not within the purview of the acts so long as he merely touches here for no other purpose than to reship so soon as shipment can be obtained, and he is therefore discharged. But to guard against abuses, such persons should be required to give bond with surety in the sum of \$500 to the collector to ship within 30 days and to produce to the collector a certificate of the shipping commissioner to that effect. On receipt of such bond the prisoner will be discharged.

JOSEPH STELWAGON CO. V. CHILDS.

(Circuit Court of Appeals, Third Circuit. May 21, 1900.)

No. 9.

PATENTS—INFRINGEMENT—ROOFING MATERIAL.

The Childs patent, No. 429,885, for an improved roofing material, consisting of an upper and lower layer of paper or other fabric, between which is interposed a layer of bituminous or other similar material, held valid and infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

W. C. Strawbridge, for appellant.

Charles G. Coe, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Attentive consideration of this record and of the arguments of counsel has led us all to the conclusion which was arrived at by the court below. 99 Fed. 87. The opinion which was filed by the learned judge of that court has our entire concurrence. We might, of course, express the same views in different terms and at greater length, but no useful purpose would be subserved by doing so. The decree is affirmed.

GOODYEAR SHOE MACH. CO. v. SPAULDING et al.

SAME v. COOK.

(Circuit Court, D. Massachusetts. May 4, 1900.)

Nos. 1,008, 1,009.

1. PATENTS—INFRINGEMENT.

The question of infringement involves considerations of practical utility and of substantial identity, and therefore must be quantitative as well as qualitative; and infringement should not be found from the mere fact that the terms of a claim of complainant's patent are applicable to the defendant's device.

2. SAME—CONSTRUCTION OF CLAIMS.

Where the utility of a patented machine resides in a complete cycle of operations, and the patentee subdivides the whole process into parts, making certain mechanical operations, which do not stand alone in practical use, stand alone in claims, these claims must be construed with caution, where infringement of part only is charged, as it is by no means certain that the claims would have been allowed with any substantial omissions.

3. SAME—INFRINGEMENT—MACHINE FOR SEWING SHOES.

The French & Meyer patent, No. 412,704, for a shoe-sewing machine, construed, and held not infringed as to claims 1, 2, and 5.

4. SAME.

The Fowler & Warren patent, No. 564,986, for a shoe-sewing machine, construed, and held not infringed.

In Equity. These were suits in equity for infringement of two patents. On final hearing.

Elmer P. Howe and Benj. Phillips, for complainant.

Fish, Richardson & Storrow, for defendants.

BROWN, District Judge. The defendants in these two cases, respectively, use machines of the same construction. A single mechanical device is alleged to infringe two distinct patents. The Spaulding suit is on letters patent 412,704, dated October 8, 1889, to French & Meyer, for a shoe-sewing machine. Claims 1, 2, and 5 are involved. It is unnecessary to distinguish them, since a finding as to one is decisive as to all. The Cook suit is on letters patent 564,986, dated August 4, 1896, to Fowler & Warren, for a shoe-sewing machine. This patent has but one claim. In each case the sole question is of infringement.

The prior art is sufficiently presented in the old Dancell machine. The inventions of the patents, as well as the defendants' device, may be regarded as improvements upon Dancell. The Dancell machine was useful and operative, and was employed upon turned shoes to unite the sole and upper. Its chain-stitch forming operation is performed by the needle, the looper, and tension devices. On the needle is imposed the work of pulling thread from the supply through the tension devices, of drawing up the slack of previously drawn loops through the successive needle holes, and of firmly setting the stitches. Defects in this operation are that the pulling up of the slack from the loops through the needle holes and around the between substance, and setting the stitch by a downward pull, tend to cut the between substance, and to pull apart the sole and upper which are being sewed together; that the needle is forced to pull its thread against the strain of the tension device; and that there is reeving of the thread through the needle hook, resulting in a weakening or breaking of the thread. French & Meyer devised a "take-up" which relieves the needle of the task of drawing up the slack of the last loop and setting the stitch. This is the subject-matter of the Spaulding suit. They provided, also, means to relieve the needle from pulling thread from the supply; but this is not involved in the infringement charged in the Spaulding suit. The Cook case relates to a "pull-off" which relieves the needle of the task of drawing thread from the supply, and gives the needle slack thread, instead of thread under strain of the tension.

The defendants use the Dancell machine, with an addition on the front which may be called a "front take-up roll." The complainants say that this first pulls off thread from the tension, wherefore it is called a "pull-off" in the Cook case, and then takes up slack from the loop, wherefore it is called a "take-up" in the Spaulding suit. In other words, it is charged that it performs two distinct functions, each of which is within the prohibition of a patent in suit. The defendants deny infringement, and affirm that in the normal operation of their respective machines they do not in fact "pull off" or "take up" any appreciable amount of thread. Looking at both cases together, there is force in the complainant's contention that if the defendants' front take-up roll does not in fact take up, pull off, or both, it cannot give slack to the needle, and therefore is, upon the evidence in both cases, an entirely useless incumbrance. It must be said that the brief for the defendants does not give the court much aid in understanding why the device in controversy is employed by the defendants. The omission by the learned counsel for the defendants to add to a bare description of the parts and their operation a full account of their effect upon the thread is remarkable in a brief of 68 pages. It does not follow, however, that, because the complainants may have placed the defense in something of a dilemma by comparing the contentions of fact in the two cases, they are entitled to prevail in either case or in both.

If the contention of the complainants be accepted that it has proved both a pull-off action and a take-up action, there still remains the question of infringement in each case. The dilemma in which counsel have

sought to place the defendants is not a true dilemma, since it does not cover the entire case, but only a branch thereof, and since it does not exhaust the alternatives. There is still the possibility that the defendants' take-up roll may have some take-up action and some pull-off action, which, employed together, are of benefit to the machine of the defendants, but neither of which is an infringement of a patent. The defendants, while denying that the complainants have proved the facts upon which infringement is charged, contend that, even upon the state of facts claimed, there is no infringement. They contend that the complainants rest upon an erroneous construction of the patents in suit. We may assume, for the purposes of this decision, that a pull-off action of one-fourth or three-eighths of an inch is proven by the complainants in the Cook case, and a take-up action of one-fourth or three-eighths of an inch in the Spaulding case.

We will consider first the Cook case, which involves the pull-off and the Fowler & Warren patent. The claim is as follows:

"In a chain-stitch hook-needle sewing machine, the combination of tension, looper, hook needle, a pull-off mechanism between the needle and the tension, and actuating mechanism timed to cause the pull-off mechanism to make its pulling stroke after the hook needle has completed its loop-drawing stroke and while the loop is held under strain by the hook of the needle, substantially as described."

The novelty is not in the provision of a pull-off, since this was old, nor in the mechanism to actuate it, but resides in a new operative relation between the pull-off mechanism and the other stitch-forming devices, especially the needle, viz. the needle hook, after it has drawn out the loop, takes part in the pulling-off operation, by holding the loop against the pull of the pull-off truck, and thus compels the pull-off truck to draw its thread from the tension. The patent office referred the applicant to the French & Meyer patent (in suit in the Spaulding case) saying:

"If there be any substantive advantage derived from holding the thread in the hook of the needle when the pull-off is operated, rather than holding such thread by the shank of the needle, as in the reference, such advantage should be set forth in the description."

This was done in the following language:

"The advantage derived from holding the thread in the hook of the needle when the pull-off is operated, rather than holding such thread by the needle shank (for example, as in patent No. 412,704, dated October 8, 1889, to French & Meyer), is that a supply of thread for the loop about to be drawn is maintained in the preceding loop, which is impossible if the shank of the needle is relied upon to hold the thread," etc.

The specification says, also:

"After the needle makes its back stroke, drawing a new loop of thread through the stock and the preceding loop, the pull-off truck moves, and slackens the thread between the needle hook and tension, the preceding loop furnishing slack thread between the needle hook and the preceding stitch."

Therefore, as the needle goes through the stock, it has slack thread on both sides,—on one side from the previous loop, and on the other from the tension. We have now to consider only the slack on the tension side; for, in respect to such slack as is taken by the defend-

ant from the loop, there is no infringement in the Cook case. Assuming a pull-off action of one-quarter or three-eighths of an inch in the defendant's machine, and that this occurs while the loop is held under strain in the hook of the needle, and therefore is within the letter of the claim of the Fowler & Warren patent, does this constitute infringement? What was the object of Fowler & Warren in the provision of slack thread for the needle? The defendants say to reduce the rendering of the thread to a minimum. It was contemplated that the pull-off should draw from the tension the full length of thread required for the next stitch. For prevention of rendering the amount of thread drawn by the pull-off is material. I am of the opinion that the defendant has disproved the contention of the complainant that there was any rendering in the Dancell machine while the needle was going through the stock. The cross-examination of Mr. Metcalf is very convincing on this point. While the needle goes through the stock, the thread is firmly clamped by the leather,—this clamping effect being greater than the difference between the two resistances of the respective sides; and the thread is pulled equally from both sides. It is only after the needle withdraws from the leather that, in consequence of the unequal strain on the loop and tension sides, the thread draws across the needle hook, or renders. Therefore, if the supply of slack thread on the tension side is exhausted in going through the needle, rendering will begin in the defendant's machine practically as soon as the needle is withdrawn from the leather. This would be the case with the defendant's machine, if we assume pull-off action to occur as a matter of fact. The amount of slack, at most, is sufficient only to go through the leather, and there is a rendering immediately thereafter as in the Dancell machine. The device of the defendant, therefore, does not perform the function of preventing "rendering," which is a defect attendant upon the handling of the thread after it is withdrawn from the leather.

The defendant's machine and Dancell's are alike, in that the needle must pull off about an inch of thread against the strain of the tension, with accompanying rendering. In Fowler & Warren, the full length of thread for the stitch having been pulled off, there is enough slack to enable the needle to get nearly to the end of the stroke, when, both sides becoming taut, the needle sets the stitch under strain at the end of the back stroke with a minimum of rendering. Therefore we find that the defense, based upon the difference in the amount of thread drawn, is something more in respect to rendering than a question of degree. If the defendant does not pull off that part of the thread which the complainant draws to prevent rendering, and stops short of performing that function, he does not in any degree perform that function or effect that object, of the patented invention. To hold the defendant for infringement, the complainant must go further, and show that by drawing off that first quarter or three-eighths of an inch of slack, which is not the preventive of rendering, the defendant accomplishes something within the scope of the invention and of the protection of the patent. This the complainant undertakes to do, claiming that the defendant pro-

cures, by the amount of thread drawn, a substantial advantage in remedying another defect in the operation of a sewing machine of this class. This, however, is a defect not referred to in the patent, and therefore it rests upon the complainant to show clearly its existence, and also that it was remedied to some substantial extent by the invention of Fowler & Warren, and, further, to show that its existence in the defendant's machine is obviated in substantially the same way. It does not seem to me that this has been sufficiently established by the complainant.

The experts for the complainant have such skill in statement as to forbid any liberality in the construction of their language, which is presumably exactly coextensive with their meaning. Both Mr. Livermore and Mr. Metcalf say, in substance, that if the full tension strain, or a heavy tension strain, be added to the nip of the leather, there will be a very severe strain on the thread until the hook of the needle is withdrawn from the stock, and that the provision of a small amount of slack thread, say a quarter of an inch, is of great importance to obviate this. The difficulty with this evidence is in its application to this case. The term "tension" is constantly employed by complainant's experts to cover the spool and a further device called the "rear-spring take-up." The defendant insists upon a discrimination between them, which seems very material upon the question of the value of a small amount of pull-off action. If there is no heavy strain from this rear take-up, the evidence of the experts must be regarded as relating to a hypothetical case, which differs from this case in the facts. Mr. Metcalf testifies in the Spaulding case that in the defendant's machine the slackness of the previously drawn loop provides the needle on the loop side with enough thread to go through the leather. The defendant has shown that in his device the supply for the needle on the tension side comes from the rear take-up during the passage of the needle through the leather. The needle, therefore, pulls against the full force of the tension only when it has receded from the leather. My attention has not been called to any evidence to the effect that, during the delivery of thread by the rear take-up, there is therefrom any important strain upon the thread. The defendant asserts that, even if his device, through a pull-off slide, obtains thread on the thread-supply side under a lighter resistance than the spring of the rear take-up from which it would otherwise draw it, this is a matter too trivial for consideration. Whether, as a practical matter, this is so, or not, I am unable to determine, and a determination of this question in the complainant's favor would seem necessary.

The complainant's proposition that infringement is qualitative, and not quantitative, cannot be accepted. Infringement should not be determined by a mere decision that the terms of a claim of a valid patent are applicable to the defendant's device. Two things are not necessarily similar in a practical sense because the same words are applicable to each. The question of infringement involves considerations of practical utility and of substantial identity, and therefore must be quantitative, as well as qualitative. As the defendant Cook does not use a machine which accomplishes the avowed object of

Fowler & Warren,—to prevent rendering,—and as no evidence has been brought to my attention showing that his machine infringes the Fowler & Warren patent in any other substantial respect, I must hold, even granting that the complainant has proved the facts upon which it relies, that it has not established infringement.

We will now consider the Spaulding suit, which involves the French & Meyer patent, and the “take-up” which draws up slack from the last loop and sets the stitch. The material parts of the claims in issue are sufficiently set forth in the following extract from claim 1:

“And a take-up, as b2, a cam, as C1, and connecting devices intermediate the said cam and the said take-up; the said cam through the said connecting devices actuating the said take-up to pull upon the loop of needle thread about the shank of the needle while the needle is in the stock and holds the said loop upon its shank; the said take-up drawing the said loop about the shank of the needle, as described, to set the last stitch, of which the said loop forms a part, without straining the between substance; the said stitch being set before the loop to form the next stitch is drawn through it,—substantially as described.”

Assuming a take-up action of one-quarter or three-eighths of an inch in the defendants' machine, we find therein, as in French & Meyer, a take-up, actuated by a cam, which serves to pull upon the loop of needle thread. This pulling movement begins, however, before the needle enters the stock, but probably continues while it is in the stock, so that the language of the claim, “to pull upon the loop of needle-thread * * * while the needle is in the stock,” seems applicable to the defendants' device. Mr. Metcalf says that, though it would be fair to say that the take-up action begins earlier in the defendants' machine than in French & Meyer's, he is sure “there can be no reasonable doubt that in defendants' machine, in actual operation, the needle is always in the leather during the take-up operation.” As no contradiction of this is called to my attention, I do not think any substantial difference is shown to exist in this particular. The question of infringement must therefore turn upon the words, “to set the last stitch.” Although Mr. Livermore says that he understands, by “setting the stitch,” “taking back or pulling upon the thread which enters into the stitch,” I am satisfied that in the claim it means pulling the loop taut about the needle shank, and that it would be a violation of ordinary usage of terms, as well as of the particular use of terms of the patent, to say that there was a “setting the stitch,” so long as there was any substantial slackness of the loop around the shank of the needle. Mr. Browne, defendants' expert, testifies that in the defendants' machine there is always a substantial slackness, and Mr. Metcalf, complainant's expert, testifies that in the defendants' machine “the needle is enabled to get its loop through the leather without encountering any substantial resistance in addition to the friction of the leather. This follows because the slackness of the previously drawn loop is sufficient to furnish the needle with slack thread on one side of its throat,” etc. The defendants' machine leaves enough slack on the loop side to go through the leather. It does not, therefore, set the stitch by a take-up.

It should be observed, furthermore, that, to the full operation of the French & Meyer machine, the take-up must not only pull the thread taut about the needle (in the language of the specification, "the take-up itself alone performs the duty of setting the stitch"), but it must go on and draw from the supply the thread for a new stitch. The claims in suit, therefore, relate to a part only of the cycle of operations of the patent; other claims, not in suit, relating to the thread-drawing movement produced by the cam, and to other auxiliary devices for handling the thread. Where the utility of a patented machine resides in a complete cycle of operations, and a patentee subdivides the whole process into parts, making certain mechanical operations, which do not stand alone in practical use, stand alone in claims, these claims should be construed with some caution. Because the patent office has allowed a claim for a device capable of performing a number of functions, it by no means follows that this claim, with any substantial omissions, would have been allowed. The patent is not broadly for a cam-actuated take-up, pulling up some slack thread while the needle is in the stock. Mr. Livermore says that:

"Defendants' machine clearly embodies the subject-matter of claims 1, 2, and 5 of the French & Meyer patent, unless limited by construction of the language of the patent to a machine in which the take-up operates to shorten and pull upon the loop to the strain determined by the tension of the machine."

But is not this the fair construction? To escape it we must simply ignore the setting of the stitch, which the patentee has specified, and thus broaden the claim. Moreover, this setting of the stitch by the take-up is a substantial thing, and is not performed by the defendants' machine, in which the needle sets the stitch by a downward pull, with the disadvantages thereof. There can be no contention that the whole cycle of defendants' operation is that of French & Meyer, and one function which is claimed is surely not performed by the defendants. The setting of the stitch by the take-up seems to be of the essence of French & Meyer's mode of operation. In this way is secured the upward pull in the direction to draw together closely the layers of material without cutting the between substance, and the drawing up of the last stitch by a direct pull through the needle hole preceding the one in which the needle is standing, thus avoiding rendering over the between substance. The defendants, it is true, may have benefited to some slight degree by a part performance of some operations performed by the complainant's device. But the patentee receives the full measure of the legal protection to which he is entitled when others are prohibited from doing that which he has claimed. If some crumbs of benefit to other inventors may fall between the lines of his patent, this is no reason for enlarging his claims. I am of the opinion that the complainant in the Spaulding case is in the familiar situation of standing upon its own view of the breadth of the invention, rather than upon the rights conferred by the patent.

In each case I find no infringement. The bills will be dismissed.

THE OCCIDENTAL.

(District Court, D. Washington, N. D. May 12, 1900.)

1. SEAMEN—SERVING WITHOUT VALID CONTRACT—RIGHT TO LEAVE VESSEL.
Seamen who go on board a vessel, and enter upon the work as mariners voluntarily, but without any valid contract, may be required by the master to perform such services as are necessary to the navigation of the vessel while at sea, but they are not bound to continue with the vessel through the voyage, and may leave it at any port without forfeiting the wages earned, although they cannot in such case require the owner to return them to the port of shipment.
2. SAME—SHIPPING ARTICLES—VALIDITY.
Shipping articles which provide for a voyage to one or more foreign ports, or for a coasting voyage, at the option of the master, do not sufficiently state the nature of the voyage, as required by Rev. St. § 4511, and are void.

In Admiralty. Suit by seamen to collect wages.

M. M. Madigan, for libelants.

Gorham & Gorham, for claimant.

HANFORD, District Judge. This is a suit to collect seamen's wages which the libelants claim to have earned by services on the ship *Occidental*, on a run from San Francisco to Seattle. The owner of the ship appears as claimant, and has filed an answer in which he resists the demand of the libelants on the ground that they became bound, by signing articles for a definite period of time, to continue in the service of the vessel to the end of the specified period, and until the return of the vessel to San Francisco, the port of discharge, and that, being so bound to service, they were guilty of continued willful disobedience of lawful commands of the captain, and by such disobedience they have forfeited the entire amount of their wages. I find from the evidence that during the run from San Francisco to Seattle the libelants faithfully performed their duties as seamen in doing the work required of them, which was necessary to be done in navigating the vessel, but on two occasions they refused to do seamen's work which was not strictly necessary in maneuvering the vessel or for her preservation, and while at sea they made known their intentions to leave the vessel on arrival at Seattle. After coming to anchor in the harbor, they did repeatedly refuse to work in discharging ballast, and in justification of their refusal to do work other than what was necessary in the navigation of the vessel they charge that the shipping articles for the voyage are unlawful and void, and that the captain imposed upon them by leaving San Francisco without having on board a full complement of men. I find from the evidence that the captain made a bona fide attempt to employ 10 seamen for the voyage, and that 10 men signed the shipping articles in the presence of the deputy United States shipping commissioner, but 3 of those who signed failed to report for duty. When the ship was ready to cast off her moorings, the captain was informed by the mate that there was a full crew on board, and then, without taking the trouble to muster the crew on deck, the vessel proceeded on her way, although there were then on

board only 7 of the crew who had signed the shipping articles, and, in place of the absentees, the ship agent who had undertaken to supply the crew sent the libelants Knowles and Anderson on board, but these two men did not sign the shipping articles until the vessel was at sea. In view of these facts, the claimant contends that the shipping articles are valid, and that the ship did not leave port without a sufficient crew.

As to the libelants Knowles and Anderson, it is clear that, although they went on board the vessel voluntarily, they were not bound to continue in the service of the vessel during the voyage, nor for any definite term. The captain could require them to do work necessary to be done in the proper navigation of the vessel while she was at sea, but they were free to leave the vessel at any place, and, having served as mariners, they are entitled to receive compensation therefor. Rev. St. U. S. § 4521.

I will only consider one of the various grounds assigned for impeaching the validity of the shipping articles. The voyage for which the libelants were hired is described as follows: "From the port of San Francisco to Honolulu, H. I., and such other foreign ports as the master may direct, via British Columbia or Puget Sound, thence to return to San Francisco for final discharge via British Columbia or Puget Sound. If the vessel does not go to Honolulu, H. I., or other foreign port, she will return direct to San Francisco, Cal., from British Columbia or Puget Sound for final discharge, as directed by the master." It is clear that the shipping articles provide for a voyage to one or more foreign ports, or for a coasting voyage, at the option of the master, and I consider the objection to be fatal to the contract. Rev. St. U. S. § 4511, in terms which are mandatory, requires that shipping articles shall state the nature of the voyage. At the time of engaging themselves in the service of the vessel, seamen have a right to know whether they are engaging for a foreign voyage or merely to serve in domestic trade. A captain may lawfully hire a crew to proceed in a vessel from one port of the United States to another, and then to a foreign port and return to the port of discharge via a number of intermediate ports, but the law does not permit such duplicity in shipping contracts as we have in this instance, where, by the specified terms of the shipping articles, the master is given full control to take the vessel and her crew on a long voyage to one or more foreign ports, or make a short run to a near-by domestic port and return to the port of discharge. It is the intention of the law to prohibit the shipment of seamen without their consent, and, to make it appear that the seamen have consented to enter the service of the vessel for a voyage or for a specified term, it is essential, and the law requires, that the shipping articles specify clearly the nature of the intended voyage. As already intimated, I hold the shipping articles in this case to be void, and consequently the disobedience of the libelants cannot be regarded as an offense punishable by forfeiture of their wages.

The libelants went on board the vessel voluntarily, without having any valid contract entitling them to be returned to the port of San Francisco, and therefore they have no just claim for expenses

of returning to San Francisco, nor for any compensation, except wages while they were doing the work required of them. A decree will be entered awarding to each of the libelants wages at the rate of \$35 per month for 12 days' time, and costs.

ARGO STEAMSHIP CO. v. SEAGO et al.

(Circuit Court of Appeals, Fifth Circuit. May 8, 1900.)

No. 863.

SHIPPING—SUIT FOR DAMAGE TO CARGO—BURDEN OF PROOF.

Where a bill of lading for a shipment of sugar recited the receipt of the sugar in apparent good order and condition, and stipulated for its delivery in like good condition, proof that it was delivered in a damaged condition casts upon the vessel the burden of showing either that it was not in good order when received, or that it was damaged through one of the perils excepted in the contract.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Saml. L. Gilmore and H. C. Cage, for appellant.

Jas. McConnell, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. On the 6th of January, 1897, the steamship Europa arrived in the port of New Orleans on a voyage from Antwerp. A portion of her cargo consisted of 2,000 bags of Dutch granulated sugar, for which she had issued a bill of lading in the usual form, certifying that they were in apparent good order and condition when received on board of said steamship, and contracting to deliver the same at the port of New Orleans "in like good order and condition." A. K. Seago & Co., the appellees herein, were the consignees and owners of the sugar, and upon its discharge from the ship upon the levee they found the same so badly damaged that they refused to receive it, and it was thereupon stored in the government warehouses, and the steamship was libeled to respond for the damages sustained in the premises, amounting to the sum of \$1,542.37. In the answer the defendant admits that the ship received the sugar in good order as alleged in the libel and shown in the bill of lading. The answer then recites, to wit: (1) That the ship encountered bad weather; (2) that a fire occurred on board; (3) that the ship discharged the cargo into a warehouse, and reloaded the same. The answer does not aver that the sugar in question was damaged by or from any of these causes, nor that it was damaged at all from any cause. The averment of the answer in this connection is that "the damage, if any, is much less than is alleged in the libel"; and in speaking of what portions of the cargo were damaged by fire and water and what were not it is distinctly stated that the sugars, the subject of this litigation, were included in the sound portion when discharged to warehouse in Plymouth. After such averments of noninjury by the fire and water, the answer alleges:

"Respondents do not know the amount of damage, if any, sustained by said sugar, but they are informed and believe and allege that, if any,—which is not admitted,—the same is much less than is alleged in the libel; and respondents further allege that, if any damage was occasioned to the said sugar, same did not happen by or through any unseaworthiness of said steamer, her tackle, apparel, or furniture, nor by or through any negligence, delay, default, or misconduct of the officers or crew of the said vessel, nor any of them, nor of any person or persons on board or belonging to the said steamer, for that they, all and every of them, did and used their utmost endeavors for the preservation of said ship and her cargo, and to prosecute the intended voyage without loss, damage, or delay; and respondents especially plead the exceptions in their said bill of lading, which they allege cover the damage, if any, to the said sugar."

The libelants took the depositions of numerous witnesses and experts, who prove that the sugar was not only badly damaged, but, as found in the report of two experts appointed by the court to examine and report on the condition of the sugar: "The entire lot was damaged to such extent that the sugar had become unmerchantable and salable only to a refinery or confectioner." The defendant produced and examined only one witness in support of the allegations in the answer on the subject of the bad weather, the fire and the unloading and reloading to and from the warehouse. This witness, although he was on the ship during the voyage in question, and testified about the three incidents referred to, did not testify that the sugar was damaged by either; on the contrary, his evidence tends to show that the sugar in question was not damaged by either of the three causes mentioned. The matter of damages was referred by the court to a commissioner to "ascertain and report the amount of the damages," who, after taking testimony and hearing the parties, filed his report, awarding the sum of \$1,705.12. As the libelants had in the libel estimated their damage at a lower figure, a remittitur was entered for the difference, to wit, \$162.75. No opposition or exception was filed to this report of the commissioner, and it was, on motion, confirmed, and a final decree rendered for \$1,542.37, with interest and costs. On this appeal the following errors are assigned:

"(1) That the court erred in holding that the maritime disasters suffered by the ship were not full justification for any damage that the sugar may have suffered; (2) that the court erred in holding the defendant ship to any further proof of care and diligence than that contained in the record; (3) that the court erred in not sustaining the exception in the bill of lading in reference to damage by warehousing; (4) that the court erred in not sustaining the exception in the bill of lading in reference to fire, collision, and perils of the sea; (5) that the court erred in not finding that the wet condition of the sugar might not have been caused by absorption of water beyond the control of the ship; (6) that the court erred in allowance of damages herein, if it should be found that any damage should be allowed; (7) that the court erred in allowing, as damages, expenses which would necessarily have been incurred by the libellant, even if the sugar should have arrived in good condition."

The libelants having alleged and proved that the sugars were delivered in a damaged condition, and as the bill of lading recited that the sugars were received in apparent good order and condition, and the carrier's contract was to deliver in like good order and condition, the burden of proof was on the claimant to show, either that the goods were not in good order when received by the ship (see *Nelson v. Woodruff*, 1 Black, 156, 160, 17 L. Ed. 97), or that they were damaged while

in transit through one of the perils excepted in the contract (see *Clark v. Barnwell*, 12 How. 272, 280, 13 L. Ed. 985). *Clark v. Barnwell* is the leading case on the subject, and has been universally followed down to the present day. See 5 Notes U. S. Rep. p. 88. As the claimant failed to allege and prove that the goods were in bad order when received, or were damaged through any one of the excepted perils, no one of the first five assignments of error is well taken. As no exceptions were filed to the report of the commissioner in the matter of damages, and the same was confirmed by the court without opposition, and the transcript shows no question whatever made thereon in the district court, the questions sought to be raised by the sixth and seventh assignments of error cannot be considered. The decree of the district court is affirmed.

PLANTERS' FERTILIZER MFG. CO., Limited, v. ELDER et al.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1900.)

No. 862.

1. SHIPPING—BILLS OF LADING—CONSTRUCTION AND EFFECT.

A bill of lading is both a receipt for goods and a contract to carry, and as a receipt it makes a prima facie case only, and is open to explanation.

2. SAME—SHORTAGE IN CARGO DELIVERED—BURDEN OF PROOF.

Where bills of lading for cargoes of phosphate specified the quantity, but contained the further statements, "Weight and quantity unknown," or "Weight unknown," the burden rests upon the shipowners to account for any discrepancy between the quantity delivered and that specified; but this is met by proof that the full quantity loaded was delivered, and this may be shown as against a consignee who has paid drafts drawn by the shippers for the full quantity specified, where the bills of lading were attached to the drafts.

3. SAME—FREIGHT—CONSTRUCTION OF CONTRACT.

When a bill of lading presented by the shipper, and signed by the agent of the ship, recites a shipment in bulk as so many tons, at so much freight per ton, it will be construed as a contract for carriage in bulk, and the freight is not subject to reduction because the cargo when delivered does not weigh out the quantity stated.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

The libelants claim \$2,936.50 for freight due for the carriage of two cargoes of superphosphate by their steamships Merrimac and Montezuma from Liverpool to New Orleans, the rate of freight being eight shillings per ton. The libel alleges that bills of lading for the two cargoes were issued and delivered to the shippers, copies of the same being annexed to and made part of the libel. The bill of lading marked "Exhibit A" is stated to be "in bulk," 750 tons, 19 cwt., and 1 qr., and the bill is indorsed, "Weight and quantity unknown." The freight is stated to be eight shillings per ton. In the bill of lading marked "Exhibit B," that issued per steamship Merrimac, the cargo was declared to be "in bulk," 750 tons, 6 cwt., and 2 qrs. This, however, was to be reduced by 145 tons "short shipped," to be forwarded by the steamship Montezuma, the other steamer, and was included in bill of lading "A," that issued per steamship Montezuma; and this bill of lading is indorsed "Weight unknown," and the freight is stated at eight shillings per ton. In the freight bill, being Exhibit C2, attached to the libel, the quantity of phosphate upon which the

payment of freight was demanded is declared the same as that set out in the two bills of lading. The respondent's answer admitted the shipments by the two steamships named, and set up that, according to the bills of lading in the possession of respondent, the cargoes were 750 tons, 6 cwt., and 2 qrs. by the Merrimac, of which 145 tons were not shipped by that steamer, but were retained to be forwarded subsequently by the Montezuma; that, after deducting this amount from the originally intended cargo of the Merrimac, there was still, besides, short, lacking, and deficient $39\frac{220}{2240}$ tons of the quantity received by libelants for transportation; that the value of this short quantity of superphosphate was \$483.46; that the cargo actually brought and delivered by the Montezuma was $41\frac{708}{2240}$ tons less than that actually received for carriage; that of this shortage part was of the quality known as 12 per cent., and the remainder was 14 per cent., there being $40\frac{708}{2240}$ tons of the former, and 1 ton of the latter,—the former being of the value of \$403.39, and the latter \$12.39; that the total value of the shortage in both cargoes was \$904.20. The answer further says that, prior to the arrival of either vessel at New Orleans, respondent paid the bills of exchange drawn for the price of said phosphate by its vendors, which bills of exchange were presented with the bills of lading issued by libelants, setting out the receipt by them for carriage of the entire quantity of phosphate,—that is, 750 tons, 6 cwt., and 2 qrs. by the Merrimac, and 650 tons, 19 cwt., and 1 qr. by the Montezuma,—while, as a matter of fact, there was delivered to respondent only this quantity, less $80\frac{1087}{2240}$ tons, which was of the value of \$904.20, and that the amount due libelants was only the freight on the phosphate they actually delivered, less the value of the amount of phosphate they received for delivery, but failed to deliver; that this amounted to \$1,977.46, which respondent admitted to be due and deposited in the registry of the court; that it was entitled to deduct from the \$2,936.50, freight upon the whole cargo, as shown by the bills of lading, the sum of \$959.04, the value of the phosphate which was not delivered; and the respondent, by way of cross libel, claimed the right to deduct this difference, as proposed by the answer. By a supplemental answer, respondent claimed that libelants' claim should be further reduced by the sum of \$52.53, the freight on the portion of the cargo which it claimed was not delivered, and reduced its tender to \$1,874.93, which amount was paid into the registry, and withdrawn by the libelants without prejudice to either party.

There is little conflict in the evidence, and it establishes that the shippers of the superphosphate delivered the goods to the ships on their own weights and measurements, and that the same was received and stowed without any inspection or weighing on the part of the ships; that the shippers made out and presented for signature bills of lading, reciting the amount in bulk, with alleged weights; that as presented the bills of lading were indorsed in the one case, "Weight and quantity unknown," and in the other, "Weight unknown," and as thus indorsed were signed and delivered by the agents of the ships; the consignee paid drafts drawn by the shippers for the full amount of superphosphate as formally recited in the bills of lading, the bills indorsed "Weight unknown" accompanying the drafts; that all the goods delivered by the shippers and received by the ships were safely carried and fully delivered, without appreciable loss; that in the delivery to the consignee in the port of New Orleans the goods were not all weighed, but the weight of the whole was averaged under the joint inspection of an agent of the consignee and one of the officers of the ship; that the method followed in ascertaining the weight was that 10 out of every 100 wheelbarrow loads were weighed, and on these weights the whole, when delivered, was estimated; and that, as ascertained by the above method, there was an actual shortage of some 80 tons in the delivery of both cargoes.

The district court rendered a decree in favor of the libelants for the full amount claimed, in the following terms: "It is ordered, adjudged, and decreed that the libelants, Elder, Dempster, & Co., do have and recover of and from the respondent, the Planters' Fertilizer Manufacturing Company, the sum of two thousand nine hundred and thirty-six $\frac{59}{100}$ dollars (\$2,936.50), with five per cent. interest on the sum of one thousand four hundred and sixty-seven $\frac{87}{100}$ dollars (\$1,467.63) from December 6, 1894, until paid, and like interest

on the sum of one thousand four hundred and sixty-eight ⁸⁷/₁₀₀ dollars (\$1,468.87) from December 22, 1894, until paid, and all costs of suit, subject to a credit of one thousand eight hundred and seventy-four ⁹³/₁₀₀ dollars (\$1,874.93) paid April 14, 1896."

Branch K. Miller, for appellant.

J. Ward Gurley, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The main contention of the appellant is to the effect that, as the evidence shows that there was a short delivery of cargo, the libelants were estopped by the recitation of the weights as given in the bills of lading as to the amount actually received by the ships to be delivered; and the more so as the bills of lading, as issued by the ships' agents, were handed over to the shipper, who used them to draw on the consignee for the full amount of the cargo recited to have been received and shipped, and as the consignee, relying upon the verity of the bills of lading and in advance of the arrival of the cargo, paid bills of exchange drawn for the full value of the goods as recited. A bill of lading is of a twofold character. It is a receipt for goods, and a contract to carry. As a receipt, it makes a prima facie case only, and is undoubtedly open to explanation. See *The Lady Franklin*, 8 Wall. 325, 19 L. Ed. 455; *The Delaware*, 14 Wall. 579, 20 L. Ed. 779; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991. As the bills of lading in the present case, although containing formal recitals of specific weights, which were made, probably, for the purpose of determining the amount of freight to be paid, were indorsed in one case, "Weight and quantity unknown," and in the other, "Weight unknown," there can be no question that the same are open to explanation in regard to the exact amount of goods delivered to the ship; and, as the bills of lading accompanied the drafts drawn by the shippers and paid by the consignee, the consignee was undoubtedly charged with notice that the recitals of weights contained in the bills of lading were purely formal.

The bills of lading in this case being open to explanation, the only practical question is as to the burden of proof. It may well be that in the first instance this would be upon the owners of the ships. In the present case it has been met, so far as to show, by undisputed evidence, that all of the cargo actually received was fully delivered. The conclusion, of course, is that where the bill of lading is indefinite as to the amount of goods received, and the proof shows that all the goods received were actually delivered, the ship must be relieved in regard to alleged short delivery. This conclusion is in accord with adjudged cases called to our attention.

In *Campart v. The Prior* (D. C.) 2 Fed. 819, it was held:

"Where wheat was shipped to France by several parties under bills of lading specifying that the quantity and quality of the wheat was unknown, and suit was brought for nondelivery of the whole amount, held, that the burden of

proof was on the libelants to show the quantity of wheat delivered in Havre, and their case must fall for lack of evidence; the claimants of the ship showing that all the wheat shipped was delivered, and the bills of lading surrendered by the consignees."

In *The Ismaele* (D. C.) 14 Fed. 491, it was held:

"A cargo of sulphur, on being weighed as delivered, proved to be 28 tons short of the amount stated in the bill of lading, which also contained a memorandum, 'Weight and quality unknown.' Three officers of the vessel testified that all the sulphur taken in was delivered, except what escaped through the pumps. Held, that the burden was upon the consignee to prove that the difference arose from the abstraction of the missing quantity on the voyage."

There is also some contention on the part of the appellant that the decree of the district court is erroneous in that it allows freight upon the amount of cargo recited in the bills of lading, when in fact there was a less amount, by some 80 tons, actually received and carried. On the face there appears to be some merit in this contention, but an examination of the record shows that the evidence is silent as to the actual contract for carriage, except as contained in the bills of lading; and as in the bills of lading the shipments are recited in bulk as so many tons, at so much per ton, we are inclined to hold with the lower court, and allow for the freight as a contract of carriage in bulk.

The appellant also contends that the decree of the court below is erroneous for not allowing interest upon the credit of \$1,874.93 from the date of deposit. As we interpret the decree, while interest is allowed upon the amount of freight from the time of the delivery of the goods, the whole is subject to a credit of \$1,874.93 from the date of April 14, 1896, and that, we take it, was the date at which the money paid into court by the respondent was withdrawn by the libelants. If we are correct in this, there is no error in the decree in the matter of interest. The decree appealed from is affirmed.

MEMORANDUM DECISIONS.

ADRIANCE, PLATT & CO. v. NATIONAL HARROW CO. et al. (Circuit Court of Appeals, Second Circuit. May 5, 1900.) No. 160. Appeal from the Circuit Court of the United States for the Southern District of New York. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This appeal must be dismissed, because an order overruling a demurrer and giving the defendant leave to answer is not a final decision. See (C. C.) 98 Fed. 118.

CITY OF NEW ORLEANS v. WARNER et al.¹ (Circuit Court of Appeals, Fifth Circuit. May 1, 1900.) No. 928. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Branch K. Miller and Saml. E. Gilmore, for appellant. Richard De Gray, Wm. Grant, and John D. Rouse, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. All the questions raised on this appeal have been settled adversely to the appellant in the protracted litigation of this case. See Warner v. City of New Orleans, 167 U. S. 467, 17 Sup. Ct. 892, 42 L. Ed. 239; Id., 59 U. S. App. 131, 31 C. C. A. 238, 87 Fed. 829; and City of New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 280, Adv. S. U. S. 280, 44 L. Ed. —. It follows that the decree of the circuit court herein appealed from must be affirmed, and it is so ordered, with costs, but no damages.

CONSOLIDATED FASTENER CO. v. BRADT et al. (Circuit Court of Appeals, Second Circuit. February 28, 1900.) No. 92. Appeal from the Circuit Court of the United States for the Northern District of New York. This is an appeal from an order granting a preliminary injunction. Charles E. Mitchell, for appellants. John R. Bennett, for appellee. Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The questions presented on this appeal are in all respects the same as those discussed in Fastener Co. v. Hays (decided to-day) 100 Fed. 984, the infringing fastener being identical. For the reasons expressed in opinion in the Hays Case, the order appealed from is affirmed, with costs.

COUCH et al. v. LITTLE EMILY MIN. & MILL. CO. (Circuit Court of Appeals, Ninth Circuit. May 14, 1900.) No. 609. In Error to the Circuit Court of the United States for the Northern District of California. R. S. Minor, for defendant in error. Dismissed pursuant to the sixteenth rule.

COYNE, Collector, v. MANHATTAN BREWING CO. (Circuit Court of Appeals, Seventh Circuit. June 15, 1900.) No. 650. In Error to the Circuit Court of the United States for the Northern District of Illinois. Solomon H. Bethea, for plaintiff in error. Levy Mayer, for defendant in error. Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

PER CURIAM. This case is not essentially different from that of Nunn v. Brewing Co., 40 C. C. A. 190, 99 Fed. 939, recently decided by the United States circuit court of appeals for the Sixth circuit. The judgment below is affirmed.

¹ Rehearing denied May 9, 1900.

DE BARY et al. v. CARTER. (Circuit Court of Appeals, Fifth Circuit. April 24, 1900.) No. 860. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. On stipulation of counsel, it is agreed that this case abide the result in *De Bary v. Souer* (C. C. A.) 101 Fed. 425.

THE IRIS. (Circuit Court of Appeals, First Circuit. April 25, 1900.) No. 280. Appeal from the District Court of the United States for the District of Massachusetts. Frederic Dodge, for appellant. Eugene P. Carver, for appellees. Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. Whereas, after a hearing on the merits, a judgment was entered on this appeal on February 2, 1900 (40 C. C. A. 301, 100 Fed. 104), and afterwards, seasonably, a petition for rehearing was filed and allowed, whereby the judgment was vacated; and whereas, the matter of said petition has been fully heard on its merits, and the court is unanimously of the opinion that there is no cause for entering a judgment other than that heretofore entered as aforesaid. Therefore it is ordered, adjudged, and decreed that judgment be entered in the same terms as those in which the judgment was entered as aforesaid on said 2d day of February.

LEWISOHN BROS. v. ANACONDA COPPER MIN. CO. (Circuit Court of Appeals, Ninth Circuit. May 11, 1900.) No. 426. Appeal from the Circuit Court of the United States for the District of Montana. Marshall, Forbis & De Witt, for appellant. William Scallon, for appellee. Dismissed pursuant to stipulation of counsel, each party to pay its own expenses.

MESERVE v. HAYDEN et al. (Circuit Court of Appeals, Eighth Circuit. March 19, 1900.) No. 1,196. In Error to the Circuit Court of the United States for the District of Nebraska. C. J. Smyth, for plaintiff in error. A. E. Harvey (Amasa Cobb, G. M. Lamberton, and F. M. Hall, on the brief), for defendants in error. Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The treasurer of the state of Nebraska brought this action against the receiver of the Capital National Bank of Lincoln, Neb., to recover certain moneys of the state deposited in the bank before its failure. The receiver demurred to the petition on the ground that the action could not be maintained in the name of the treasurer of the state, but that it must be brought in the name of the state, and the court sustained the demurrer. Thereupon, by leave of the court, the name of the state was substituted for that of the treasurer as the plaintiff in the action, and the cause was prosecuted to final judgment, which was affirmed at the present term of this court. *McDonald v. Nebraska* (at the present term) 101 Fed. 171. This writ of error, which was sued out by the treasurer of state to prevent a possible failure of justice in the event this court should hold that the state was not the proper plaintiff in the action, is therefore dismissed.

NATIONAL NICKEL CO. v. NATIONAL NICKEL SYNDICATE, Limited. (Circuit Court of Appeals, Ninth Circuit. May 7, 1900.) No. 406. Appeal from the Circuit Court of the United States for the District of Nevada. W. E. F. Deal, for appellee. Dismissed pursuant to the sixteenth rule. See (C. C.) 86 Fed. 486.

S. RAUH & CO. v. GUINZBURG. (Circuit Court of Appeals, Second Circuit. April 30, 1900.) No. 72. Appeal from the Circuit Court of the United States for the Southern District of New York. Allan D. Kenyon, for appellant. James A. Hudson, for appellee. Before WALLACE, Circuit Judge, and THOMAS, District Judge. No opinion. Order affirmed, on opinion of court below. 95 Fed. 151.

UNITED STATES v. BOARD OF SUP'RS OF COPIAH COUNTY, MISS. (Circuit Court of Appeals, Fifth Circuit. May 23, 1900.) No. 923. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. A. M. Lea, for the United States. J. S. Sexton and R. N. Miller, for appellee. Dismissed.

ALLISON v. NEW YORK LIFE INS. CO. (Circuit Court, S. D. New York. March 27, 1900.) At Law. On motion for new trial. A. J. Dittenhoefer, for plaintiff. L. L. McCall, for defendant.

WHEELER, District Judge. As to some of the things for the conversion of which this action is brought, a verdict has been directed for the plaintiff; as to some, questions of fact were submitted to the jury, who have found as to part for the plaintiff and as to part for the defendant; and as to the residue, a verdict has been directed for the defendant. The verdict is special, showing the several amounts found for the articles by these classes. Exceptions were taken by the defendant to the rulings upon which the verdict was directed and the questions were submitted, but none as to the manner of submitting them; so the questions remaining are those of law arising upon the rulings, and those arising upon the evidence as to whether it warranted the several findings. None of the rulings upon which any branch of the verdict has been found appear to be so far out of the way as to warrant setting it aside, and compelling a new trial in that respect, before the exceptions can be heard; and no part of the verdict appears to be so contrary to the evidence, or the weight of the evidence, applicable as to warrant any conclusion that it has been reached otherwise than upon fair consideration of the evidence. The rights of the parties seem now to require nothing further in this court than a judgment on the verdict, and an allowance of the exceptions, for which more time may be necessary. Motion for a new trial overruled. Judgment on the verdict. Stay and term extended 30 days for filing exceptions.

WELSBACH LIGHT CO. v. R. MOMAND CO. et al. (Circuit Court, S. D. New York. February 2, 1900.) Motion for Preliminary Injunction. John R. Bennett, for the motion. George E. Cruse, opposed.

LACOMBE, Circuit Judge. Same order as in the Freeman Case (C. C.) 100 Fed. 298.